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**Implicit Consent to Treaties and Self-determination: Brief  
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*Ion GÂLEA*

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**Implicit Consent to Treaties and Self-determination:  
Brief Remarks on the Judgment of the Court of Justice of the  
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***Ion GÂLEA\****

*Faculty of Law, University of Bucharest*

**Abstract:** *The article presents the most important considerations of the judgments of the Court of Justice of the European Union of 4 October 2024 in the cases Commission/Front Polisario (C-778/21P, C-798/21P and C-779/21P, C-799/21P). It examines in particular the interpretation given by the Court of the distinction between conferring a right and imposing an obligation, by a treaty, to a third party. Moreover, it analyses the consequences of the right to self-determination and of the permanent sovereignty over natural resources of a non-self-governing territory on the issue of consent of a people for an agreement to be applied on the territory at issue. Thus, the study follows the very detailed interpretation by the Court of Justice of the customary international law, in order to identify the conditions needed for the consent of a people to be presumed.*

**Key words:** *Third Parties to Treaties, Conferral of a Right, Presumed Consent, Self-Determination, Permanent Sovereignty over Natural Resources.*

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*\*Ion Gâlea is Professor of Public International Law and Law of Treaties at the University of Bucharest, Faculty of Law. He held the position of director general for legal affairs (legal advisor) within the Ministry of Foreign Affairs of Romania between 2010 and 2016. Between 2016 and 2021, he was the Ambassador of Romania to the Republic of Bulgaria. Since 2021, he is judge at the General Court of the European Union.*

*The opinions expressed in this paper are solely the author's and do not engage the institutions he belongs to.*

## Introduction

This short article exposes an “episode” of a far wider legal and political saga opposing, since at the latest in 2012, the Front Polisario (“*Frente Popular de Liberación de Saguía el Hamra y Río de Oro*”), on one side, and the institutions of the European Union, namely the Commission and the Council, on the other side. Practically, this article is a “follow-up” to the study published in 2021 on the judgment of the General Court of 29 September 2021 in the *Front Polisario/Council* case,<sup>1</sup> as it proposes to offer a brief overlook on the judgment of the Court of Justice rejecting the appeals against those judgments.<sup>2</sup>

The factual and legal background of the dispute is related to two elements: on one side, the treaty relations between the European Union and the Kingdom of Morocco, in particular related to trade and fisheries, and, on the other side, the status of Western Sahara and the circumstance that the Kingdom of Morocco exercises control over this territory.

The status of Western Sahara remains disputed to this day. From the point of view of international relations and international law, it could be recalled that Western Sahara, a territory in the north-west of Africa, had been a Spanish colony since the 19<sup>th</sup> century and was included, since 1963, on the list of non-self-governing territories, compiled by the Secretary General of the United Nations according to article 73 of the Charter of the United Nations.<sup>3</sup> In 1974,

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<sup>1</sup> Ion Gâlea, *Principles of International Law and Jurisdictional Review of Agreements concluded by the European Union: the Front Polisario Cases of 29 September 2021*, Romanian Journal of International Law, 2021, issue 26, pp. 62-102, commenting on judgment of 29 September 2019, T-279/19, Front Polisario/Council, EU:T:2021:639 (hereinafter “T-279/19”) and judgment of 29 September 2021, T-344/19 and T-356/19, Front Polisario/Council, EU:T:2021:640 (hereinafter “T-345/19, T-356/19”).

<sup>2</sup> Judgment of 4 October 2024, Commission/Front Polisario, C-778/21P and C-798/21P, EU:C:2024:833 (hereinafter “C-778/21P, C-798/21P”) and judgment of 4 October 2024, Commission/Front Polisario, C-779/21 P and C-799/21 P, EU:C:2024:835 (hereinafter “C-779/21P, C-799/21P”). It is to be noted that on the same day, the Court of Justice delivered a third judgment, under the preliminary reference procedure, by which it interpreted the relevant provisions of EU law in the sense that, on one side, a Member State cannot unilaterally adopt a measure banning the import of agricultural products from Western Sahara the labelling of which systematically fails to comply with the indication of the country of origin and, on the other side, EU law imposes that the labelling of cherry tomatoes and melons from Western Sahara must indicate Western Sahara as the country of origin – judgment of 4 October 2024, Confédération paysanne (Melons et tomates du Sahara occidental), C-399/22, EU:C:2024:839.

<sup>3</sup> C-779/21P, C-799/21P, para. 16.

Spain announced its decision to hold, under the auspices of the United Nations, a referendum "intended to enable the people of Western Sahara to exercise its right to self-determination".<sup>4</sup> In this context, on the background of a dispute involving Morocco, Mauritania, Spain, but also Algeria related to the status of this territory,<sup>5</sup> in its 1975 *Western Sahara* advisory opinion, the International Court of Justice considered, on one side, that Western Sahara was not *terra nullius* at the time of the Spanish colonization and, on the other side, that:

*"the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity [which] might affect the application of Resolution 1514 (XV) [of the United Nations General Assembly] in the decolonisation of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory".*<sup>6</sup>

In 1975, the Kingdom of Morocco occupied part of the territory of Western Sahara, through a peaceful "march" (the "Green March", called upon by the King).<sup>7</sup> On 14 November 1975, Spain, Morocco and Mauritania agreed upon the "Madrid Accords", according to which the territory of Western Sahara would be split between Morocco and Mauritania.<sup>8</sup> As a consequence, an armed conflict broke out between Morocco, Mauritania and the national liberation movement, Front Polisario. In the context of that armed conflict, part of the population of Western Sahara, mostly members of the Sahrawi people, fled that territory and found refuge in camps located in Algeria.<sup>9</sup>

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<sup>4</sup> *Ibid.*, para. 20.

<sup>5</sup> Resolution 3292 (XXIX) adopted by the General Assembly at its 2318<sup>th</sup> plenary meeting on 13 December 1974 (Request for advisory opinion), preamble, paragraphs 5-8.

<sup>6</sup> *Western Sahara, Advisory Opinion*, ICJ Reports, 1975, p. 12, para. 162.

<sup>7</sup> See United Nations Security Council Resolution 380 (1975) on Western Sahara, adopted on 6 November 1975, at its 1854<sup>th</sup> session. It '[deplored] the holding of the [announced] march' and '[called] upon [the Kingdom of Morocco] immediately to withdraw from the Territory of Western Sahara all the participants in [that] march'.

<sup>8</sup> Declaration of Principles on Western Sahara by Spain, Morocco and Mauritania, Annex II to U.N. Doc. S/11880, November 19, 1987, in Security Council Official Records, 30<sup>th</sup> Year, Supplement for October, November and December 1975, p. 41; Thomas M. Franck, *The Stealing of the Sahara*, American Yearbook of International Law, vol. 70, issue 4 (1976), p. 694-721; see also Ion Gâlea, *The Law of Treaties in the Recent Case-Law of the European Court of Justice: the Frente Polisario Case, Interpretation and Territorial Application of Treaties*, Analele Universității din București, Seria Drept, nr. I/2017, p. 139-155.

<sup>9</sup> See C-778/21P, C-798/21P, para. 30, C-779/21P, C-799/21P, para. 16.

Moreover, when Spain announced, in 1976, putting an end to its presence in Western Sahara,<sup>10</sup> Front Polisario declared the establishment of the “Sahrawi Arab Democratic Republic”. Recognition of the latter remains limited.<sup>11</sup>

In 1976, Morocco and Mauritania agreed on the partitioning the territory of Western Sahara and, consequently, Morocco annexed the part of that territory which had been apportioned to it by that treaty. In 1979, a peace agreement was concluded between Mauritania and the Front Polisario in 1979, Mauritania renouncing to any territorial claim in relation to Western Sahara. Subsequently, Morocco took control over the territory of Western Sahara.<sup>12</sup>

The conflict between Morocco and the Front Polisario came to an end in 1988, when a ceasefire was proclaimed and an UN-led peace process was implemented, aimed for organizing a referendum. An UN Mission (MINURSO) was set in 1991, with the purpose of supporting the organization of such referendum.<sup>13</sup> Nevertheless, the referendum has not been held to this day. The issue of Western Sahara remains on the UN agenda and the mandate of MINURSO is renewed every year.<sup>14</sup> The Kingdom of Morocco controls most of the territory of Western Sahara and claims sovereignty. The remaining part of that territory is controlled by Front Polisario.

On this background, the European Union engaged in treaty relations with the Kingdom of Morocco, as an important partner. Those agreements, in particular those concerning trade and fisheries, inevitably raised the question of territorial application. Following a “first series of cases” before the European Court of Justice,<sup>15</sup> the relevant agreements concluded between the

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<sup>10</sup> UN Document A/31/56-S/11997; Ion Gâlea, *The Law of Treaties in the Recent Case-Law of the European Court of Justice: the Frente Polisario Case, Interpretation and Territorial Application of Treaties*, loc. cit., p. 8.

<sup>11</sup> The Sahrawi Arab Democratic Republic has been recognized by 84 UN Member States, but 37 Members have “frozen” or “withdrawn” such recognition. The Sahrawi Arab Democratic Republic has been a member of the African Union (formerly the Organization of African Unity), since 1984.

<sup>12</sup> . In 1979 and 1980, the UN General Assembly adopted Resolutions 34/37 and 35/19, by which asserted that Morocco is the “occupying power” and state that the UN did not recognize the status as administrating power to Morocco.

<sup>13</sup> United Nations Security Council Resolution 690 (1991) on the Situation concerning Western Sahara.

<sup>14</sup> See UN Security Council Resolution 2703 (2023) of 30 October 2023 and UN Security Council Resolution 2756 (2024) of 31 October 2024.

<sup>15</sup> Judgment of 10 December 2015, T-512/12, Front Polisario/Council, EU:T:2015:953 (hereinafter “T-512/12”), Judgment of 21 December 2016, C-104/16P, Council/Front Polisario, EU:C:2016:973 (hereinafter “C-104/16P”).

European Union and Morocco provided expressly that their territorial scope included Western Sahara. Thus, the question was raised whether the Council could, under EU law, conclude such agreement. After the General Court annulled in 2021 the decisions concluding the relevant agreements,<sup>16</sup> on 4 October 2024 the Court of Justice rejected the appeals. Thus, the purpose of this short contribution is to examine the most important aspects, in particular of international law that may result from the judgments of the Court.

It is proposed, first, to examine the legal background of the dispute, followed by certain aspects related to the law of treaties, namely: second, the distinction between conferring a right and imposing an obligation and, third, the issue of the presumed consent when a right is intended to be conferred to a third party. Fourth, the relevance of self-determination in the context of consent will be examined.

## **1. Legal background of the dispute**

The legal background of the dispute involves a series of agreements and judgments of the General Court and the Court of Justice. As this background has been exposed in detail in our previous contribution of 2021,<sup>17</sup> we consider useful to underline only the most important elements.

A “first” series of cases started in 2012, when the Front Polisario contested before the General Court of the European Union the decision of the Council for the conclusion of the “2012 Liberalisation Agreement” between the European Union and the Kingdom of Morocco.<sup>18</sup> This agreement, did not contain a territorial clause, but was interpreted by reference to the “wider” Association Agreement between the EU and the Member States, on one side, and the Kingdom of Morocco, for the other side.<sup>19</sup> Thus, the territorial scope of the 2012 Liberalisation Agreement and of the Association Agreement was

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<sup>16</sup> T-279/19 and T-345/19, T-356/19.

<sup>17</sup> Ion Gâlea, *Principles of International Law and Jurisdictional Review of Agreements concluded by the European Union: the Front Polisario Cases of 29 September 2021*, *loc. cit.*, p. 66-74.

<sup>18</sup> Agreement, in the form of an Exchange of Letters, between the European Union and the Kingdom of Morocco, concerning the reciprocal liberalization measures on liberalization products, processed agricultural products, fish and fishery products, approved by Council Decision no. 2012/497/EU of 8 March 2012, Official Journal L 241, p. 2.

<sup>19</sup> Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, signed in Brussels on 26 February 1996, entered into force on 1 March 2000 (OJ 2000 L 70, p. 2).

the “territory of the Kingdom of Morocco”.<sup>20</sup> In a first judgment rendered in 2015, the General Court interpreted this concept in the light of article 31 (3) b) of the Vienna Convention on the Law of Treaties, as including the Western Sahara, as the subsequent practice of the parties witnessed application to that territory,<sup>21</sup> and annulled the decision for the conclusion of that agreement. It held that the Council failed to exercise its obligation to examine all the relevant facts, in order to satisfy itself that “there was no evidence of an exploitation of the natural resources of the territory of Western Sahara under Moroccan control likely to be to the detriment of its inhabitants and to infringe their fundamental rights”.<sup>22</sup>

Ruling on an appeal against the 2015 judgment of the General Court, the Court of Justice decided that the wording “territory of the Kingdom of Morocco” should be interpreted in such a way that the agreement should be in conformity with other rules of international law, in particular with the principles of relative effect of treaties and the right to self-determination.<sup>23</sup> The Court referred to article 30, paragraph (3) c) of the Vienna Convention on the Law of Treaties and considered that the terms “territory of the Kingdom of Morocco” must therefore be interpreted as not covering the Western Sahara. With respect to the principle of relative effect to treaties, the Court considered that “*the people of Western Sahara must be regarded as a ‘third party’ within the meaning of the principle of the relative effect of treaties*”.<sup>24</sup> In this context, the Court also ruled:

*“[such] third party may be affected by the implementation of the Association Agreement in the event that the territory of Western Sahara comes within the scope of that agreement, without it being necessary to determine whether such implementation is likely to harm it or, on the contrary, to benefit it. It is sufficient to point out that, in either case, that implementation must receive the consent of such a third party. In the present case, however, the judgment under appeal does not show that the people of Western Sahara have expressed any such consent”.*<sup>25</sup>

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<sup>20</sup> T-512/12, para. 74.

<sup>21</sup> *Ibid.*, para. 99-102.

<sup>22</sup> *Ibid.*, para. 241.

<sup>23</sup> C-104/16P, para. 86 to 94.

<sup>24</sup> *Ibid.*, para. 106.

<sup>25</sup> *Ibid.*, para. 106.

This interpretation was followed in a subsequent case, *Western Sahara Campaign*.<sup>26</sup> It related to fishery activities in the adjacent waters to the territory of Western Sahara, allegedly conducted while implementing two fisheries agreements concluded in 2006 and 2013 between the European Union and Morocco.<sup>27</sup> The Court of Justice referred to the principles of self-determination and relative effect of treaties and held that it would be contrary to these rules of international law “*if it were agreed that the waters directly adjacent to the coast of the territory of Western Sahara were to be included within the scope of that agreement*”.<sup>28</sup> Practically, in the two judgments, the Court “saved” the agreements through an interpretation that would be in accordance with the above-mentioned rules of international law.

Following the judgment in case C-104/16P, the Council and the Commission modified the approach towards the agreements between the EU and Morocco. In 2017 and 2018, the Council authorized negotiations on extending the territorial scope of the liberalisation agreement and of a fisheries agreement between EU and Morocco, in order to include the territory of Western Sahara.<sup>29</sup> The agreements (hereinafter referred to as the “2018 liberalisation agreement” and the “2019 fisheries agreement”) were signed in 2018 and

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<sup>26</sup> Judgment of 27 February 2018, C-266/16, *Western Sahara Campaign UK*, EU:C:2018:118 (“hereinafter *Western Sahara Campaign*”).

<sup>27</sup> *Ibid.*, para. 41.

<sup>28</sup> *Ibid.*, para. 71.

<sup>29</sup> Opening of negotiations related to the Agreement 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 were authorized on 29 May 2017 (“liberalisation agreement”); Opening of negotiations on negotiations with the Kingdom of Morocco with a view to amending the Agreement and agreeing on a new Implementation Protocol. Following those negotiations, a new Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco was authorized on 16 April 2018 (“fisheries agreement”).

2019,<sup>30</sup> and the decisions of the Council for concluding those agreements were adopted in 2019.<sup>31</sup> It is against the decisions on the conclusion of these agreements that the Front Polisario filed actions for annulment before the General Court.<sup>32</sup>

The main feature of these agreements is that they provided, in an express manner, that their territorial scope included Western Sahara: more precisely, the 2018 liberalisation agreement applied to products originating from Western Sahara, while the 2019 fisheries agreement applied to waters adjacent to Western Sahara.<sup>33</sup> Meanwhile, both agreements provided that they

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<sup>30</sup> 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, was signed on 25 October 2018 (hereinafter referred to as the "2018 liberalization agreement"). Signature was approved by Council Decision (EU) 2018/1893 of 16 July 2018 relating to the signature, on behalf of the European Union, of the Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (OJ L 310, 6.12.2018, p. 1); 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 was signed in Brussels, on 14 January 2019 (hereinafter referred to as "the 2019 fisheries agreement"). Signature was approved by Council Decision (EU) 2018/2068 of 29 November 2018 on the signing, on behalf of the Union, 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 (OJ L 331, 28.12.2018, p. 1).

<sup>31</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 (OJ 2019 L 34, p. 1) – hereinafter "Council Decision (EU) 2019/217"; 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 (OJ 2019, L 195, p. 1), hereinafter "Council Decision (EU) 2019/441".

<sup>32</sup> Ion Gâlea, *Principles of International Law and Jurisdictional Review of Agreements concluded by the European Union: the Front Polisario Cases of 29 September 2021*, loc. cit., pp. 65-66.

<sup>33</sup> T-279/19, para. 53, T-344/19, T-356/19, para. 61.

are “without prejudice” to the respective positions of the European Union with regard to the status of Western Sahara and of the Kingdom of Morocco with regard to that region.<sup>34</sup> In case of the 2019 fisheries agreement, it provided for a “financial counterpart” to be paid by the EU annually, managed by an EU-Morocco joint commission. Its purpose was to create benefits for the “populations concerned”, proportionally with the fishing activities.<sup>35</sup>

The Council Decision (EU) 2019/217 approving the conclusion of the 2018 liberalisation agreement contained important preambular considerations. It recalled, *inter alia*, that the Commission assessed the consequences of the agreement, “particularly with regard to the advantages and disadvantages for the people concerned”,<sup>36</sup> and concluded that, essentially, the tariff preferences “will have a positive overall effect for the people concerned”.<sup>37</sup> The Preamble also noted that the Commission and the EEAS have “taken all reasonable and feasible steps in the current context to adequately involve the people concerned in order to ascertain their consent to the agreement”. In this sense, the preamble referred to “wide-ranging consultations”, leading to the conclusion that “the majority of social, economic and political stakeholders who participated [...] were in favour of [the agreement]”.<sup>38</sup> The preamble of Council Decision 2019/441 on the conclusion of the 2019 fisheries agreement contained similar considerations related to the assessment of the beneficial character of the agreement and conducting “wide-ranging” or “extensive” consultation, in order to ascertain consent of the “people concerned”.<sup>39</sup> However, the Council acknowledge that a number of actors, including the Front Polisario, refused to take part in the consultations.<sup>40</sup>

By its judgments of 29 September 2021 the General Court followed, in essence, the previous approach of the Court in cases C-106/14P and *Western Sahara Campaign*, and annulled the decisions on the conclusion of the 2018 liberalisation agreement and of the 2019 fisheries agreement.<sup>41</sup> First, the General Court rejected the pleas of admissibility related to the alleged capacity to be a party to legal proceedings and to *locus standi* of the Front

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<sup>34</sup> T-279/19, para. 53, T-344/19, T-356/19, para. 70

<sup>35</sup> T-344/19, T-356/19, para. 63.

<sup>36</sup> Council Decision (EU) 2019/217, preambular paragraph 7.

<sup>37</sup> *Ibid.*, preambular paragraph 9.

<sup>38</sup> *Ibid.*, preambular paragraph 10; see also Ion Gâlea, *Principles of International Law and Jurisdictional Review of Agreements concluded by the European Union: the Front Polisario Cases of 29 September 2021*, *loc. cit.*, p. 72.

<sup>39</sup> Decision 2019/441, preambular paragraphs 8-12.

<sup>40</sup> *Ibid.*, para. 12.

<sup>41</sup> T-279/19 and T-345/19, T-356/19.

Polisario. The General Court held, in particular, that international law recognized the right of self-determination to the people of Western Sahara and relied on United Nations General Assembly resolution in order to ascertain that the Front Polisario has the quality of “representative of the people of Western Sahara”.<sup>42</sup> Second, it held that the Council failed to comply with the judgments in cases C-104/16P and *Western Sahara Campaign*, in particular with the requirements derived from the principles of self-determination and relative effect of treaties. Thus, the General Court held that the Council had not taken sufficient account of all the relevant factors concerning the situation in Western Sahara and had wrongly taken the view that it had a margin of appreciation to decide whether it was necessary to comply with the requirement that the people of that territory had to express its consent to the application of the agreement at issue, as a third party to that agreement.<sup>43</sup>

The analysis of the judgment of the Court would focus, in a first stage, on the question of consent of a third party to an international agreement and, second, to the consequences of the principle of self-determination.

## **2. Relative effect of treaties. Conferring a right versus imposing an obligation**

The main point on which the Court of Justice came to a different conclusion than the General Court is the question whether the agreements at issue created an obligation for a third party. As recalled previously, “the people of Western Sahara” would be the third party at issue.<sup>44</sup>

Thus, on one side, the General Court had held that the two agreements impose obligations on this third party. According to the General Court, both the 2018 liberalization agreement and the 2019 fisheries agreement had the effect of imposing an obligation to the third party, in so far as they granted to one of the parties to those agreements, namely the Kingdom of Morocco,

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<sup>42</sup> T-279/19, paras. 89-94; the General Court referred to UN General Assembly Resolution 34/37 of 21 November 1979, “Question of Western Sahara” and UN General Assembly Resolution 35/19 of 11 November 1980, “Question of Western Sahara”. See also Ion Gâlea, *Principles of International Law and Jurisdictional Review of Agreements concluded by the European Union: the Front Polisario Cases of 29 September 2021*, *loc. cit.*, p. 75-76.

<sup>43</sup> T-279/19, para. 391; T-345/19, T-356/19, para. 364; see also C-778/21P, C-798/21P, paras. 72-73, C-779/21P, C-799/21P, paras. 45-46.

<sup>44</sup> *Supra*, T-279/19, para. 391; T- T-345/19, T-356/19, para. 364; see also C-104/16P, para. 106.

competence or power within the territory of the third party, which the latter is not therefore entitled to exercise itself or, as the case may be, delegate.<sup>45</sup>

On the other side, the Court of Justice found that the above interpretation of the agreements by the General Court has been vitiated by an error of law. Thus, the Court made the distinction between the conferral of a right and imposing an obligation, through a treaty, towards a third party. For both situations, the consent of the third party must “exist”,<sup>46</sup> but only for imposing an obligation this consent must be express. In the case at issue, the Court found that the General Court “incorrectly interpreted the agreement” at issue when it held 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”.<sup>47</sup>

The Court offered the following reasoning for this finding. First, it held that:

*“[A]lthough the implementation of the agreement at issue means that the acts of the Moroccan authorities carried out in the territory of Western Sahara have legal effects [...], changing the legal situation of the people of that territory, the fact that that agreement recognises those authorities as having certain administrative powers which are exercised in that territory does not however allow the finding that that agreement creates legal obligations for that people as a subject of international law”.*<sup>48</sup>

Thus, the Court appears to explain that it is not the agreement that grants the Moroccan authorities certain powers or competences over the territory of Western Sahara, but this is an already existing fact. In this respect, the Court emphasizes that the “without prejudice to the respective position of the parties” clause contained by the agreements, mentioned above,<sup>49</sup> does not mean that “the European Union recognises the alleged sovereignty of the Kingdom of Morocco over Western Sahara”.<sup>50</sup>

Second, the Court explains that:

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<sup>45</sup> T-279/19, para.322; T-345/19, T-356/19, para. 318.

<sup>46</sup> C-778/21P, C-798/21P, para. 173, C-779/21P, C-799/21P, para. 145.

<sup>47</sup> C-778/21P, C-798/21P, para. 174, C-779/21P, C-799/21P, para. 146. See also Denys Simon, *Nouvelle victoire du Front Polisario dans un imbroglio juridico-politique durable*, Europe, no. 1, janvier, 2025, pp. 7-11, p. 9.

<sup>48</sup> C-778/21P, C-798/21P, para. 175, C-779/21P, C-799/21P, para. 147.

<sup>49</sup> See *supra*, T-279/19, para. 53, T-344/19, T-356/19, para. 70.

<sup>50</sup> C-778/21P, C-798/21P, para. 176, C-779/21P, C-799/21P, para. 148.

*“[t]he people of Western Sahara is not, moreover, the addressee of the [...] administrative acts drawn up by the Moroccan authorities in connection with the implementation of that agreement, which it would be required to recognise; nor is it the addressee of the measures taken by the EU authorities and by the authorities of the Member States with regard to them”.*<sup>51</sup>

The administrative acts at issue are the fishing authorisations in case of the 2019 fisheries agreement or the certificates of origin in case of the 2018 liberalization agreement. Moreover, in case of the latter, the Court acknowledges the agreement does not exclude the conclusion of “separate arrangements” which would apply to products originating in Western Sahara, which are not subject to controls by those authorities, including products originating in the part of the territory of Western Sahara controlled by Front Polisario.<sup>52</sup>

We note that this last argument can be compared in a larger sense to the one in the *Brita* case,<sup>53</sup> in which the Court was confronted with the existence of two legal regimes, namely the Association agreement between the EC and Israel and the EC-Palestine Liberation Organization Association Agreement. The Court held in *Brita* that preferential treatment provided by the EC-Israel Agreement may be refused when the goods concerned originated in the West Bank, as customs authorities may not make an elective determination, leaving open the questions of which of the agreements to be taken into account – namely, the EC-Israel Association Agreement and the EC-PLO Association Agreement – applies in the circumstances of the case.<sup>54</sup> In order to reach this conclusion, the Court held that:

*“to interpret [...] the EC-Israel Association Agreement as meaning that the Israeli customs authorities enjoy competence in respect of products originating in the West Bank would be tantamount to imposing on the Palestinian customs authorities an obligation to refrain from exercising the competence conferred upon them by virtue of the abovementioned provisions of the EC-PLO Protocol.”*<sup>55</sup>

However, *Brita* concerned the interpretation of the EC-Israel association agreement, not the validity of the decision concluding it, in a similar way to C-104/16 P and Western Sahara Campaign cases. The Court found that the

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<sup>51</sup> C-778/21P, C-798/21P, para. 176, C-779/21P, C-799/21P, para. 148.

<sup>52</sup> C-779/21P, C-799/21P, para. 148.

<sup>53</sup> Judgment of 25 February 2010, *Brita*, C-386/08, EU:C:2010:91.

<sup>54</sup> *Ibid.*, para. 58.

<sup>55</sup> *Ibid.*, para. 52.

EC-Israel agreement is to be interpreted as *not* applying in the Palestinian territories.

Doctrine considers the statement according to which the 2018 liberalization agreement and the 2019 fisheries agreement do not impose legal obligations on the people of Western Sahara as “debatable” for two reasons.<sup>56</sup>

First, it is argued that the Court does not explain how the case at issue is different from *Brita*. It is also sustained that the judgment in the present case may be interpreted as meaning that an obligation would be imposed to a “third people” by an agreement applying in a “third territory” only when the respective “third people” concluded an agreement with the European Union.<sup>57</sup> Thus, it is argued that, following the judgment of the Court of Justice of 4 October 2024, the *de facto* perspectives of the representatives of the people of Western Sahara to conclude an agreement with the European Union would be compromised.

Indeed, it is difficult to identify the way in which the above quoted paragraph in the *Brita* case would articulate or relate to the statement in the judgment of 4 October 2024, according to which the finding that an agreement that recognises administrative powers of the Moroccan authorities to be exercised in the third territory does mean that agreement creates legal obligations for that people.<sup>58</sup> However, we do not support the second part of the criticism, as the Court expressly pointed out expressly:

*“the conclusion of that agreement does not prevent the Union from providing, where appropriate, for separate arrangements which would apply to products originating in Western Sahara which are not subject to controls by those authorities, including products originating in the part of the territory of Western Sahara controlled by Front Polisario”.*<sup>59</sup>

Second, it is argued that at the admissibility stage, the Court admitted itself that the application of the agreements at issue had “an impact” on the right of the Sahrawi people to exploit their natural resources, arising from the customary law principle of permanent sovereignty over natural resources.<sup>60</sup> Thus, it would be difficult to argue that accepting the exploitation or

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<sup>56</sup> Jean Félix Delile, *From Vienna to Luxembourg: The Europeanization of international law as a tool for stabilizing the EU's relations with Morocco in Front Polisario II*, Common Market Law Review, vol. 62, 2025, pp. 955-984, p. 977.

<sup>57</sup> *Ibid.*, p. 977.

<sup>58</sup> C-778/21P, C-798/21P, para. 175, C-779/21P, C-799/21P, para. 147.

<sup>59</sup> C-779/21P, C-799/21P, para. 148.

<sup>60</sup> Jean Félix Delile, *op. cit.*, p. 977.

management of resources over which a people enjoys permanent sovereignty does not amount to imposing an obligation.<sup>61</sup> Such considerations might be supported also by findings of the International Court of Justice. For example, in 2024, the Court in the Hague found that “*Israel’s policy of exploitation of natural resources in the Occupied Palestinian Territory is inconsistent with its obligation to respect the Palestinian people’s right to permanent sovereignty over natural resources*”.<sup>62</sup> However, it appears that the Court of Justice of the European Union drew a very fine distinction. Thus, there would be no equivalence between “imposing an obligation” and “affecting a right” from the point of view of requiring consent of the third party affected, even if the source of “affecting that right” is an agreement between two other subjects of international law.

A parallel could be drawn with *East Timor* case. Portugal argued, in 1991, that is before East Timor’s independence, that by concluding a delimitation treaty with Indonesia (“Timor Gap Treaty”) covering the waters adjacent to East Timor, Australia violated, *inter alia*, East Timor’s status as a non-self-governing territory and the right of the people of the Territory to self-determination and to permanent sovereignty over its wealth and natural resources.<sup>63</sup> The Court declined jurisdiction, as the judgment would have to rule, as a prerequisite, on the lawfulness of Indonesia’s conduct in absence of that State’s consent.<sup>64</sup> Thus, the question that would have arisen is somehow comparable: would the Timor Gap Treaty between Indonesia and Australia have imposed “an obligation” to the people of East Timor, entitled to the right of self-determination and permanent sovereignty of natural resources? It results from the 2018 Conciliation Commission Report between Australia and East Timor that following the independence referendum in East Timor in 1999, the United National Transitional Administration in East Timor and, after achieving statehood in 2002, Timor-Leste as a State, “*continued the terms*” of the Timor Gap Treaty, which, contained rights and obligations for

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<sup>61</sup> *Ibid.*

<sup>62</sup> *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024, ICJ Reports, 2024, p. 41, para. 133. It is true, the Court referred to the “occupying power” status of Israel – see, for example, para. 125: “Where, however, an occupying Power pursues a policy of exploitation of natural resources in the occupied territory contrary to the law of occupation, this policy could be contrary to the principle of permanent sovereignty over natural resources.”

<sup>63</sup> *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90, para. 133.

<sup>64</sup> *Ibid.*, para. 135.

both sides.<sup>65</sup> Hypothetically, the following question could arise: what would be the legal situation if the representatives of the people of Western Sahara, before or after constituting a State, would “continue the terms” of the 2018 liberalization agreement and the 2019 fisheries agreement (as Timor-Leste and Australia agreed)?

### 3. Implicit consent for conferring a right (“stipulation pour autrui”)

Since the Court of Justice came to the conclusion that the two agreements at issue did not impose a legal obligation on a third party, but conferred a right to such a party, it proceeded to the analysis of the requirement of consent for the conferral of such right. The Court quoted the Permanent Court of International Justice in the case concerning *Free Zones of Upper Savoy and the District of Gex* and held:

*“[...] it should be noted that customary international law does not provide that the consent of a third party that is subject to an agreement which confers a right on that third party is to be expressed in a particular form (see, to that effect, judgment of the Permanent Court of International Justice of 7 June 1932, ‘Free Zones of Upper Savoy and the District of Gex’, PCIJ Reports 1927, Series A/B, No 46, p. 148). It follows that customary international law does not exclude the possibility that such consent may be granted implicitly in certain circumstances”.*<sup>66</sup>

The statement is correct from the point of view of the legal consequences. However, we will take the opportunity to develop the rather theoretical debate in international law related to the possibility of a treaty to confer a right to a third party “with” or “without” the consent of that party, that surrounded the *travaux préparatoires* of the Vienna Convention on the Law of Treaties between States.

First, the question whether the consent of a third party *is needed* for the creation, by a treaty, of a right in the benefit of that third party was a subject of debate within the International Law Commission in 1964.<sup>67</sup> Thus, the

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<sup>65</sup> PCA Case N° 2016-10, In the Matter of the Maritime Boundary between Timor-Leste and Australia (The “Timor Sea Conciliation”), Report and Recommendations of the Compulsory Conciliation Commission between Timor Leste and Australia on the Timor Sea, 9 May 2018, para. 33-36.

<sup>66</sup> C-778/21P, C-798/21P, para. 180, C-779/21P, C-799/21P, para. 152.

<sup>67</sup> International Law Commission, Draft Article on the Law of Treaties, with commentaries (1966), Yearbook of the International Law Commission, 1966, vol. II, p. 228, para. 5.

International Law Commission was split between two theoretical approaches. On one side, certain members considered that the third party may acquire the right only through some form of a collateral agreement with the parties to the treaty. In other words, as in the case of an obligation, a right would be created when the treaty provision is intended to constitute an offer of a right and when such offer is “accepted”.<sup>68</sup> On the other side, other members estimated that the when the intention of the parties to a treaty is to “not merely to confer a benefit to a third State” but “to invest it with an actual right”, the third State acquires “a legal right to invoke directly and on its own account that provision”, without the aid of a party to obtain the execution of that provision. According to those members of the International Law Commission, such right is not conditional upon any specific act of acceptance by the third party or other collateral agreement.<sup>69</sup> In other words, consent would not be needed for the creation of a right.

Although the opinions in the International Law Commission have been almost equally divided, this division proved theoretical.<sup>70</sup> Thus, the first group considered a treaty provision conferring a right as “no more than the offer of a right” until the third state manifested its acceptance in some form, while the second group considered that the right arises directly.<sup>71</sup> The provision that was proposed by the International Law Commission constituted, therefore, a compromise: the first group “conceded that acceptance of a right by a third State, unlike acceptance of an obligation, need not be express but may take the form of a simple exercise of the right offered in the treaty”, while the second group “conceded that a disclaimer of what they considered to be an already existing right need not be express but may in certain cases occur tacitly through failure to exercise it”.<sup>72</sup> The result of the compromise is the current article 36, paragraph (1) of the Vienna Convention on the Law of Treaties:

*“A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed*

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<sup>68</sup> *Ibid.*, p. 228, para. 3.

<sup>69</sup> *Ibid.*, p. 228, para. 4.

<sup>70</sup> M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff, 2009, p. 485

<sup>71</sup> International Law Commission, Draft Article on the Law of Treaties, with commentaries (1966), Yearbook of the International Law Commission, 1966, vol. II, p. 228-229, para. 5.

<sup>72</sup> *Ibid.*, p. 229, para. 5.

*so long as the contrary is not indicated, unless the treaty otherwise provides”.*

It appears, on the basis of the “compromise” reached within the International Law Commission, that this provision goes “further” than requiring “tacit” consent: it is “presumed” unless otherwise stipulated. The presumption can be rebutted by a contrary indication. Of course, a question may arise whether article 36 paragraph (1) reflects customary international law. However, the substantial support in favour of this article within the Vienna Conference, adopted in the same form as proposed by the International Law Commission (unlike, for example, article 37 related to the revocation of a right), constitutes an indication in this sense.

Second, reliance on the case concerning *Free Zones of Upper Savoy and the District of Gex* may be discussed. The Court of Justice of the European Union quoted this case in order to support the statement that customary international law does not require that consent of the third party for the conferral of a right should be expressed in a particular form, and, therefore, it could be given in an implicit manner.<sup>73</sup> Although, as mentioned, we consider the statement as correct, two elements may be pointed out.

On one side, the *Free Zones* case laid the emphasis on the *intention of the parties* to create a right and passed rather quickly over the “acceptance” of that right by the third party, merely because in the case at issue it was clear that Switzerland accepted the rights conferred in the aftermath of the Napoleonic wars.<sup>74</sup> The Permanent Court of International Justice states:

*“It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is however nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such.”<sup>75</sup>*

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<sup>73</sup> *Supra*, C-778/21P, C-798/21P, para. 180, C-779/21P, C-799/21P, para. 152.

<sup>74</sup> Third Report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur, doc. A/CN.4/167 and Add.1-3, Yearbook of the International Law Commission, 1964, vol. II, p. 23, para. 13. The Special Rapporteur states: “(...) the Court had no doubt that Switzerland was either directly or indirectly an actual party to the relevant instruments and therefore had contractual rights (...)”.

<sup>75</sup> PCIJ (1932), Series A / B , No . 46, pp. 147-148.

Thus, the main issue in the *Free Zones case* was not whether the right of the third state was accepted or should have been accepted,<sup>76</sup> but whether such right may be *revoked* without the consent of that third party. Moreover, the *Free Zones case* was very specific due to the fact that the stipulations for a third party, in the circumstances of the case, were linked to the “territorial rearrangement intended to establish an enduring international settlement of the frontiers” and constituted a “clear evidence of a specific collateral agreement”.<sup>77</sup>

On the other side, evidence of customary international law may be found in the large support for the substantial provisions of the Vienna Convention during the conference on the law of treaties of 1968-1969<sup>78</sup> than the considerations of the *Free Zones case*, which should be regarded as specific, having in mind the territorial nature of the stipulations at issue. Examples of *stipulations pour autrui* without a territorial nature could include: the right of States, which are not parties to the Rome Statute of the International Criminal Court, to accept the jurisdiction of the Court through a declaration lodged in accordance with article 12 (3) of the Statute; the right of States, which are not members of the United Nations, to bring matters before the Security Council, according to article 34 (2) of the UN Charter; the provisions of the Peace Treaties of 1947 according to which the “defeated” States renounced, on behalf of itself and its nationals, at requests for damages towards any of the United Nations, including those which were not parties to the treaties.<sup>79</sup> In all of these cases, the question of the third State’s “acceptance” did not arise. As in article 36 paragraph (1) of the Vienna Convention, the consent of the third parties, in general, appeared to be “presumed”, the acceptance of a particular State resulting from the mere exercise of that right.

Of course, it is difficult to argue that such legal constructions may be “transposed” to the agreements at issue between the European Union and Morocco. However, as long as the those agreements confer a *right* and not an

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<sup>76</sup> Third Report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur, doc. A/CN.4/167 and Add.1-3, Yearbook of the International Law Commission, 1964, vol. II, p. 26, para. 22.

<sup>77</sup> *Ibid.*, para. 22-23; Dissenting opinion of judges Altamira and Hurst in the *Free Zones case*, PCIJ (1932), Series A / B , No . 46, pp. 185-186.

<sup>78</sup> M. E. Villiger, *op. cit.*, pp. 24-25.

<sup>79</sup> Peace Treaties with: Romania, article 30, Finland, article 29, Bulgaria, article 28, Hungary, article 32, Italy, article 76. See, for example, Third Report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur, doc. A/CN.4/167 and Add.1-3, Yearbook of the International Law Commission, 1964, vol. II, p. 25, paras. 18, 19, quoting the case of the ship *Fausto*, in which Uruguay relied on article 76 of the Peace Treaty with Italy.

*obligation*, as the Court of Justice of the European Union ruled, nothing would prevent the general rule of international law in article 36 paragraph (1) of the Vienna convention to take effect. Thus, assent of the third party should be “*presumed so long as the contrary is not indicated*”.

#### **4. Conditions for conferring a right. The role of self-determination**

The Court of Justice of the European Union determined, as mentioned, that the international customary law allows the consent for the conferral of a right to be implicit and does not require a particular form for such consent.<sup>80</sup> However, this general statement was developed in the case of a people, entitled to the right of self-determination and permanent sovereignty over natural resources. Thus, supplementary conditions, which the doctrine regards as “autonomous”,<sup>81</sup> were included, in order for the consent of a people – as a third party – to be considered as presumed. The Court of Justice of the European Union identified two conditions. It is important to underline that the Court identified these conditions as being specific to the case of a people of a non-self-governing territory:

” (...) *in the particular case of a people of a non-self-governing territory*, the consent of that people to an international agreement in respect of which it has the status of a third party and which is to be applied in the territory to which its right to self-determination relates may be presumed *so long as two conditions are satisfied*”.<sup>82</sup>

It appears that the Court used the word “presumed”, which coincides with article 36 paragraph (1) of the Vienna Convention on the Law of Treaties and added the two conditions, which it regards as particular to the case of a people of a non-self-governing territory.

The first condition is that the agreement in question must not give rise to an obligation for that people.<sup>83</sup> No doubt, this condition is correct. However, it relates to a different hypothesis than the conferral of a right. The different hypothesis also stem from the structure of the Vienna Convention on the Law of Treaties, which contains a different article. Thus, according to article 35, an obligation arises for a third State from a provision of a treaty “*if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing*”. The

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<sup>80</sup> *Supra*, C-778/21P, C-798/21P, para. 180, C-779/21P, C-799/21P, para. 152.

<sup>81</sup> Jean Félix Delile, *op. cit.*, p. 978.

<sup>82</sup> C-778/21P, C-798/21P, para. 180, C-779/21P, C-799/21P, para. 152, emphasis added.

<sup>83</sup> C-778/21P, C-798/21P, para. 181, C-779/21P, C-799/21P, para. 153.

requirement of a "written" consent was included during the Vienna Conference. However, the requirement of "express" consent is considered as being of a customary nature.<sup>84</sup>

Moreover, the Court of Justice of the European Union determined, as a preliminary step to the identification of this condition, that the General Court erred in law when it determined that the agreements at issue imposed obligations on the people of Western Sahara and, for this reason, the consent of the said people was required.<sup>85</sup> Thus, the first condition "refers back" to the legal situation that led to setting aside the requirement of explicit consent.

The second condition established by the Court of Justice of the European Union is more complex, and was labelled as follows (hereinafter we shall refer to it as the "second condition"):

*"(...) the agreement must provide that the people itself, which cannot be adequately represented by the population of the territory to which the right of that people to self-determination relates, receives a specific, tangible, substantial and verifiable benefit from the exploitation of that territory's natural resources which is proportional to the degree of that exploitation. That benefit must be accompanied by guarantees that that exploitation will be carried out under conditions consistent with the principle of sustainable development so as to ensure that non-renewable natural resources remain abundantly available and that renewable natural resources, such as fish stocks, are continuously replenished. Lastly, the agreement in question must also provide for a regular control mechanism enabling it to be verified whether the benefit granted to the people in question under that agreement is in fact received by that people".<sup>86</sup>*

The Court added the following statement related to the possibility to rebut the presumption of consent:

*"In the event that the two conditions [...] are satisfied, the consent of the people concerned must be held to have been obtained. The fact that a movement which presents itself as the legitimate representative of that people objects to that agreement cannot, as such, be sufficient to call in question the existence of such presumed consent. [...] That presumption of consent may nonetheless be reversed so long as*

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<sup>84</sup> The "written" requirement was included on a proposal by the delegation of Cambodia. See Official Records, 1969, Plenary, 59f, parag. 5; see also M.E. Villiger, *op. cit.*, p. 477.

<sup>85</sup> C-778/21P, C-798/21P, para. 174, C-779/21P, C-799/21P, para. 146.

<sup>86</sup> C-778/21P, C-798/21P, para. 181, C-779/21P, C-799/21P, para. 153.

*legitimate representatives of that people establish that the system of benefits conferred on that people by the agreement in question, or the regular control mechanism which must accompany it, does not satisfy the [second condition exposed above].”<sup>87</sup>*

The following considerations can be made with respect to the above quoted ”second condition”.

*i) First*, the Court of Justice of the European Union linked the second condition to the interests of the peoples of non-self-governing territories.<sup>88</sup> Thus, it affirmed that the second condition is necessary in order to ensure that the agreements at issue are compatible with ”with the principle, derived from Article 73 of the Charter of the United Nations and enshrined in customary international law, that the interests of the peoples of non-self-governing territories are paramount”.<sup>89</sup>

It appears that the Court of Justice of the European Union did not expressly affirm that the reason for which the second condition is imposed is the need to comply with the right of people to self-determination. Nevertheless, throughout the judgments, references to self-determination are numerous. On one side, the Court stated that it is for the EU judiciary to determine ”whether that agreement adequately preserves the right of the people in question to self-determination or the permanent sovereignty over natural resources”.<sup>90</sup> On the other side, in the context of the examination of questions of admissibility, the Court held that the agreements at issue had an ”impact” on the rights of the people with regard to that territory, ”including the right, derived from Article 73 of the Charter of the United Nations and the customary international law principle of permanent sovereignty over natural resources, to exploit the natural riches of the territory”<sup>91</sup> That impact occurred because the agreements were intended to apply on a territory or to waters adjacent to a territory ”in respect of which the people of Western Sahara holds the right to self-determination”.<sup>92</sup>

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<sup>87</sup> C-778/21P, C-798/21P, para. 183-184, C-779/21P, C-799/21P, para. 155-156.

<sup>88</sup> See, in this respect, Jaume Ferrer Lloret, *El conflicto del Sahara Occidental de nuevo ante el Tribunal de Justicia. Sobre la Union Europea y el respecto del derecho internacional*, Revista del Derecho Comunitario Europeo, vol. 80 (2025), pp. 21-60, p. 46

<sup>89</sup> C-778/21P, C-798/21P, para. 182, C-779/21P, C-799/21P, para. 154.

<sup>90</sup> C-778/21P, C-798/21P, para. 184, C-779/21P, C-799/21P, para. 156.

<sup>91</sup> C-778/21P, C-798/21P, para. 119, C-779/21P, C-799/21P, para. 93.

<sup>92</sup> *Ibid.*

Thus, even implicitly, it can be inferred that the Court took into account the right to self-determination held by the people of Western Sahara when establishing "the second condition".

In this context, the question that may be discussed is whether "the second condition", even if imposed with respect to consent of a third party to the conferral of a right through a treaty, is, in essence, derived from the right to self-determination.

Thus, it is well-accepted that the right to self-determination has a broad scope<sup>93</sup> and includes the right to territorial integrity.<sup>94</sup> Moreover, the International Court of Justice held that an element of the right to self-determination is the right to exercise permanent sovereignty over natural resources, which is a principle of customary international law.<sup>95</sup> In this respect, exploiting the natural resources of a territory in the benefit of another, but not of the people holding the right to self-determination, would constitute a breach of that right.<sup>96</sup>

The Court of Justice of the European Union appears to have translated these principle in the following requirement, contained by the "second condition": the people holding the right to self-determination should receive "a specific, tangible, substantial and verifiable benefit"<sup>97</sup> from the exploitation of natural

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<sup>93</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory*

*Opinion, I.C.J. Reports 2019 (I)*, p. 131, para. 144 ; *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, I.C.J. Reports 2024*, p. 66, para. 234.

<sup>94</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory*

*Opinion, I.C.J. Reports 2019 (I)*, p. 134, para. 160 ; *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, I.C.J. Reports 2024*, p. 66, para. 237.

<sup>95</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 251, para. 244, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, I.C.J. Reports 2024*, p. 67, para. 240.

<sup>96</sup> *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, I.C.J. Reports 2024*, p. 67, para. 240; Carmen Achimescu, Maria Bebec, *A l'ombre du grand mur: y-a-t-il toujours de l'espoir pour une paix israélo-palestinienne?*, *Romanian Journal of International Law (RRDI)*, 28/2022, p.36.

<sup>97</sup> For the distinction between a proper right and a mere benefit, see Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 2008, p. 208.

resources, which would be "proportional to the degree of exploitation". The Court added supplementary mechanisms to this requirement, namely guarantees that the exploitation complies with sustainable development and a control mechanism. We limit our commentary to affirming that the degree of detail of these requirements is high. Moreover, a mention might be made with respect to the proportionality principle mentioned by the Court. Thus, it might be interpreted as admitting, at least implicitly, that the exploitation of natural resources might "also" benefit other actors than the people. We consider that this is not the case, as the requirement in the "second condition" involves proportionality to the "degree of exploitation" and is immediately followed by guarantees related to a "sustainable" exploitation.

ii) *Second*, the "second condition" imposed by Court of Justice of the European Union offered details related to the fact that the recipient of the benefit should be "the people itself", which cannot be "adequately represented by the population of the territory to which the right of that people to self-determination relates". We consider this consideration important, because it underlines the fact that the holder of the right to self-determination is only the "people".

With respect to the people of Western Sahara, it is important to point out that the Court of Justice of the European Union recalled that "following the outbreak in the 1970s of the armed conflict between, inter alia, the Kingdom of Morocco and Front Polisario, a large part of the population of Western Sahara fled that conflict and found refuge in Algerian territory".<sup>98</sup> Therefore, the Court concluded:

*"[The] majority of the current population of Western Sahara is not part of the people holding the right to self-determination, namely the people of Western Sahara. That people, which for the most part has been displaced, is the sole holder of the right to self-determination with regard to the territory of Western Sahara. The right to self-determination belongs to that people, and not to the population of that territory in general, of which – according to the estimates provided by the Commission at the hearing before the Court of Justice – only 25% is of Sahrawi origin. [...] There is a difference in that regard between the concept of the 'population' of a non-self-governing territory and that of the 'people' of that territory. The latter refers to a political unit*

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<sup>98</sup> C-778/21P, C-798/21P, para. 156, C-779/21P, C-799/21P, para. 127.

*which holds the right to self-determination, whereas the concept of 'population' refers to the inhabitants of a territory".<sup>99</sup>*

Thus, the mere fact that a benefit would be granted to the "population" of a territory and not to the "people", as holder of the right to self-determination would be sufficient, in our view, to determine that the "second condition" is not fulfilled. It is what can be in essence inferred from the fact that the Court mentioned that that any benefit for the people of Western Sahara from the agreements at issue are "manifestly absent", *inter alia*, from the fact that the payments were made to or the tariff benefits are enjoyed by the Kingdom of Morocco.<sup>100</sup>

*iii) Third*, a comment may be made with respect to the possibility to rebut the presumption of consent for the conferral of a right to a third party – a people, holder of the right to self-determination. From the outset, we should underline that these considerations are theoretical, because in the case at issue the "benefit for the people of Western Sahara" was held to be "manifestly absent". Thus, we recall that the Court of Justice of the European Union held that if the second condition is met, "*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*".

On one hand, the "movement which presents itself as the legitimate representative of that people" would refer, in the present case, to the Front Polisario (which, *inter alia*, refused to take place in the "wide-ranging consultations" that preceded the two agreements at issue). In that respect, a comment could be made: whether in previous cases, the Court did not examine whether the Front Polisario was a "national liberation movement" in the sense of international law,<sup>101</sup> in the present case, the Court took a more courageous stance. It mentioned expressly that Front Polisario is a "self-proclaimed liberation movement which was created for the purpose of fighting for a particular type of future model of governance of the non-self-governing territory of Western Sahara" which "seeks precisely, relying on the people of Western Sahara's right to self-determination".<sup>102</sup> Furthermore, the Court held that Front Polisario is one of the legitimate interlocutors in the

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<sup>99</sup> C-778/21P, C-798/21P, para. 157-158, C-779/21P, C-799/21P, para. 128-129.

<sup>100</sup> C-778/21P, C-798/21P, para. 186-187, C-779/21P, C-799/21P, para. 158-159.

<sup>101</sup> See Ion Gâlea, *The Law of Treaties in the Recent Case-Law of the European Court of Justice: the Frente Polisario Case, Interpretation and Territorial Application of Treaties*, p. 144.

<sup>102</sup> C-778/21P, C-798/21P, para. 93-94, C-779/21P, C-799/21P, para. 67-68.

process conducted, with a view to determining the future of Western Sahara, under the auspices of the United Nations Security Council.<sup>103</sup>

On the other hand, according to the doctrine, this third element of the "second condition" is difficult to reconcile with the customary rule in article 36 paragraph (1) of the Vienna Convention on the Law of Treaties. Thus, the presumption of consent may be rebutted in the event of a "contrary indication" by the respective third party. It is not clear whether the "objection" to the agreement by a movement presenting itself as the legitimate representative of the people is equivalent to a "contrary indication".<sup>104</sup> However, if the national liberation movement cannot object to the agreement allegedly conferring a right to the people of Western Sahara,<sup>105</sup> the question that arises is: in case when the third party to a treaty is a "people", as subject of international law, who can provide the "contrary indication"? In international law, the third party should be always free to accept or "reject" a right.<sup>106</sup> Nevertheless, doctrine considers that the developments in the "second condition" constitutes an approach marked by "certain pragmatism" by the Court of Justice of the European Union. Thus, according to doctrine, the Court developed an autonomous approach, in the circumstances of constant opposition from the part of Front Polisario.<sup>107</sup>

## Conclusion

The judgments of the Court of Justice of the European Union of 4 October 2024 in the cases Commission/Front Polisario constitutes an important development with respect to the way in which the Court interprets international customary law.

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<sup>103</sup> C-778/21P, C-798/21P, para. 95, C-779/21P, C-799/21P, para. 69. See also Juan Soroeta Licerias, *El statuto de la Sahara Occidental y la legalidad de la explotacion de sus recursos naturales ante el TJUE (2012-2024) o el difícil arte de aplicar el derecho internacional priorizando los intereses políticos y economicos de la Union Europea*, Revista General de Derecho Europeo, vol. 65 (2025), pp. 66-122, p. 75.

<sup>104</sup> Jean Félix Delile, *op. cit.*, p. 980-981.

<sup>105</sup> *Ibid.*, p. 981.

<sup>106</sup> Third Report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur, doc. A/CN.4/167 and Add.1-3, Yearbook of the International Law Commission, 1964, vol. II, p. 26, para. 22; see also Pierre d'Argent, *Article 36*, in O. Corten, P. Klein (ed.), *Les Conventions de Vienne sur le droit des traités. Commentaire article par article*, vol. II, Bruylant, Bruxelles, 2006, vol. II, p. 1481.

<sup>107</sup> Jean Félix Delile, *op. cit.*, p. 982.

The first important development, even if criticized by doctrine, is the differentiation between “imposing an obligation” and “conferring a right” by agreements, which create either a fishing zone in waters adjacent to Western Sahara or trade facilities applicable to products originating also from that territory. Thus, the important development is the interpretation of those agreements in the sense that, even if they “impact the rights”<sup>108</sup> of the people of Western Sahara over that territory or “changes the legal situation” of that people with regard to the right to self-determination,<sup>109</sup> no obligation is imposed on that people. Thus, the Court of Justice held that granting the authorities of the Kingdom of Morocco certain powers, to be exercised in the territory of Western Sahara, is not equivalent to imposing an obligation to the people of Western Sahara. Even if the solution of the General Court was clearer, in the sense that affecting the rights was held as equivalent to imposing an obligation, the legal construction of the Court of Justice appears more subtle. This approach might allow, by way of pragmatism, for future legal constructions allowing, under certain conditions, an agreement between the European Union and Morocco to effectively apply in Western Sahara, while fully complying with the right of the people of this territory to be entitled to benefits inherent to the right to self-determination and permanent sovereignty of natural resources.

The second important development is constituted by the conditions developed by the Court of Justice in order for the consent of the third party to be presumed, in the particular circumstances when the third party is a people, holder of the right to self-determination. Thus, the most important is the “second condition”, which is a very detailed autonomous interpretation of customary international law related to the requirements, which have to be fulfilled in order for the consent of a people – third party – to be presumed to an agreement, which confers to the respective people a right, but not an obligation. Thus, the following requirements derive from the “second condition”: first, the agreement has to provide (not “only” a right) but a “*a specific, tangible, substantial and verifiable benefit from the exploitation of that territory’s natural resources*”; second, the benefit has to be “proportional to the degree of exploitation”; third, the benefit must be granted “to the people itself” not to the “population of the territory”; fourth, guarantees must be provided that the exploitation will be carried out in accordance with sustainable development; and, fifth, a control mechanism must be provided. As a supplementary element, if these requirements are met,

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<sup>108</sup> C-778/21P, C-798/21P, para. 119, C-779/21P, C-799/21P, para. 93.

<sup>109</sup> C-778/21P, C-798/21P, para. 185, C-779/21P, C-799/21P, par 157.

the consent of the people will be presumed. In this context, the movement that presents itself as the legitimate representative of that people cannot “simply” object and, therefore, call into question the presumed consent. It can only argue that the conditions are not met.

Practically, the development is important because all the requirements, except for the one related to the recipient of the benefit as being the people, and not the “population”, are linked to the exploitation of the natural resources of a territory on which that people holds the right to self-determination. Moreover, the circumstance that a national liberation movement presenting itself as the representative of that people cannot “simply” object, but can only argue that those requirements are not met, opens a way forward.

Thus, by interpreting customary international law, the Court indirectly draws the path for the EU institutions and the Kingdom of Morocco on how to write the future agreements, in order to be compatible with the principles of self-determination and relative effect of treaties. The Court thus finds what doctrine calls a “diplomatic balance”<sup>110</sup> between the important bilateral relations between EU and Morocco, which will find a way to continue, and the respect for the right to self-determination. This “balance” is also confirmed by the fact that, in case of the 2018 liberalization agreement, for reasons of legal certainty, the effects of the annulment of the decision concluding have been postponed with twelve months, allowing thus the parties to conclude a new agreement, which would comply with the conditions identified by the Court.<sup>111</sup>

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<sup>110</sup> Wording quoted from José Maria Pernas Alonso, *El Tribunal de Justicia de la UE declara nulo el acuerdo UE-Marruecos que afecta el Sahara Occidental, pero permite su vigencia un año más : un caso de sentencia « diplomáticamente correcta »*, Revista Arazandi Union Europea, no. 11, Noviembre de 2024, pp. 1-13, p. 9.

<sup>111</sup> C-779/21P, C-799/21P, p. 186.

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