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Part 1 Introduction

1.0 The topic

In this thesis I will examine the most recent court cases concerning two bilateral agreements between the Kingdom of Morocco and the EU. The two agreements, the Association Agreement (AA) and the Sustainable Fisheries Partnership Agreement (SFPA) between the EU and Morocco, both give preferential treatment to products originating in Morocco. However, these agreements become controversial as they explicitly also cover products deriving from the disputed area of Western Sahara. This has caused the Polisario Front, a national liberation movement, to launch a proceeding before the European General Court (EGC). This court case, with the Polisario Front as the applicant and the European Council and the European Commission as the defendants will be the main topic under scrutiny in this thesis, as it entails many different questions and dilemmas within international law.

In this thesis I will claim that the EU is normally viewed as a morally just organisation that lives up to its international obligations and champions values such as human rights, rule of law and democracy. I will analyse whether this is a correct presumption when it comes to the EU's actions *vis-a-vis* Western Sahara. If I reach the conclusion that the EU knowingly and with intent does not live up to its international obligations, I will try to give an explanation of why this might be the case on the basis of the political environment the EU finds itself in.

Firstly, in the next part, I will introduce my problem statement alongside two sub-questions that I will try to answer during the thesis. I will also briefly introduce the methodological approach and theoretical foundation for the political science literature I use in the last part of the thesis. Lastly in this part, I will focus on three main delimitations I have chosen before outlining the remaining sections of the thesis.

1.1 Presentation of the problem statement and sub-questions

In this thesis, I will examine the following problem statement:

What effect does the international legal status of Western Sahara have on the legality of the bilateral fisheries and agricultural agreements between the Kingdom of Morocco and the European Union, and what can the actions of the EU potentially tell us about the underlying logic of the EU's external policies?

This two-fold problem statement entails both a legal analysis of the most recent court case in the European General Court, as well as an analysis, which derives from international relation theory. It thus moves on two distinct but interconnected legs, which together will form the contents of the thesis. It is the assumption that the EU's legal battles in the different court institutions in the European judicial system constitute a key element in its external actions, as it indicates the logic through which we can understand the conduct of the EU.

By providing an explanation of the conduct of the EU derived from a political science perspective, this thesis goes one step further and distinguishes itself from most other legal analyses of the conduct of the EU. I hereby hope to contribute to the debate of both the EU's conduct in regards to Western Sahara specifically, but also to use this finding as an indication of what might be the new normal in EU's external actions

However, long before this discussion will be relevant, a number of underlining sub-questions need to be examined. To be able to answer my research question, it is necessary to answer the following sub-questions:

- *What does the bilateral agreements between EU and Morocco entail, and why is Morocco generally an important partner for the EU?*

- *What characterises the international legal status of Western Sahara and how does the different relevant actors describe this legal status?*

The answers to each of these questions contribute with essential knowledge that will lead me towards answering my main research question. I will devote distinct sections in this thesis for each of these questions and begin these sections with a brief justification of the significance of the question under exploration. It suffices here to state that the questions, with the exception of the legal status of the Western Sahara, all have a descriptive nature, and such will be answered in the first descriptive part of the thesis.

Evidently, these questions and the main problem statement only explore a fraction of the very complex interplay between the EU, Morocco and Western Sahara. In the next section, I will briefly elaborate on the methods used to analyse these questions before moving to the delimitations and weaknesses of this thesis.

1.2 Methodology and Sources

As stated above, this research question operates within two academic disciplines *i.e.* the discipline of International Law and of Political Science. In order to answer the problem statement satisfactorily, I therefore need to apply two different methodological approaches, the legal doctrinal and the theory testing deductive approach. These two methodological approaches will be described in the following section along with a description of the different sources utilised in this thesis.

1.2.1 Legal doctrinal approach and sources

The first part of my research question focuses on what effect the international legal status of Western Sahara has on the legality of the bilateral agreements between Morocco and the EU concerning fisheries and agricultural products. This part is a purely legal analysis, and thus I have sought to answer this question through a legal dogmatic approach.¹ As Hutchinson argues, this approach forms the foundation of most legal analysis.²

Put simply, it is the task of the researcher to establish the status of the legal doctrine of interest through identification, analysis and synthetisation of the contents of the law(s) in question.³ The legal doctrine starts with a clear and neutral reading of the existing law within a certain field.⁴ On this basis and through a critical examination of the legislation, case law and legal principles where the different elements are combined and synthesised the researcher should derive at a debatably correct depiction of the law as it stands.⁵ Lastly, the legal-dogmatic also contains a prescriptive element in which the researcher assesses and give inputs on how a particular issue should be understood.⁶

To establish the legal doctrine, I have used many different types of sources. Primarily I have used legal documents such as treaties, agreements and protocols. This enables me to analyse the actual contents of the legal foundations relevant for this thesis. Furthermore, I have used

¹ Hutchinson, Terry. Doctrinal Research: Researching the jury. In: *Research Methods in Law*. Dawn Watkins & Mandy Burton (eds.) 2017. 2nd edition. 8ff.

² *Ibid.* pp. 10.

³ *Ibid.* pp. 13.

⁴ Smits, Jan M. What is legal doctrine? On the aims and methods of legal-dogmatic research. *Maastricht European Private Law Institute*. Working Paper No. 2015/06. pp. 8.

⁵ *Supra* note 1. pp. 13.

⁶ *Supra* note 4. pp. 10.

court documents from a variety of judicial institutions such as judgements and opinions. This allows me to get an idea of how the different legal documents have been interpreted, and to establish what the relevant customary law is, as this is often reflected in judicial rulings.⁷ I have also used sources that are non-legally binding such as resolutions from relevant organisations, public statements from relevant individuals and academic literature.

In short, I have utilised sources within all categories of internationally recognized material according to article 38 of the Statute of the International Court of Justice.⁸ By using such a variety of sources, I ensure a high level of validity and reliability in the descriptions, analyses and discussions provided.

1.2.2 Theories and methods for second research question

As previously stated, the doctrinal legal method will be used to answer the first half of my research question. In order to analyse and discuss the second half of my research question, I need to apply a different logic and thus methodological reasoning. If the bilateral fisheries and agricultural agreements between the EU and Morocco are deemed illegal due to the inclusion of Western Sahara, the EU can ultimately respond in two fundamentally different ways. The EU can either acknowledge the judicial rulings and terminate the bilateral agreements or it can do whatever in its power to keep the agreements in force despite their illegality.

Through different theories from the political science literature, these fundamentally different responses could be rationalised. Through the Normative Power Europe line of thinking, we would expect that the EU would act in a manner that is consistent with its international legal obligations, as the power of the European Union consists of its power to change: “(...) *the norms, standards and prescriptions of world politics away from the bounded expectations of state-centricity.*”⁹

If we assume that the General Court of Justice rules that the bilateral agreements indeed constitute a breach of EU’s international obligations, then we would expect the EU to terminate these agreements if we follow the reasoning of the theoretical framework of Normative Power

⁷ Roberts, Anthea & Sivakumaran, Sandesh. *The Theory and Reality of the Sources of International Law*. In: *International Law*. Malcolm Evans (ed.) 2018. 5th Edition. pp. 98.

⁸ *United Nations*. Statute of the International Court of Justice. 18 April 1946. Article 38. Available at: <https://www.icj-cij.org/en/statute>.

⁹ Manners, Ian. *The Normative Ethics of the European Union*. *International Affairs*. 2008. Vol. 84. No. 1. pp. 45.

Europe. Contrary, if we believe in the logic of structural realism, and especially the offensive realism, we would expect the EU to act in accordance with its self-interest irrespective of the outcome of the court case. As Mearsheimer puts it: “*For realists, institutions reflect state calculations of self-interest based primarily on concerns about relative power; as a result, institutional outcomes invariably reflect the balance of power.*”¹⁰

If the General Court rules in favour of a breach of international obligations, then we can formulate two fundamentally different hypotheses, derived from each of the theoretical frameworks. From the Normative Power Europe framework, I deduct the hypothesis “*The European Union will abide by the court rulings, as it strengthens its position as a normative power in world politics*”. Conversely, from the structural realism I subtract the hypothesis: “*The European Union acts in the interest of its own material capabilities regardless of the ruling of the court*”.

These hypotheses derived from two theories of how states and international organisations act will be put against the observed conduct of the EU, in order to establish which theory holds the biggest power of explanation. This method of studying international relations is called deductive hypothesis testing.¹¹ The ultimate goal of this method is to stress test the theories under scrutiny through a logic of falsification inspired by Karl Popper. The theories are used to structure and to simplify the vastly complex reality by formulating clear ontological assumptions, through which we can analyse the world. Through a comparison of the value of the different theories, we achieve to both test the power of explanation of the theories and to arrive at the best possible explanation of the reality we observe. In section 5.1 I will provide a more detailed account of how I have derived at the hypotheses outlined above.

Through both the legal doctrinal method and the deductive hypothesis testing, I hope to deliver a valid and adequate explanation to my two-fold research question. However, given my research question and the methods chosen to analyse this question, there are relevant aspects, which are not included in this thesis. In the next section, I will briefly touch upon the delimitations of this thesis.

¹⁰ Mearsheimer, John J. A Realist Reply. *International Security*. 1995. Vol. 20. No. 1. pp. 82.

¹¹ Mearsheimer, John. J. & Walt, Stephen. Leaving Theory Behind: Why Simplistic Hypothesis Testing is Bad for International Relations. *European Journal of International Relations*. 2013. Vol. 19 No. 3. pp. 427.

1.3 Delimitations of the thesis

In this section, I will emphasise three delimitations of the thesis. I believe these three delimitations highlighted here constitute the main research choices I have made in this paper. However, I acknowledge that readers might highlight other relevant delimitations than the ones presented below.

1.3.1 EU as a unified actor

In this thesis, I almost consistently treat the EU as a unified actor, which acts in concert in all issues concerning external politics. This is evidently not the case in the real world. The EU consists of a number of main bodies including the European Commission, the Council and the European Parliament, each of which acting in accordance with their own internal logics and with highly diverse political and institutional mandates.

Furthermore, the union is made up of 27 member states, from Malta, an island nation with just over half a million inhabitants, to Germany, with its more than 80 million and surrounded by nine neighbouring countries. Furthermore, you have countries within the union that are intransigently linked to Morocco because of either history, geography or both, and countries, which only have an interest in Morocco exactly because of their membership in the EU. With such variety in member states, it is no surprise that all are pursuing their own vastly different political agendas.

By treating the EU as a unified actor, and only highlighting the internal differences in the EU when it is of utmost importance, I reduce the complexity of the issue at hand. This is of course necessary in order to provide a stringent analysis, but it also poses the risk of becoming too reductionistic, and thus not be applicable in the world of real politics. However, when it comes to the external actions of the EU and the negotiations of bilateral agreements the EU often acts in unison as a single and coherent actor, why I believe that this delimitation only strengthens the clarity of the thesis.

1.3.2 Non-involvement of other actors and organisations

Another choice I have made is to focus solely on the relationship between the EU, Morocco and Western Sahara. I will only include the perspectives of other actors, such as the UN, when it is of essential value to the thesis. The sole focus on this trilateral relationship leaves out other and relevant regional and international actors.

Most significantly, I will not go into detail with the actions of the UN in relation to the conflict between Morocco and Western Sahara. I will briefly touch upon the UN led mission to Western Sahara as well as a few of the General Assembly resolutions passed over the years including the views on the status of the territory of Western Sahara. This obviously will by no means constitute a complete picture of the UN's handling of the situation, but I do not believe an account of this is essential for the scope of this thesis. What is essential is to understand that we have a parallel UN-led process in which the conflict will hopefully someday come to a peaceful and mutually acceptable conclusion. This will hopefully be evident through the thesis.

Along similar lines, I have, almost categorically, also excluded the positions of Algeria and Mauritania despite their relevance in the conflict between Morocco and Western Sahara. The African Union, which has been extensively engaged in the Western Sahara dispute, will not be covered in this in paper either.¹² Neither will the U.S, despite its involvement in the conflict, which became especially vocal during the presidency of Donald Trump.¹³ These are all very relevant and important actors in this conflict, but a complete analysis of each of their positions and actions in the conflict could constitute a thesis of its own. Therefore, they are, as a general rule, not included in this thesis unless it is of utmost importance for the sake of clarity.

1.3.3 Methodological choices

I believe that the best way to analyse and discuss my two-fold research question is through the doctrinal legal approach and the deductive hypothesis testing as described above. Nonetheless, by utilising these specific approaches, I have made a clear academic and methodological choice, which can be questioned.

Instead of relying on my own reading and reasoning, I could have collected interview-data from relevant actors. This could have increased the external validity of my thesis, as the perspectives would have been verified by other people engaged in this topic. The methods used here place a big responsibility on my academic reasoning and reading of the different sources. Through careful analysis based on all the different sources described in section 1.3.1, I believe

¹² Hasnaoui, Yasmine. Morocco and The African Union: A New Chapter for Western Sahara Resolution? *Arab Centre for Research and Policy Studies*. 2017. pp. 1.

¹³ Kestler-D'Amours, Jillian. US recognize Morocco's claim to Western Sahara. Now What?. *Al Jazeera*. 11 December 2020. Available at: <https://www.aljazeera.com/news/2020/12/11/us-recognised-moroccos-claim-to-western-sahara-now-what>.

however that I arrive at satisfactory and adequate answers to my research questions, this will however be up to the reader to decide. These conclusions could have been backed by accounts from interviewees, in order to strengthen the validity of the conclusions and the repeatability of the research. The concern for the validity and repeatability of the thesis is countered by my utilisation of a plethora of different sources as well as my extensive use of references throughout the analysis. Therefore, I argue that my thesis still lives up to the high academic standards that one should expect.

Despite these delimitations highlighted here, I still believe this thesis can contribute with valuable new insights and perspectives on this highly complex issue. By not focusing on these elements, the thesis follows a straightforward and academically coherent common thread. If I included too many aspects into this paper, there would be an overarching danger of a non-focused and superficial analysis, which would not have the academic weight I seek. However, this is not to diminish the limitations of the thesis, and the questions and perspectives not covered here, could easily be the subject of further research into this very interesting topic.

1.4 Outline of the contents of the thesis

The sections above outline the key elements of this thesis and which academic choices and delimitations have been made in the process. This section will briefly give an overview of the remainder of the thesis and how it is structured.

The thesis is centered around answering the questions laid down in the problem statement and the sub-questions presented in section 1.2. In order to do so, I have structured the thesis into six parts of which this introduction constitutes the first. Each of the six parts of this thesis are divided in multiple sections each focusing on a distinct element within the wider context of the part.

In the next part, which will primarily be of a descriptive nature, I will outline the relationship between Morocco and the EU and give a brief description of the bilateral agreements and the conflict of Western Sahara alongside the most significant historical events in this conflict. This part will allow me to examine the different elements I deem necessary in order to proceed to the analysis of the legality of the agreements between Morocco and the EU. The descriptive sections thus serve as the foundation upon which the analysis and the discussion will stand. This part will also provide an answer to the first sub-question, namely what the bilateral

agreements under scrutiny entail and why Morocco is an important neighbouring country for the EU.

In the third part of the thesis, I will provide an extensive account of the legal status of the territory of Western Sahara. I will look at this question from the perspective of the main actors in question that is; the EU, the Kingdom of Morocco and Western Sahara itself. However, I will also include the perspectives of the UN and of the International Court of Justice, as these are fundamental for the understanding of how the international system perceives the status of Western Sahara. This part thus provides an answer to my second sub-question on how the different actors view the status of the territory of Western Sahara.

The fourth part, which constitutes the main body of the thesis, will be the legal analysis of the recent court case on the legality of the bilateral agreements. I will here briefly establish the main legal obligations of the EU in relation to this question before providing a summary of the previous court cases in the European judicial system concerning the Morocco – Western Sahara issue. This will lead me to an in-depth analysis of the most recent court case where focus will be on the *locus standi* of the Polisario Front, the principle of *pacta tertiis nec nosent nec prosunt* and consent and lastly whether the EU has failed to live up to its legal obligation of non-recognition of an illegal situation. This fourth part will thus provide an answer to the first element of my problem statement.

On the basis of the legal analysis, I will proceed to the discussion of this paper. In the discussion, I will provide a possible explanation of the actions of the EU from a political science perspective, where I include the international political environment as a factor in this explanation. As stated in section 1.2.2 I will discuss this on the basis of two distinct theoretical frameworks. These two frameworks provide two very different perspectives on how the EU could act rationally in relation to this question. However, as will be seen, I argue that only one of these theoretical frameworks holds a power of explanation in this case. Lastly, a concluding section will pick up on the main points arrived at throughout the thesis.

Part 2 Morocco and Western Sahara - a brief introduction

2.0 Introduction to the descriptive part

This part of the thesis will provide the description of key actors, events and relationships that are fundamental to know and understand in order to follow the arguments and conclusions in the remainder of the thesis. This will thus provide us with the necessary knowledge to understand the roots of the conflict in focus. I will also give a brief description of the agreements in question to allow the reader a chance to understand the contents of these agreements and why they are important for the EU-Morocco relationship. This will be followed by a description of the significance of Morocco for the EU in addition to the bilateral agreements. The bilateral agreements have an economic focus providing cheap goods to Europe and job creation in Morocco in return. However, as I argue later, Morocco is also important in other important aspects besides the economy. This will allow me to answer my first sub-question about the importance of Morocco for the EU at large. Lastly, I will give a brief introduction to the territory of Western Sahara focusing on key events and figures that help explain the longstanding conflict.

2.1 Morocco - EU relations

In this section, I will look at the relationship between the EU and Morocco both historically and now. This is done to highlight the importance of the partnership for each of the parties, and to introduce some key aspects of the partnership with relevance for the court case of interest. I will also introduce both the agricultural and sustainable fisheries partnership agreement. This section therefore provides the basic knowledge needed in order to analyse the court ruling and to discuss the EU's response to this ruling, by answering the question: *Why is Morocco important for the EU*. This question is essential to answer, when analysing the EU's response to the potential illegality of the bilateral agreements between the two parties, and therefore this provides us with the foundation for the answer to the second part of the research question presented in section 1.1.

Because Western Sahara and Morocco are primarily treated as one economic unit in the economic bilateral relationship between Morocco and the EU, I will follow the same logic in this section by not distinguishing between Morocco and Western Sahara. If my descriptions concern Western Sahara in particular, this will be explicitly expressed in this section. In the

coming sections I will desecrate this relationship, however for now it suffices to treat them as a unified actor.

2.1.1 Historic bonds between Europe and Morocco

The Kingdom of Morocco has been incontrovertibly linked to the European continent due to its geographic proximity. At the narrowest, there is a mere 14,3 kilometres between the two continents at the Strait of Gibraltar.¹⁴ This geographical connection has led to continuous military interactions especially with both Spain and France, which culminated in March 30 1912 with the Treaty of Fez, establishing Morocco as a French protectorate.¹⁵ Simultaneous with the French protectorate, the Spanish Zone was established in the areas of Morocco bordering Spain, to acknowledge Spain's inherent interest in these particular areas.¹⁶

In 1956, the French authorities decided to grant Morocco its independence following a tumultuous period initialled by the outbreak of World War 2.¹⁷ The French termination of the protectorate came as a surprise to Spain, who then decided to follow the French example and grant independence to the Spanish Zone, however maintaining control over Ceuta and Melilla, which are still Spanish exclaves to this day.¹⁸

After its independence, Morocco sought to establish collaborations with many countries and organisations. This led to the establishment of the collaboration between the EU and Morocco, which officially began in 1967 with the signing of the 5-year Bilateral Agreement.¹⁹ Since then the ties between the two parties have only grown deeper, and especially the Euro-Mediterranean partnership established in 1995, normally known as the Barcelona process, reiterated these ties.²⁰ Of the 12 non-European states included in the Barcelona process,

¹⁴ Kanbrik.com. What is the Distance Between Spain and Morocco at the Strait? *Kanbrik.com*. Available at: <https://www.kanbrik.com/what-the-distance-between-spain-and-morocco-at-the-strait/>.

¹⁵ Laroui, Abdallah, Will D. Swearingen & Susan Gilson Miller. Decline of traditional government. *Britannica*. Available at: <https://www.britannica.com/place/Morocco/Decline-of-traditional-government-1830-1912>.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Abdelhadi, Magdi. Ceuta and Melilla: Spain's enclaves in North Africa. *BBC*. 5 June 2021. Available at: <https://www.bbc.com/news/world-africa-57305882>.

¹⁹ Suárez-Collado, Ángela & Davide Contini. The European Court of Justice on the EU-Morocco agricultural and fisheries agreements: an analysis of the legal proceedings and the consequences for the actors involved. *The Journal of North African Studies*. 2021. p. 3.

²⁰ Lopes, Patricia. The Complicated Nature of EU-Morocco Relations. *European Student Think Tank*. 26 January 2022. Available at: <https://esthinktank.com/2022/01/26/the-complicated-nature-of-eu-morocco-relations/>.

Morocco was the country that gained the most in economic terms.²¹ The main objectives with the Barcelona Process was to create an area of peace and prosperity with focus on human rights, to establish a stronger economic relationship and to create a deeper social and cultural integration between the countries covered.²²

This has been followed by many bilateral agreements, which have further strengthened the ties between Morocco and the EU. As it is phrased by the EU-Morocco Association Council, a body for collaboration between the two parties: “*From mere neighbours, the European Union and Morocco have thus become true partners in their common vision for the future of the Mediterranean and beyond.*”²³ On 13th October 2008 Morocco was established as an “advanced partner” to the EU, which is a even further concretization of the deep ties between the two parties.²⁴

These historic bonds and the status of advanced partner to the EU is a clear sign that Morocco is an important actor for the EU. In the following section I will briefly outline the contents of two of the bilateral agreements i.e. the Sustainable Fisheries Partnership Agreement (SFPA) and the Association Agreement (AA), as these are the main agreements concerning agricultural and fisheries products from Morocco and Western Sahara, and therefore also the centre of focus in the court cases.

2.1.2 Bilateral agreements between EU and Morocco

Firstly, I will provide a brief description of the Association Agreement (AA), and especially protocol 1 and 4, as they lay the foundation for the agricultural collaboration between the two actors, and thus constitute the important elements of this agreement in relation to this thesis. Hereafter, I will give a brief introduction to the Sustainable Fisheries Partnership Agreement (SFPA).

²¹ *Ibid.*

²² Slimane, Faten Ben, Sabri Boubaker & Jamel Jouini. Does the Euro-Mediterranean Partnership contribute to regional integration? *Journal of Policy Modeling*. 2020. Vol. 42. No. 1. pp. 331.

²³ European Council. Joint declaration by the European Union and Morocco for the fourteenth meeting of the Association Council. *Council of European Union*. 27 June 2019. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2019/06/27/joint-declaration-by-the-european-union-and-the-kingdom-of-morocco-for-the-fourteenth-meeting-of-the-association-council/>.

²⁴ Martín, Iván. EU-Morocco Relations: How Advanced is the ‘Advanced Status’?. *Mediterranean Politics*. 2009. Vol. 14. No. 2. pp. 239.

The description of these specific agreements is provided, as they are both key to understanding the specificities of the Polisario v. the Council case under scrutiny here. They constitute the only bilateral agreements with direct economic impact on Western Sahara, as exports from Western Sahara to the EU solely concerns fisheries or agricultural products.²⁵ Moreover, they provide an account of the depth of the bilateral relationship between Morocco and the EU.

2.1.2.1 The Association Agreement

The foundation of the bilateral relationship between the EU and Morocco is the Association Agreement (AA), which was signed in 1996 on the basis of the Barcelona Process, and came into force in 2000.²⁶ The AA reiterates the geographical and historical relationship between the two parties outlined in the section above, by emphasising these strong ties in the very first recital, which goes: “ *Considering the proximity and interdependence which historic links and common values have established between the Community, its Member States and Morocco.* ”²⁷ The AA establishes the groundwork for the political dialogue and cooperation between Morocco and EU, which is stated in article 1 paragraph 2 litra a, where it is stated that the aim of the AA is to: “ *provide an appropriate framework for political dialogue (...) allowing the development in all areas they consider relevant to such dialogue.* ”²⁸

One of these areas is to implement an economic liberalisation of agricultural products and fisheries, as laid down in chapter II, article 16.²⁹ Article 17, paragraph 1 in the AA lays down one of the most controversial articles in the bilateral relationship between Morocco and the EU, as it stated that: “ *Agricultural and fishery products originating in Morocco shall benefit on import into the Community from the provisions set out in Protocols 1 and 2 respectively.* ”³⁰ This article outlines the entire controversy, as it does not offer a clarification on what specific territory “Morocco” entails.

²⁵European Commission. Commission Staff Working Document - 2021 Report on the benefits for the people of Western Sahara on extending tariff preferences to products from Western Sahara. *European Commission*. SWD(2021) 431 Final. 22 December 2021. pp. 3.

²⁶ European Commission. 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. *Official Journal of the European Communities*. L70/2. 18 March 2000.

²⁷ *Ibid.* Recital 1.

²⁸ *Ibid.* Article 1, (b).

²⁹ *Ibid.* Article 16.

³⁰ *Ibid.* Article 17, para 1.

Western Sahara is not mentioned at all in the AA, and as such this agreement, which serves as the most fundamental bilateral agreement, does not revolve around this dispute. In article 94, it is stipulated that the agreement shall apply to the EU on the one hand and to the Kingdom of Morocco on the other.³¹ In Protocol IV, which is an annex to the AA, a definition on the goods of origin is given in article 2 paragraph 2.³² Nevertheless, this still does not give an explanation of which geographical territory is considered to be a part of the Kingdom of Morocco.

However, clarification was delivered with the most recent amendment of the protocols referred to in article 17. In the Council decision amending the protocols to include products from Western Sahara it is stated that products that originate in Western Sahara have been certified as Moroccan and thus benefitted from the tariff preferences, which are outlined in the AA.³³ Thereby the Council acknowledged that products originating in Western Sahara was also labelled as Moroccan and thus are covered by the AA. This clarification does however entail many legal questions, which are the focus in the recent and previous court cases and consequently will be analysed in part four of this thesis.

2.1.2.2 The Sustainable Fisheries Partnership Agreement

In addition to the AA, EU and Morocco have also entered into a bilateral Sustainable Fisheries Partnership Agreement (SFPA).³⁴ Multiple fisheries agreements have been conducted over the years, with the first established in 1995 being by far the most significant fisheries agreement between the EU and a third party in an economic sense.³⁵ Historically these fisheries agreements have raised many different economic, biological and legal issues on both sides, leading to a stop of bilateral fisheries agreements between the parties at different times.³⁶ However, the collaboration within the fisheries sector has always been recommenced and the most recent fisheries agreement between the parties came into effect on the 20th March 2019.³⁷

³¹ *Ibid.* Article 94.

³² *Supra* note 26. pp. 82.

³³ European Council. Decision (EU) 2019/217. International Agreements. *Official Journal of the European Union*. 06 February 2019. L34/1. pp. 1.

³⁴ The European Union. Sustainable Fisheries Partnership Agreement Between the European Union and the Kingdom of Morocco. *Official Journal of the European Union*. L77/8. 20 March 2019.

³⁵ *Supra* note 19. pp. 13.

³⁶ Popescu, Irina. EU-Morocco fisheries agreement. *European Parliament Research Service*. 2019.

³⁷ *Supra* note 34.

This agreement gives EU vessels a right to fish for surplus stocks in Morocco, in exchange for financial contribution consisting of both direct payment for fishing licences, fees paid by vessel owners and sectoral support for the Moroccan fishing sector as laid down in article 3 and 12 respectively.³⁸ These direct payments for fishing licences and fees paid by the vessels' owners are paid to and administered by the Moroccan authorities. The fishing done by EU-vessels only includes surplus stocks, *i.e.* fish within the fishing quota that are not caught by the local fishers, to ensure that EU-vessels do not engage in competitive fishing activities with these local fishers, which is also in accordance with the United Nations Convention on the Law of the Seas (UNCLOS) article 62(2) and (3).³⁹

The SFPA is of great financial significance, as it contributes with app. 40 mio. euros annually.⁴⁰ This makes it the second largest SFPA of the 13 currently in place in economic terms, only exceeded by the SFPA to Mauritania.⁴¹ The significance of the agreement further underlines the importance of the relationship between EU and Morocco. In the exchange of letters between the EU and Morocco, leading up to the most recent revision of the SFPA, it is emphasised that the waters adjacent to the territory of Western Sahara is included in the territorial scope of the SFPA.⁴² This inclusion of the waters and marine resources of Western Sahara is, as with the AA, the key point in the dispute between Western Sahara and the EU, which will be outlined in the analysis section of this thesis.

Both these agreements clearly show that the economic relationship with Morocco is important for the EU. It is also evident that both Morocco and the EU strongly wish to cover the territory of Western Sahara by these agreements as well. .

2.1.3 The importance of Morocco in addition to the bilateral agreements

In the sections above I have outlined the historic, social and economic ties between EU and Morocco. I have also outlined the key contents of the AA and SFPA both to illustrate the deep

³⁸ *Ibid.*

³⁹ United Nations Convention on Law of the Sea. 10 December 1982. *United Nations*. Article 62(2) and (3). Available at: https://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm.

⁴⁰ *Supra* note 36.

⁴¹ European Commission. Sustainable Fisheries Partnership Agreements (SFPAs). *European Commission*. 2020. Available at: https://ec.europa.eu/oceans-and-fisheries/fisheries/international-agreements/sustainable-fisheries-partnership-agreements-sfpas_en#ecl-inpage-59.

⁴² European Union. Exchange of Letters between the European Union and the Kingdom of Morocco accompanying the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco. *Official Journal of the European Union*. 20 March 2019. L77/53.

and important economic ties between the EU and Morocco and to provide an introduction to the agreements central in the legal court cases. In this section I will briefly outline the main areas in which Morocco constitutes a key partner or adversary for the EU, besides what have already been illustrated so far. I have chosen to focus on migration and energy supply as the main areas of collaboration/competition between the two parties, as these clearly illustrate the significance of Morocco towards the EU.

2.1.3.1 Migration

Morocco is a key partner country for the EU when it comes to limiting the influx of refugees and migrants to its Southern European borders, especially Spain. Here Morocco occupies three distinct but interconnected roles in relation to African-EU migration - as a source of migration, as a transit country and as a final destination for migrants.⁴³

Especially crucial for the EU is Morocco's role as a transit country for migrants mostly originating in Sub-Saharan Africa, which is estimated to be around 700.000 individuals.⁴⁴ The high number of migrants using Morocco as a transit country has led to an increase in the EU support to tackle the migration challenges in Morocco.⁴⁵ The support amounts to €346 million, where €101.7 million are earmarked for strengthening the Moroccan border control.⁴⁶ This makes Morocco the second largest recipient of the EU's support scheme on migration, and is evidence of the significance of Morocco as a key allied in relation to migration.⁴⁷

However, Morocco is not only an ally in keeping the flows of migrants at a sustainable level, but can also use its significance as a political tool to pressure the EU and the bordering countries. This was emphasised in May 2021, where Morocco allowed more than 8.000 migrants to enter into Ceuta, the Spanish exclave connected to Morocco, which sends a undisputable signal of its disappointment with the Spanish authorities who had delivered medical treatment to Brahim Ghali, the leader of the Polisario Front and Morocco's adversary

⁴³ Kostas, Stylianos. Morocco's Triple Role in the Euro-African Migration System. *Mei@75*. 18 April 2017. Available at: <https://www.mei.edu/publications/moroccos-triple-role-euro-african-migration-system>.

⁴⁴ El Ghazouani, Driss. A Growing Destination for Sub-Saharan Africans, Morocco Wrestles with Immigrant Integration. *Migration Policy Institute*. 2 July 2019. <https://www.migrationpolicy.org/article/growing-destination-sub-saharan-africans-morocco>.

⁴⁵ European Union. EU Support on Migration in Morocco. *European Commission*. 2021. Available at: https://ec.europa.eu/trustfundforafrica/sites/default/files/eutf_morocco_2.pdf.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

number one.^{48;49} The move was followed by a Facebook post by the Moroccan Human Rights Minister, stating that the price of underestimating Morocco is very high.⁵⁰ According to Ruth Turrión, professor in Political Science at Complutense University of Madrid: “*The instrument of migratory pressure is always used because it is the most effective way to gain more funds and press hard enough to achieve political objectives.*”⁵¹

This episode led to a diplomatic dispute, where Morocco called home its ambassador to Spain, thereby cancelling all bilateral diplomatic relations. However, in late March 2022 Spain made a drastic U-turn to support Morocco’s autonomy plan for Western Sahara, and thereby ending half a century of neutrality on the issue.⁵² I will elaborate on Morocco’s autonomy plan and the different views on this in section 3.4.1 and 3.4.2, but here it suffices to state that many observers analyse the Spanish change of heart as a direct consequence of the Ceuta incident and the following diplomatic row.⁵³

2.1.3.2 Gas supply

Another area where Morocco plays a key role is in the gas supply to Spain. The Maghreb-Europe gas pipeline, which runs from Algeria to Spain through Moroccan territory is the biggest gas pipeline supplying Spain with app. 10 billion cubic-metres of gas annually.⁵⁴ The contract between Morocco and Algeria concerning the operation of the gas pipe was not renewed in 2021 due to a diplomatic dispute between the two countries following Morocco’s rapprochement towards Israel and Algeria’s inherent interest in the Western Saharan issue, which will briefly be explained in section 2.2.2.⁵⁵ At the time of writing the Maghreb-Europe

⁴⁸ Martinez, Marta Rodriguez. Is Morocco using migration as a bargaining chip against the EU? In: *Euronews*. 25 May 2021. Available at: <https://www.euronews.com/my-europe/2021/05/25/is-morocco-using-migration-as-a-bargaining-chip-against-the-eu>.

⁴⁹ Edwards, Sam. Morocco uses migrants to get what it wants. In: *Politico*. 19 May 2021. Available at: <https://www.politico.eu/article/morocco-uses-migrants-to-get-what-it-wants/>.

⁵⁰ *Supra* note 48.

⁵¹ *Ibid.*

⁵² Bartolomé, Marcos. Why is Madrid pandering Morocco? In: *Foreign Policy*. 13 May 2022. Available at: <https://foreignpolicy.com/2022/05/13/spain-sanchez-morocco-polisario-western-sahara-algeria/>.

⁵³ Euromed Rights. Spain and Western Sahara: An abrupt U-turn. In: *Euromed Rights*. 29 March 2022. Available at: <https://euromedrights.org/publication/spain-and-western-sahara-an-abrupt-u-turn/>.

⁵⁴ Rashad, Marwa; Ahmed, Hamid Ould & Chikhi, Lamine. Algeria to end gas supplies to Morocco; supply Spain directly. In: *Reuters*. 25 October 2021. Available at: <https://www.reuters.com/world/africa/algeria-end-gas-supplies-morocco-supply-spain-directly-sources-2021-10-25/>.

⁵⁵ AFP. Algeria-Morocco standoff threatens Spain gas supplies. In: *France24*. 30 September 2021. Available at: <https://www.france24.com/en/live-news/20210930-algeria-morocco-standoff-threatens-spain-gas-supplies>.

gas pipeline is still not in function due to the very limited diplomatic contact between Morocco and Algeria.

The Russian invasion of Ukraine and the issue with gas supply from Russia as a consequence of this invasion has led to Europe exploring other means of gas import including from Africa.⁵⁶ With Europe's and especially Spain's dependence on Algerian gas, which has only further increased by Russia's invasion, Morocco holds another bargaining chip towards Europe, as it is able to stop the gas supply from Algeria. This has led two members of the European Parliament to ask a written question to Josep Borell, the High Representative for External Relations, asking for the EU to strengthen its focus on normalising the diplomatic relations between Algeria and Morocco.⁵⁷ This indicates that European politicians are occupied with the issue, and regard it as highly important. In addition, Morocco and Nigeria are currently finalising their negotiations on another gas pipeline, which could deliver Nigerian gas to European consumers.⁵⁸ This pipeline would of course further underline Morocco's key position in relation to African gas supply to the European consumers.

Morocco's role in the gas supply chain, its key role in tackling migration challenges as well as the bilateral agreements and historic ties all show that Morocco is of key interest and importance to Europe and the EU. In the next section of the thesis, focus will shift to describe Western Sahara before proceeding to the legal analysis.

2.2 Introduction to Western Sahara

In this section, I will briefly introduce the history, geography and current situation of Western Sahara. It is important to know the geographic particularities and the main historical developments of Western Sahara as it gives an insight in why the conflict is still going on.

⁵⁶ Holleis, Jennifer & Schwikowski, Martina. Europe looks to Africa to fill natural gas gap. In: *Deutsche Welle*. 4 March 2022. Available at: <https://www.dw.com/en/europe-looks-to-africa-to-fill-natural-gas-gap/a-61017873>.

⁵⁷ Tajani, Antonio & Salini, Massimiliano. Parliamentary questions: Maghreb-Europe gas pipeline (MEG). *European Parliament*. 2 November 2021. E-004956/2021 Available at: https://www.europarl.europa.eu/doceo/document/E-9-2021-004956_EN.html.

⁵⁸ Naji, Abderrahmane. The Morocco-Nigeria gas pipeline: Economic and geopolitical benefits. *Wall Street International*. 17 October 2021. Available at: <https://wsimag.com/economy-and-politics/67267-the-morocco-nigeria-gas-pipeline>.

2.2.1 Geography and history of Western Sahara

Western Sahara borders Morocco in the north and Mauritania in the south-east with a 1.200 km Atlantic Ocean coastline to the west. It covers 266.000 km² and consists mainly of barren desert land.⁵⁹ After the Berlin Conference of 1884-1885, which divided the African continent between the European powers, Western Sahara became a Spanish colony.⁶⁰ In 1963 Western Sahara was added to the list of non-self-governing territories by the UN.⁶¹ This status was followed up by the 1966 General Assembly Resolution calling on the Spanish authorities, as the *de facto* and *de jure* administering power at the time, to hold a referendum for the indigenous people of Western Sahara on the self-determination of Western Sahara.⁶² Its final break from Spanish colonial ties came in 1975. General Franco was terminally ill and internal turmoil raged in Spain, which meant that few paid attention to the power transition in Spanish Sahara.⁶³ This effectively ended the Spanish era in the area.

Moroccan and Western Saharan waters



Source: *MarineRegions.org*

The Frente Popular de Liberación de Saguía el Hamra y Río de Oro, or Polisario Front as it is popularly known, was established on May 10 1973 as an independence movement fighting for self-determination of the Sahrawi people, the indigenous people of Western Sahara.⁶⁴ On 27

⁵⁹ New World Encyclopaedia. Western Sahara. *New World Encyclopaedia*. 21 August 2020. Available at: https://www.newworldencyclopedia.org/entry/Special:CiteThisPage?page=Western_Sahara.

⁶⁰ Omar, Sidi M. The Right of Self-Determination and the Indigenous People of Western Sahara. *Cambridge Review of International Affairs*. 2008. Vol. 21. No. 1. pp. 45.

⁶¹ United Nations. Non-Self-Governing Territories. 17 August 2021. Available at: <https://www.un.org/dppa/decolonization/en/nsqt>.

⁶² United Nations General Assembly. Question of Ifni and Spanish Sahara. 20 December 1966. A/RES/2229. Available at: <https://www.refworld.org/docid/3b00f1d91c.html>.

⁶³ Włodarski, Robert Jacek. "Relations between EU and Western Sahara - Disgraceful unity". *The New Federalist*. 15 June 2018. Available at: <https://www.thenewfederalist.eu/relations-between-eu-and-western-sahara-disgraceful-disunity?lang=fr>.

⁶⁴ *Supra* note 60.

February 1976 this liberation movement announced the establishment of the Sahrawi Arab Democratic Republic (SADR) as an independent and autonomous state.⁶⁵ The Polisario Front was afterwards recognized by the UN General Assembly as the sole legal representative of the people of Western Sahara in 1979 in its resolution 34/37 and which was also echoed in its resolution 35/19.^{66;67}

However, not long after Spain's retraction from Western Sahara both Morocco and Mauritania each annexed their part of the Western Saharan territory, which led to an armed conflict between Mauritania and Morocco on the one side and the Polisario Front on the other.⁶⁸ Mauritania did retract from the territory in 1979 on the basis of an agreement with the Polisario Front handing over the annexed parts to the organisation.⁶⁹

2.2.2 UN led mission and Morocco's presence

Contrary to Mauritania, Morocco is still present in Western Sahara. Almost immediately after the Spanish retraction from Western Sahara, King Hassan II of Morocco ordered 350.000 of his compatriots to march towards Western Sahara, to annex the territory in what is now known as "the Green March".⁷⁰ The number of Moroccans outnumbered the Sahrawi people by a factor of 4:1.⁷¹ This move was deplored by the UN Security Council in its 380 resolution, calling "(...) upon Morocco immediately to withdraw from the Territory of Western Sahara all the participants in that march".⁷² This way of using migration to obtain a political objective resembles the recent Ceuta incident described in section 2.2.3.1.

⁶⁵ *Ibid.*

⁶⁶ United Nations General Assembly. Question of Western Sahara. 21 November 1979. A/RES/34/37. Para 7. Available at: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/A_RES_34_37.pdf.

⁶⁷ United Nations General Assembly. Question of Western Sahara. 11 November 1980. A/RES/35/19. Para 10. Available at: <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/390/38/IMG/NR039038.pdf?OpenElement>.

⁶⁸ Kassoti, Eva. The Long Road Home. *Verfassungsblog*. 6 October 2021. Available at: <https://verfassungsblog.de/the-long-road-home/>.

⁶⁹ Smith, Jeffrey. International Law and Western Sahara's Maritime Area. *Ocean Development and International Law*. 2019. Vol. 50. No. 2. pp. 122.

⁷⁰ Weiner, Jerome B. The Green March in Historical Perspective. *Middle East Journal*. 1979. Vol. 33, No. 1. pp. 27.

⁷¹ Hummelbrunner, Sandra & Prickartz, Anne-Carlijn. It's not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union. *Utrecht Journal of International and European Law*. 2016. Vol. 32. No. 1. pp. 21.

⁷² United Nations Security Council. Resolution. Western Sahara. Resolution 380. *United Nations*. 6 November 1975. Available at: <http://unscr.com/en/resolutions/380>.

The Western Sahara War between Morocco and the Polisario Front lasted until the successful negotiation of a ceasefire in 1991, brokered by the UN.⁷³ The UN Security Council adopted a resolution calling for a referendum on the self-determination of the people of Western Sahara.⁷⁴ Simultaneously this resolution established the UN-led peacekeeping mission in Western Sahara with a mandate to oversee this proposed referendum and manage the ceasefire between the parties also known as MINURSO.⁷⁵

Since the establishment of the MINURSO mission, the UN has made continuous calls to hold a referendum and in 2021 it appointed a new UN Personal Envoy of the Secretary-General, Mr. Staffan de Mistura, to boost the political negotiations for a peaceful solution.⁷⁶ However, despite these efforts from the UN, the ceasefire between Morocco and the Polisario Front broke down at the end of 2020 when renewed fighting erupted between the two parties.⁷⁷ The flare up of the conflict was sparked by members of the Polisario Front blocking the main road connecting Morocco with Mauritania, and thus the entire Sub-Saharan continent.⁷⁸

Today Morocco controls approximately 80% of the disputed territory, while the Polisario Front controls the remaining 20%.⁷⁹ The territories are separated by a 2.700 km long wall mainly consisting of sand and controlled by up to 100.000 Moroccan soldiers.⁸⁰ Despite controlling 20% of the disputed area, a large portion of the Sahrawi people now live in five refugee camps

⁷³ *Ibid.*

⁷⁴ United Nations Security Council. Resolution. The Situation Concerning Western Sahara. Resolution 690. *United Nations*. 29 April 1991. Available at: <http://unscr.com/en/resolutions/doc/690>.

⁷⁵ *Ibid.*

⁷⁶ United Nations Security Council. Resolution 2602 The situation concerning Western Sahara. *United Nations*. 29 October 2021. Available at: <http://unscr.com/en/resolutions/2602>.

⁷⁷ Samulski, Anna. Collapse of Western Sahara ceasefire threatens prospect of a peaceful solution to 45-year long conflict. In: *Reliefweb*. 24 November 2020. Available at: <https://reliefweb.int/report/algeria/collapse-western-sahara-ceasefire-threatens-prospect-peaceful-solution-45-year-long>.

⁷⁸ Karam, Souhail. Why the fight over Western Sahara is heating up again. In: *Bloomberg*. 10 September 2021. Available at: <https://www.bloomberg.com/news/articles/2021-03-17/why-the-fight-over-western-sahara-is-heating-up-again-quicktake>.

⁷⁹ Pidoux, Flora. Morocco and Western Sahara: a decades-long war of attrition. In: *The Conversation*. 19 September 2021. Available at: <https://theconversation.com/morocco-and-western-sahara-a-decades-long-war-of-attrition-122084>.

⁸⁰ Maclean, Ruth. Build a wall across Sahara? That's crazy - but someone still did it. In: *The Guardian*. 22 September 2018. Available at: <https://www.theguardian.com/world/2018/sep/22/western-sahara-wall-morocco-trump>.

in Algeria's southwest Tindouf region, bordering Morocco and Mauritania, where they are completely reliant on humanitarian aid to survive.⁸¹

The legal status of Western Sahara is still disputed, and occasional fights are still erupting between the warring parties. Both the Polisario Front and Morocco are simultaneously fighting an intense diplomatic battle to get supporters for their conflicting positions. This will be analysed more in depth in section 3.2, where the international legal status of Western Sahara will be scrutinised.

2.3 Partial conclusion

The sections above have outlined the most important aspects and introduced the main actors in the conflict between Morocco and Western Sahara as well as described the interplay between Morocco and the EU. I thereby arrive at the conclusion for the first sub-question: *What does the bilateral agreements between EU and Morocco entail, and why is Morocco generally an important partner for the EU?*

The first bilateral agreement under scrutiny in this thesis, the AA, provide products originating in Morocco with a preferential tariff agreement, which opens the European market for these products. The SFPA, which is one of the most important fisheries agreements between the EU and a third party, allow for European fishers to fish in Moroccan waters as well as provide sectoral and direct economic support for the sector. Both agreements thus provide a solid economic foundation for the economic relationship between Morocco and the EU. The agreements also both includes the territory (and territorial waters) of Western Sahara due to the most recent amendment process led by the European Commission and adopted by the European Council.

Besides the bilateral agreements, which underlines the economic importance of Morocco for the EU, Morocco also plays a crucial role in relation to both migration and gas supply. Morocco therefore not only constitutes a key economic partner for the EU, but also play an important role in relation to geostrategy and security.

⁸¹ ACAPS. Algeria: Sahrawi refugees in Tindouf. In: *ACAPS briefing note*. 19 January 2022. Available at: https://www.acaps.org/sites/acaps/files/products/files/20220119_acaps_briefing_note_algeria_sahrawi_refugees_in_tindouf.pdf.

These sections above thus serve as the factual foundation upon which I will build the analysis parts below. Many important historical, geographical, and cultural aspects of the conflict have deliberately been left out of the account above, as it would take up too much space and time to go into detail without much extra value for the thesis at hand.

Part 3 – The legal status of Western Sahara

3.0 Introduction

Before venturing into the analysis of the disputed bilateral agreement, the current legal status of Western Sahara needs to be clarified. This international legal status is highly disputed, and each involved actor has its individual perspective and narrative on this issue. In this part I will firstly establish the international legal foundation upon which we can assess the status of Western Sahara before going into how the different actors position themselves. This *modus operandi* will allow me to deliver a strictly legal position upon which the different positions can be compared.

3.1 Right to self-determination

Self-determination will in this thesis be understood as the legal right for a people to decide for themselves, without influence or control from another sovereign. Self-determination can carry many forms: “(...) *self-determination rights for a minority group may involve simply political and representative rights within a central state, on the one hand, or may amount to remedial secession and ultimately independence, on the other.*”⁸² Self-determination is therefore to be considered as a continuum going from a sort of autonomy within another state to complete and undivided independence. The key characteristic of self-determination is that people can freely express their will and desire and determine their own political status.⁸³

The principle of self-determination of people is one of the founding principles of the UN, which is laid down in article 1(2) of the UN Charter.⁸⁴ Here it is established that the purpose of the organisation is to develop friendly relations among nations on the grounds of equal rights and

⁸² Sterio, Milena. *The Right to Self-Determination under International Law*. Routledge Taylor and Francis Group. New York. 2013. 1st edition. pp. 25.

⁸³ *Supra* note 60. pp. 42.

⁸⁴ *Charter of the United Nations*. San Francisco. 26 June 1945. Chapter I. Article 1. Available at: <https://www.un.org/en/charter-united-nations/>.

self-determination.⁸⁵ Similar principles are further stressed in article 73 and article 76 of the UN Charter.⁸⁶ Article 76 in particular reiterates the purpose of the UN stating that it should aid non-self-governing territories in: “(...) *their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples (...)*”⁸⁷

These lines of thoughts were stressed and strengthened in the General Assembly Resolution 1514; “*Declaration on the Granting of Independence to Colonial Countries and Peoples.*”⁸⁸ Here it is stated that “*All peoples have the right of self-determination*”⁸⁹ Academics have pointed out that the adoption of the declaration indicated a shift of the status of self-determination from being considered a principle within international law to becoming an inalienable right in international law.⁹⁰

Many argue that the right to self-determination has now evolved into a *jus cogens* norm in international law with the character of an *erga omnes* obligation.^{91;92} In the Portugal v. Australia case concerning East Timor the ICJ expressed in its judgement: “(...) *Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character, is irreproachable.*”⁹³ The *erga omnes* character of the norm means that it is an obligation, which is owed to the international community as a whole and is not linked to a specific state. Therefore, on the basis of both treaties, customary law, case law and academic literature the right to self-determination is evidently a fundamental norm, which can be invoked by a people.

⁸⁵ *Ibid.*

⁸⁶ *Supra* note 84. Chapter XI & Chapter XII. Article 73 & 76.

⁸⁷ *Ibid.* Chapter XII. Article 76.

⁸⁸ United Nations General Assembly. Declaration on the Granting of Independence to Colonial Countries and Peoples. *United Nations*. 14 December 1960. A/RES/1514(XV).

⁸⁹ *Ibid.* Article 2.

⁹⁰ *Supra* note 60. pp. 42.

⁹¹ Shrinkhal, Rashwet. “Indigenous sovereignty” and right to self-determination in international law: a critical appraisal. *Alternative*. 2021. Vol. 17. No. 1. pp. 77.

⁹² Espiell, Hectar Gros. The right to self-determination: Implementation of United Nations resolutions. *United Nations*. 1980. Available at: <https://digitallibrary.un.org/record/13664>.

⁹³ International Court of Justice. *Case Concerning East Timor. Portugal v. Australia*. Judgement. 30 June 1995. Para 29. Available at: <https://www.icj-cij.org/public/files/case-related/84/084-19950630-JUD-01-00-EN.pdf>.

3.2 Does Saharawi constitute a “people”?

As shown above, the right to self-determination of peoples is a fundamental norm in international law. However, not everyone can claim a right to self-determination, as this right requires the existence of a “people”. Thus, one must legally define the “people” in order to assess whether a right of self-determination can be claimed. It can be difficult to assess whether a collection of individuals constitute a people, as it requires an examination of the historical, cultural and political particularities that constitute the group’s distinctiveness.⁹⁴ The expression of a national identity is a continuous performative act that reproduces a sense of belonging both institutionally and discursively.⁹⁵

The Sahrawi people constitute a distinct people. It does so on the basis of its distinct social construction, which derives from its historical tribal structures and nomadic lifestyle.⁹⁶ This was also the conclusion from the ICJ in its 1975 advisory opinion on Western Sahara, where it is expressed that: *“In the present instance, the information furnished to the Court shows that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them.”*⁹⁷ Therefore, the territory could not be regarded as a *terra nullius* prior to the Spanish colonisation in 1884. Through a symbiosis of Arab, Berber and African people in the territory, a cultural, linguistic and religious identity emerged.⁹⁸

A contributing factor in the creation of a shared distinct identity was the Spanish colonisation of the Western Sahara and the establishment of the Polisario Front.⁹⁹ This strengthened the sense that the Sahrawi was something separate and distinct from both Spanish and Moroccan identities. The identity formation needs an opposition figure in order to negatively define itself, from the premise; “we are who we are, because we are not the others”. As described by Mark Drury: *“Many of these terms are relational: Sahrawi is defined against Moroccan (...)”*¹⁰⁰ This

⁹⁴ *Supra* note 60. pp. 44.

⁹⁵ *Ibid.*

⁹⁶ *Supra* note 60. pp. 44.

⁹⁷ International Court of Justice. Western Sahara. *Advisory Opinion*. 16 October 1975. Para. 81. Available at: <https://www.icj-cij.org/public/files/case-related/61/061-19751016-ADV-01-00-EN.pdf>.

⁹⁸ *Supra* note 60. pp. 44.

⁹⁹ *Ibid.*

¹⁰⁰ Drury, Mark. *Disorderly Histories: An Anthropology of Decolonization in Western Sahara*. ProQuest. 2018. Available at: https://academicworks.cuny.edu/gc_etds/2792/. pp. 102.

process of identity formation and expression is not only reserved to the territory controlled by the Polisario Front but is also evident in the Sahrawi refugee camps in Algeria.¹⁰¹

The UN has also established that the Sahrawi people are a distinct people. During the MINURSO-led census in January 2000, 86.000 possible Sahrawi voters were identified out of more than 200.000 applicants.¹⁰² This figure is in line with Spain's census from 1974 in relation to the decolonization process of Western Sahara, where it counted around 75.000 individuals as a part of the Sahrawi people.¹⁰³ This showed that there are many people living in the territory of Western Sahara that cannot be regarded as Sahrawi, which by default means that the Sahrawi identity is something distinct from the majority of the population living in Western Sahara, who identify as Moroccan.

Together all these elements form a distinct Sahrawi identity, which is located in a clearly demarcated territory. I therefore argue that all these elements in sum constitute a "people" in the legal sense.

3.3 ICJ and UN position the status of Western Sahara

The sections above have shown that indigenous people have an inalienable right to self-determination and that the Sahrawi people of Western Sahara constitute a "people". In this section I will scrutinise the ICJ and UN positions regarding the self-determination of the Sahrawi people, as they are some of the most significant voices in the debate on the self-determination of Western Sahara.

3.3.1 ICJ advisory opinion on Western Sahara

As mentioned in section 3.2 above the International Court of Justice (ICJ) delivered an advisory opinion on the situation in Western Sahara in 1975. It did so on the basis of General Assembly resolution 3292, where it requested the ICJ to deliver an advisory opinion on a) whether the territory of Western Sahara was a territory belonging to no one, a *terra nullius*, prior to the colonisation of Spain. If the answer to the first question is negative, then the ICJ was requested to answer b) what the legal ties between the territory and the Kingdom of Morocco and

¹⁰¹ San Martin, Pablo. Nationalism, identity and citizenship in the Western Sahara. *The Journal of North African Studies*. Vol. 10. No. 3. pp. 567ff.

¹⁰² *Ibid.* pp. 580.

¹⁰³ *Supra* note 60. pp. 44.

Mauritania were.¹⁰⁴ These questions should be answered to establish who could legally claim ownership of the territory. Even though such advisory opinions are not legally binding, they do however express the view of the ICJ and thus are authoritative, if an actual court case should concern a similar question.¹⁰⁵ Thereby, they provide us with a good understanding of the interpretation of a specific legal question, including the one at hand.

In this advisory opinion the ICJ answered the first sub-question negatively, as Western Sahara could not be considered a *terra nullius* prior to the Spanish colonisation, as described in section 3.2. In other words, prior to the Spanish colonisation the territory was inhabited by a people who could rightfully claim to own the land. On this basis the ICJ could then answer the second sub-question regarding the existence of legal ties between Morocco and Mauritania and the territory of Western Sahara. Despite being able to conclude that ties of allegiance between the population of Western Sahara and that of Morocco and Mauritania existed, these ties did not amount to any such ties that could establish any legal claim or sovereignty over the territory by either Morocco or Mauritania.¹⁰⁶ In the words of the ICJ: “*Thus the Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory*”¹⁰⁷

As this quote shows, the ICJ refers to the inalienable right to self-determination as laid down in GA resolution 1514, which was presented in section 3.1. It furthermore establishes that the people of Western Sahara, who legally owned the land prior to the Spanish colonisation, might have some connections to the populations of both Mauritania and Morocco, but that these connections are not sufficient to claim ownership of the territory. In the eyes of the ICJ, the people of Western Sahara is, as we just saw in section 3.2 a distinct and separate people with a right to self-determination.

This ICJ advisory opinion has been called the main legal framework regarding the question of Western Sahara, and it is widely referenced by academics and UN documents when arguing

¹⁰⁴ United Nations General Assembly. Question of Spanish Sahara. *United Nations*. 13 December 1974. A/RES/3292. Available at: <https://www.refworld.org/docid/3b00f1bf18.html>.

¹⁰⁵ Thirlway, Hugh. International Court of Justice. In: *International Law*. Malcolm Evans (ed.) 2018. 5th Edition. p. 583.

¹⁰⁶ *Supra* note 97. Para. 162.

¹⁰⁷ *Ibid.*

that Western Sahara does indeed have a right to self-determination.¹⁰⁸ Thus, the ICJ position is quite clear. In the following section I will look a bit further into the UN position and effort to solve the situation.

3.3.2 The UN position on the status of Western Sahara

As mentioned above, the UN has the right to self-determination as one of its guiding principles, which is both expressed in the Charter, multiple resolutions, and many different treaties. The UN has on many occasions also called specifically for the liberation of the Western Sahara, which ultimately also led to the establishment of the MINURSO mission in 1991 described in section 2.2.2. The General Assembly first engaged in the question in December 1966 with its resolution on what was then called Spanish Sahara. Here it called on Spain to halt its colonisation of the area and secure full liberation of the entire territory.¹⁰⁹

As briefly mentioned in section 2.2.1, the UN defined Western Sahara as a Non-Self-Governing territory in 1963, with Spain as its *de jure* administering power.¹¹⁰ Article 73 of the UN Charter lays down the obligations of the administering power, where especially the requirement to keep the interests of the inhabitants of these territories at the forefront is important.¹¹¹ The GA Resolution 1541 defines when a non-self-governing-territory has gained its self-government, which is when it has freely and voluntarily chosen to: “(a) *Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State*”¹¹². Furthermore, the GA established, in its resolution 2625, that non-self-governing territories have a status that is separate and distinct from the territory of the state that administers it.¹¹³ Hereby, it is meant that the non-self-governing territory has a distinct legal status and not just a distinct territorial status.¹¹⁴ This status also entails a right of sovereignty over its natural resources, as stipulated *inter alia* in article 1(2) of the International Covenant

¹⁰⁸ *Supra* note 68.

¹⁰⁹ *Supra* note 62.

¹¹⁰ Corell, Hans. Letter dated the 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Council, addressed to the President of the Security Council. *Security Council. S/2002/161*. pp. 2.

¹¹¹ *Supra* note 84. Chapter XI & Chapter XII. Article 73.

¹¹² United Nations General Assembly. Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under article 73e of the Charter. *United Nations. Resolution 1541*. 15 December 1960. A/Res/1541.

¹¹³ United Nations General Assembly. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. *United Nations. Resolution 2625*. 24 October 1970. A/Res/2625.

¹¹⁴ Kassoti, Eva. The Council v. Front Polisario Case: The Court of Justice’s Selective Reliance on International Rules on Treaty Interpretation. *European Papers*. 2017. Vol. 2. No. 1. pp. 32.

on Civil and Political Rights, which has also been established as a principle of customary international law.^{115;116} This means that people of a state can freely manage their own wealth and resources.¹¹⁷

The UN still regards Spain as the *de jure* administering power of the territory.¹¹⁸ This is a status, from which Spain cannot denounce itself and neither can it unilaterally transfer this status to any other states.¹¹⁹ Therefore, the UN does not regard Morocco as the administering power neither *de jure* nor *de facto*. On the contrary, the GA has previously considered Morocco as an occupational force in Western Sahara.¹²⁰ On this basis, there has been a continuous push for self-determination for the people of Western Sahara through multiple GA and SC resolutions, most notably the SC resolutions 658 and 690. In resolution 658 the SC gave its support to a plan proposed by the General Secretary of the UN and the Chairman of the African Union.¹²¹ The objective of this plan was to hold a referendum of the people of Western Sahara, defined as the same 75.000 individuals included in the Spanish census of 1974.¹²² The aim of this referendum was to achieve that: “*The people of Western Sahara will choose, freely and democratically, between independence and integration with Morocco*”.¹²³ This plan was agreed upon by both the Polisario Front and Morocco on 30 August 1988. Resolution 690 was the establishing resolution of the MINURSO mission, which was mandated to oversee the referendum, as described earlier.¹²⁴

¹¹⁵ United Nations General Assembly. International Covenant on Civil and Political Rights. *United Nations*. 16 December 1966. Article 1(2). Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

¹¹⁶ International Court of Justice. Case Concerning Armed Activities on the Territory of the Congo. *Judgement*. 19 December 2005. Para. 244. Available at: <https://www.icj-cij.org/public/files/case-related/116/116-20051219-JUD-01-00-EN.pdf>.

¹¹⁷ Prickartz, Anne-Carlijn. The European Union’s Common Fisheries Policy, the Right to Self-determination and Permanent Sovereignty over Natural Resources. 2019. *The International Journal of Marine and Coastal Law*. Vol 35. No. 1. pp. 9.

¹¹⁸ *Supra* note 114. pp. 33.

¹¹⁹ *Supra* note 110. pp. 2.

¹²⁰ *Supra* note 66.

¹²¹ United Nations Security Council. The Situation Concerning Western Sahara. Resolution 658. *United Nations*. 27 June 1990. Available at: <http://unscr.com/en/resolutions/doc/658>.

¹²² United Nations Security Council. The Situation Concerning Western Sahara: Report of the Secretary General. 18 June 1990. S/21360. Available at: https://digitallibrary.un.org/record/94688?ln=zh_CN. pp. 18.

¹²³ *Ibid.* pp. 10.

¹²⁴ *Supra* note 74.

Despite these efforts and its initial consent, Morocco later retracted its willingness to engage with the plan.¹²⁵ Morocco could not accept the possibility of full independence for Western Sahara and the individuals eligible for voting in the referendum.¹²⁶ This made the UN go back to the drawing board, with James Baker, the former U.S. Secretary of State, as the UN Special Envoy to Western Sahara in charge.¹²⁷ In his proposed plan from 1997, *the Baker plan*, he opted for a referendum on self-determination which included voters from both the MINURSO census and from the people in the area who identified as Moroccans.¹²⁸ Despite it being called the “optimum political solution” which addressed many of the key issues on both sides, the Moroccan authorities once again rejected the plan.

After the last rejection of a proposed UN plan, the UN Security Council has annually passed a resolution on the situation. The latest resolution stated *inter alia*: “*Reaffirming its commitment to assist the parties to achieve a just, lasting, and mutually acceptable political solution, based on compromise, which will provide for the self-determination of the people of Western Sahara in the context of arrangements consistent with the principles and purposes of the Charter of the United Nations*”¹²⁹ In addition to calling for self-determination of Western Sahara, the UNSC resolutions also extend the mandate of the MINURSO mission alongside calling for an annual status report on the situation by the Secretary General.¹³⁰

All these statements and efforts by the UN clearly show that the UN regards the territory of Western Sahara as a distinct territory from Morocco, which is entitled to its self-determination. As shown, this is also the conclusion reached by the ICJ in its advisory opinion. We thus have two of the main international organs with authority on the issue that unequivocally argue for the right for self-determination of Western Sahara. In the next section this position will be compared to the position of Morocco itself and the EU.

¹²⁵ *Supra* note 60. pp. 52.

¹²⁶ *Supra* note 101. pp. 579.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.* pp. 580.

¹²⁹ United Nations Security Council. Resolution 2602. 29 October 2021. S/Res/2602. Para 4.

¹³⁰ United Nations Security Council. The Situation Concerning Western Sahara: Report of the Secretary General. 01 October 2021. S/2021/843.

3.4 Morocco's and the EU's views on the status of Western Sahara

The section above established that both the UN and ICJ consider the people and territory Western Sahara eligible for self-determination, which is in line with the position of the Polisario Front. This basis allows me to compare and assess the positions by two of the main actors of relevance in this thesis, hence the EU and the Kingdom of Morocco.

3.4.1 Morocco's view on the status of Western Sahara

Morocco regards Western Sahara as an integral part of its territory. This is evident *inter alia* in the exchange of letters that accompany the latest amendment to the SFPA, where Morocco states: "*for the Kingdom of Morocco, the Sahara region is an integral part of the national territory over which it exercises full sovereignty in the same manner as for the rest of the national territory.*"¹³¹ Ever since the Spanish retraction in 1976, Morocco has claimed its right over the territory. The Green March, as described in section 2.2.2, was a manifestation of this ownership, despite many indications that it was a violation of article 49 of the Geneva convention.¹³² In Moroccan media, the term Western Sahara is not even used when addressing the situation but is instead referred to as the "Saharan dispute" or "Sahara region".

There are two main arguments against this view of Western Sahara as an integral part of Morocco. Firstly, that the territory has never been under Moroccan sovereignty, as established by the ICJ advisory opinion and second that Western Sahara as a non-self-governing territory has a status distinct and separate from the state administering it, whether that be Spain or Morocco.¹³³ Despite these counterarguments, Morocco persistently upholds its inherent right to the territory of Western Sahara.

On 11 April 2007 Morocco launched its suggestion on how to solve the long term dispute called "the autonomy plan".¹³⁴ In this plan Morocco proposed that the Sahara region could gain a degree of autonomy "*within the framework of the Kingdom's sovereignty and national unity.*"¹³⁵ It is proposed that the population of the Saharan region will manage their internal

¹³¹ The European Union. Sustainable Fisheries Partnership Agreement Between the European Union and the Kingdom of Morocco. Annex 1. *Official Journal of the European Union*. COM(2018) 678 final. 08 October 2018.

¹³² International Committee of the Red Cross. Convention (IV) relative to the protection of Civilian Persons in Time of War. 12 August 1949. Geneva. Article 49.

¹³³ *Supra* note 71. pp. 23.

¹³⁴ United Nations Security Council. Letter dated 11 April 2007 from the Permanent Representative of Morocco to the United Nations addressed to the President of the Security Council. *United Nations*. 11 April 2007. Available at: <https://digitallibrary.un.org/record/597424?ln=en>.

¹³⁵ *Ibid.* Para. 2.

affairs through legislative, executive and judicial bodies that are to enjoy exclusive powers in the territory of Western Sahara.¹³⁶ The exact structure of the autonomy should be concluded on the basis of a negotiation process and finally approved by a referendum for the population concerned.¹³⁷ This proposed plan has been rejected by the Polisario Front on two grounds; firstly the Polisario Front refuses anything other than complete self-determination in relation to Morocco, and secondly, it disputes the fact that Morocco proposed a free referendum for the “population concerned”.¹³⁸ As I outlined above in section 3.2 the Sahrawi people is something separate and distinct from the Moroccan identity, and therefore the referendum should not include the entire population of Western Sahara, but only the fraction of the population that also constitute the Sahrawi people.

Despite these counterarguments Morocco’s claim over Western Sahara gained a big boost in December 2020 when the former President Donald Trump expressed the support of the USA for Morocco’s claim on the legitimate ruling of Western Sahara.¹³⁹ This was done in a tit-for-tat agreement, which depended on Morocco’s rapprochement towards Israel. This foreign policy decision was backed by the new Biden administration during the visit of Secretary of State Anthony Blinken to Morocco in March 2022.¹⁴⁰

As shown above both Morocco and the U.S. regard Western Sahara as an integral part of the Moroccan territory. However, as described this is contrary to the view of both the UN and the ICJ. In the next section I will outline how the EU assesses the status of Western Sahara and whether this follows the some of the positions of the other actors.

3.4.2 EU’s assessment of the status of Western Sahara

The EU has a long history of trying to adopt a balanced approach towards the Western Sahara. Contrary to the UN, which has called the Moroccan presence in the area an occupation, the EU instead has called Western Sahara a: (...) *territory contested by Morocco and the Polisario*

¹³⁶ *Ibid.* Para. 5.

¹³⁷ *Ibid.* Para. 27.

¹³⁸ AFP. Morocco’s autonomy plan for the Western Sahara. In: *France24*. 07 April 2022. Available at: <https://www.france24.com/en/live-news/20220407-morocco-s-autonomy-plan-for-the-western-sahara>.

¹³⁹ Shinkman, Paul D. Trump: Morocco Recognizes Israel as U.S. Supports its Contested Claims. In: *USnews*. 10 December 2020. Available at: <https://www.usnews.com/news/world-report/articles/2020-12-10/trump-morocco-recognizes-israel-as-us-supports-its-contested-claims>.

¹⁴⁰ Lee, Matthew. Blinken in Morocco amid shifts in Mideast, NAfrica diplomacy. *abcNews*. 29 March 2022. Available at: <https://abcnews.go.com/International/wireStory/blinken-morocco-amid-shifts-mideast-nafrica-diplomacy-83738139>.

Front.”¹⁴¹ Furthermore, the European Council and the European Commission have long maintained that Morocco is the *de facto* administering power of the territory.¹⁴² However, this concept does not exist in international law, and thus has been rejected by Advocate General Wathelet and scholar Eva Kassoti among others.^{143;144} In addition, the European Commission has made a mutual exclusive distinction between an occupied territory and a non-self-governing territory.¹⁴⁵ Such a distinction does not have any merit in international law.¹⁴⁶ On the other hand neither the EU nor any of the member states have officially recognized Morocco’s sovereignty over the territory.¹⁴⁷

Despite not calling the presence of Morocco an occupation, the EU has persistently maintained that a sustainable and lasting solution to the conflict should be reached under the auspices of the UN and especially the special envoy to Western Sahara.¹⁴⁸ Similarly, None of the EU member states have officially recognized the Sahrawi Arab Democratic Republic. On the contrary, a substantial part of the member states have expressed their support to the “autonomy plan” proposed by the Moroccan authorities. Among others it is backed by both France¹⁴⁹, Germany¹⁵⁰ and most interestingly Spain¹⁵¹. The support by Spain marks a historic U-turn, where it previously has maintained its neutrality regarding the question of Western Sahara as mentioned in section 2.1.3.1.

¹⁴¹ European Union. EU annual Report on Human Rights and Democracy in the World in 2014. *Council of the European Union*. 22 June 2015. 10152/15. pp. 186.

¹⁴² Advocate General Wathelet. Opinion of Advocate General. Case C-266/16. *Curia*. 10 January 2018. Para. 217.

¹⁴³ *Ibid.* para. 221-225.

¹⁴⁴ *Supra* note 68. pp. 1.

¹⁴⁵ European Parliament. Answer Given by High Representative/Vice-President Ashton on behalf of the Commission. *European Parliament*. 13 March 2014. E-000235/2014. Available at: https://www.europarl.europa.eu/doceo/document/E-7-2014-000235-ASW_EN.html.

¹⁴⁶ Kontorovich, Eugene. Economic Dealings with Occupied Territories. *Columbia Journal of Transitional Law*. 2015. Vol. 14. No. 1. pp. 611.

¹⁴⁷ European General Court. *Front Polisario v Council*. *Curia*. T-512/12. Judgement. 10 December 2015. para. 241.

¹⁴⁸ *Supra* note 19. pp. 17.

¹⁴⁹ Sans, Alba. France backs Morocco on Western Sahara issue. In: *Atalayar*. 22 March 2022. Available at: <https://atalayar.com/en/content/france-backs-morocco-western-sahara-issue>.

¹⁵⁰ Euractiv. Morocco, Germany renew ties after ‘misunderstandings’. In: *Euractiv*. 16 February 2022. Available at: <https://www.euractiv.com/section/politics/news/morocco-germany-renew-ties-after-misunderstandings/>.

¹⁵¹ Cembrero, Ignacio. Spain falls into line with Morocco on the Western Sahara conflict. In: *OrientXXI*. 15 April 2022. Available at: <https://orientxxi.info/magazine/spain-falls-into-line-with-morocco-on-the-western-sahara-conflict,5528>.

There is therefore not a collective and strong EU stance on the question. Both the EU itself and many of the member states try to have a balanced approach, where they on one hand do not recognize Moroccan sovereignty of the territory, but on the other hand neither express recognition of the state of SADR. Both the EU and all the member states, including the ones supporting the autonomy plan, emphasise the importance of continuing the self-determination process under the auspices of the UN. Nevertheless, the EU occupies a position between the position held by Morocco, in which Western Sahara constitutes an integrated part of Morocco, and the EU and ICJ that emphasise the right to self-determination of Western Sahara.

3.5 Partial conclusion

In the sections above I have outlined the different views on the international legal status of Western Sahara. This was done to provide an answer to my second sub-question as laid down in section 1.1: *“What characterises the international legal status of Western Sahara and how does the different relevant actors describe this legal status?”*

As I have shown both the UN and the ICJ, in its advisory opinion hold that Western Sahara is a non-self-governing territory, which has an inherent right to self-determination. The UN has furthermore on some occasions called the Moroccan presence an occupation of the territory. Morocco on the other hand holds the view that the territory of Western Sahara is an integrated part of the Kingdom. The EU occupies a sort of middle position between these two views, stating that Morocco is the *de facto* administering power of Western Sahara, abstaining from calling the Moroccan presence an occupation. The EU has also consistently held that the negotiations on the future status of Western Sahara should continue under the leadership of the UN and the Special Envoy to the conflict.

The final legal status of Western Sahara is not determined yet. However, it is my assessment that the UN and the ICJ hold the most valid views in relation to international law on how Western Sahara should be characterised with their focus on self-determination and the distinctiveness and separateness of the territory. In the next part of the thesis, I will make my legal analysis of the present court case, which will be done on the basis of both the legal status of Western Sahara and the previous court cases in the European court system concerning Morocco and Western Sahara. In this part of the thesis the status of Western Sahara and the different positions held by the described actors will play an important role.

Part 4 - Polisario Front v. Council

4.0 Introduction to part 4

In this part of the thesis, I will examine the most recent court ruling by the European General Court (EGC) concerning the Sustainable Fisheries Partnership Agreement (SFPA) and the protocols for the Association Agreement (AA) amending tariff preferences between Morocco and the EU, both of which has been described in section 2.1.2.

The proceedings were brought forward by the Polisario Front against the European Council decisions concluding the amended protocols of the AA and the SFPA on the 27 April 2019¹⁵² and 10 June 2019¹⁵³ respectively. On the 29th of September 2021 the EGC ruled that the SFPA and the protocols for the AA did not live up to the international obligations of the EU, and thus the agreements were annulled.¹⁵⁴

In order to understand why this decision was reached, I will now proceed to the analysis part of this thesis. Here I will first outline the international legal obligations of the EU to establish what the organisation needs to abide by. Hereafter, I will briefly introduce the previous court cases in the European judicial system concerning the Western Sahara dispute and the contested agreements. It is important to give a brief overview of the most significant aspects of the previous court cases as the current court case in question closely considers these rulings.

This will lead me to an examination of the application by the Polisario Front and the pleas presented by the organisation. Hereafter, I will examine on which grounds the Polisario Front were granted *locus standi* in front of the court, where especially the different claims on the legal status of Western Sahara and the Polisario itself will constitute fundamental elements of that section. This will lead me to an analysis of the Polisario Front's direct and individual concern in the case(s). Eventually I will have an extensive analysis of the norm of *Pacta tertiis nec nosent nec prosunt* and how this norm in international law applies to this case. All of this

¹⁵² European General Court. Polisario Front. Action brought on 27 April 2019. *Curia*. 27 April 2019. Available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=215737&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3947305>.

¹⁵³ European General Court. Polisario Front. Action brought on 10 June 2019. *Curia*. 10 June 2019. Available at: <https://curia.europa.eu/juris/document/document.jsf?docid=216893&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=3933280>.

¹⁵⁴ European General Court. Press Release No. 166/21. *Curia*. 29 September 2021. Available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-09/cp210166en.pdf>.

will lead me to the judgement reached by the EGC and an assessment of whether it arrived at a correct conclusion.

The aim of this part is eventually to arrive at an answer to the legal part of my problem statement: *What effect does the international legal status of Western Sahara have on the legality of the bilateral fisheries and agricultural agreements between the Kingdom of Morocco and the European Union?*

4.1 EU's legal obligations

In the previous part of the thesis the disputed legal status of Western Sahara was outlined. This part also showed that certain legal obligations arise from this status, such as its right to self-determination and to its natural resources. The status also put some legal obligations on the EU as an international organisation. Traditionally, international law was a system of rights and duties for sovereign states, but in recent decades, with the increased significance of international organisations, these rights and duties also bind such organisations.¹⁵⁵ This section will thus briefly explore which relevant international obligations the EU must abide by.

In article 21(2)(b) of the Treaty on the European Union (TEU), it is expressed that the EU should pursue its external policies to *"consolidate and support democracy, the rule of law, human rights and the principles of international law;"*¹⁵⁶ These ideals should therefore be upheld in all the actions and agreements negotiated by the EU. Article 21(1) stresses the EU's respect for the principles put forward by the UN Charter.¹⁵⁷ Furthermore, article 3(5) of the TEU also emphasises that the general principles of international law as well as the UN Charter should form the EU relations with the wider world.¹⁵⁸

One of these principles of international law is stipulated in article 14 of the Draft articles on the responsibility of international organisations, which instructs that international organisation must not aid or assist states on conducting an unlawful act, and that the international organisation is in violation if it knowingly assists in the wrongful act, or the act would be

¹⁵⁵ *Supra* note 71. pp. 23.

¹⁵⁶ European Union. Consolidated Version of the Treaty on European Union. *Official Journal of the European Union*. C326/13. 26 October 2012. Article 21(2)(b).

¹⁵⁷ *Ibid.* 21(1).

¹⁵⁸ *Ibid.* Article 3(5).

wrongful if the international organisation carried it out itself.¹⁵⁹ This is further reiterated in article 42(2) of the same draft articles.¹⁶⁰

As described in section 3.1 the right to self-determination constitutes an obligation *erga omnes* not to aid or assist in actions that maintain the *status quo* situation. Despite this being an obligation carried by states, the EU is also bound by these obligations as it is an entity with legal personality and the capability to carry out actions in breach of this obligation.¹⁶¹ As Ph.D. candidate Hummelbrunner and Senior Scientist Prickartz of University of Salzburg formulate it: “(...) a breach of an international obligation by the institutions of the EU would constitute an internationally wrongful act of the EU, which entails the EU’s international responsibility”.¹⁶² It is on this legal basis that the lawfulness of the EU’s actions must be assessed. Prior to this analysis, I will outline the main conclusions of the previous relevant court cases.

4.2 previous cases concerning agreements between EU and Morocco

In the sections above, I have illustrated the international legal foundation that applies to the territory of Western Sahara and to the EU, especially concerning its external policies. In this section, I will outline and compare the previous court rulings regarding the EU’s bilateral agreements with Morocco and their application for the territory of Western Sahara. Three rulings will here come under scrutiny, and lastly a table will summarise the key similarities and differences between them.

4.2.1 European General Court case T-512/12

The first court case, which deals with a related issue is the T-512/12 case before the EGC, which was brought forward by the Polisario Front against the European Council on 19 November 2012.¹⁶³ The Polisario Front challenged the Council decision to enter into the Association Agreement (AA), introduced in section 2.1.2.1, and the Liberation Agreement,

¹⁵⁹ International Law Commission. Draft articles on the responsibility of international organizations. *United Nations*. 2011. Article 14. Available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf.

¹⁶⁰ *Ibid.* Article 42(2).

¹⁶¹ *Supra* note 71. pp. 31.

¹⁶² *Ibid.* pp. 34.

¹⁶³ European General Court. Polisario Front. Action brought on 19 November 2012. *Curia*. 19 November 2012. Available at: <https://curia.europa.eu/juris/document/document.jsf?jsessionid=3C1C8FAB6F36CA21ACEF3694A87ECFD6?ext=&docid=134184&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=232284>.

which in essence is a further extension of the AA.¹⁶⁴ The Polisario Front argued that the agreements violated international obligations as the agreements were *de facto* applied to Western Saharan products without having gained the explicit consent of the people of Western Sahara. The Polisario Front was thus seeking to partially annul the agreements.^{165;166} It is particularly article 94 of the AA, which stipulates that the agreement applies to the territory of Morocco without providing a definition on what is meant by this spatial delimitation that was disputed.¹⁶⁷

The Court came to a conclusion on 10 December 2015, in which it found that the Polisario did possess a legal personality and thus had legitimate standing before the court.¹⁶⁸ This was concluded on the grounds that the Polisario Front i) participates in UN-led negotiations, ii) has a constituting document and iii) has a distinct internal organisation and structure.¹⁶⁹ Article 263 of the TFEU stipulates that: “*Any natural or legal person may (...) institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures*”.¹⁷⁰ In accordance with this article, it was also ruled that the Polisario Front was directly and individually concerned with the issue, why it did have a legal right to instigate the proceeding.¹⁷¹

The EGC found that the EU had in practice accepted that the agreements were applied in the territory of Western Sahara, which is under the control of Morocco.¹⁷² The argument is that the EU knew that Morocco regards Western Sahara as an integral part of its territory. Therefore, the EU should have made sure that the territory was explicitly defined in article 94 of the AA, if it wished to ensure that Western Sahara was not *de facto* included in the application of the agreement. By not doing so, the EU implicitly acquiesce to this practice.¹⁷³ On this basis the

¹⁶⁴ *Ibid.*

¹⁶⁵ *Supra* note 147. para. 149 & 201.

¹⁶⁶ *Supra* note 19. pp. 6.

¹⁶⁷ *Supra* note 147. para. 101.

¹⁶⁸ *Ibid.* para. 54.

¹⁶⁹ *Ibid.*

¹⁷⁰ European Union. Treaty on the Functioning of the European Union. *Official Journal of the European Union*. 26 October 2012. Article 263. Available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2012:326:FULL&from=EN>.

¹⁷¹ *Supra* note 147. para. 111.

¹⁷² *Ibid.* para. 102.

¹⁷³ *Ibid.* para. 101 & 102.

contested decision *i.e.* the AA and liberalisation agreements should be annulled, because of this *de facto* application to the territory of Western Sahara.¹⁷⁴

Nevertheless, this acquiescence from the EU's side does not amount to a recognition of Morocco's territorial claim in the view of the EGC.¹⁷⁵ This is a highly surprising conclusion, as it counters the ICJ advisory opinion on Namibia, where it established that states have an obligation to not to enter into treaty relations with other states if such treaty relations could imply recognition as legal of an illegal situation.¹⁷⁶ The EGC thereby downplays the level of wrongdoing of the conduct of the EU.

4.2.2 European Court of Justice C-104/16

The European Council and the European Commission brought forward an appeal to the judgement in case T-512/12 on 16 February 2016, which was processed by the European Court of Justice.¹⁷⁷ In this appeal case, the ECJ argued that the Polisario Front did not have legal standing before the court, and therefore ruled the actions of the Polisario Front as inadmissible and thus in opposition to the judgement by the EGC.¹⁷⁸ This could very well seem to be a big defeat of the Polisario Front, but this conclusion was derived from the fact that the bilateral agreement cannot apply to the territory of Western Sahara, as it is a non-self-governing territory.¹⁷⁹ Because the agreement could not apply on the territory of Western Sahara, the Polisario Front could not be found admissible before the court.¹⁸⁰

One of the court's main arguments was that the bilateral agreements could not cover Western Sahara as this would be a violation of article 31(3)(c) of the Convention on the Law of Treaties

¹⁷⁴ *Ibid.* para. 247.

¹⁷⁵ *Ibid.* para.

¹⁷⁶ International Court of Justice. Legal Consequences for States of the Continued Presence of South Africa in Namibia. *Advisory Opinion*. 21 June 1971. Para. 121. Available at: <https://www.icj-cij.org/public/files/case-related/53/053-19710621-ADV-01-00-EN.pdf>.

¹⁷⁷ European Court of Justice. Appeal brought on 19 February 2016 by the Council of the European Union against the judgment of the General Court (Eighth Chamber) delivered on 10 December 2015 in Case T-512/12 Polisario Front v Council. *Curia*. Appeal. Available at: <https://curia.europa.eu/juris/document/document.jsf?jsessionid=3C1C8FAB6F36CA21ACEF3694A87ECFD6?text=&docid=174541&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=232284>.

¹⁷⁸ European Court of Justice. Council v. Front Polisario. *Curia*. C-104/16 P. Appeal judgement. 21 December 2016. Para. 141(2).

¹⁷⁹ *Ibid.*

¹⁸⁰ *Supra* note 114, pp. 24.

(VCLT).¹⁸¹ This article articulates the principle that agreements between two parties must take into account any other relevant rules of international law, which have an effect on the parties. By this the court therefore meant that Western Sahara has a distinct legal status and thus also needs to provide its explicit consent in order for the agreements to apply in its territory, due to its right to self-determination.¹⁸² This argument closely resembles the ICJ advisory opinion, which it also references. It is therefore the second independent court which underlines the inherent right to self-determination for the people of Western Sahara.¹⁸³ The Court's conclusion is, when Article 94 of the AA refers to the Kingdom of Morocco, this cannot include the territory of Western Sahara, as it is not an inherent part of the Kingdom of Morocco.

In this judgement, the Court also ruled that the practice of treating the products originating from Western Sahara as *de facto* Moroccan was against international law because of Western Sahara's status as a non-self-governing territory, which grants it a status that is distinct and separate from that of Morocco in accordance with UNGA resolution 2625, which again gives Western Sahara sovereign rights over its natural resources.¹⁸⁴

The ECJ ruling has attracted some criticism due to its statement that the EU could not have intended to apply the agreements in violation of its international obligations because the EU has repeatedly stated the significance of complying with these principles and obligations.¹⁸⁵ This argument seems hollow, as just because one stresses the importance of fulfilling one's obligations it does not necessarily mean that one's practice follows suit, as pointed out by Jed Odermatt, Lecturer at City Law School at the University of London. He argues: "*The CJEU seems to argue that since the EU institutions profess to respect international law, the Association Agreement must be interpreted in a way that assumes the EU intends to act in a way that respects principles of international law*"¹⁸⁶. This is an interesting line of argumentation, as it presumes that the EU upholds its international obligations in this case

¹⁸¹ United Nations Convention on Law of the Treaties. *United Nations*. Vienna. 23 May 1969. Article 31(3)(c). Available at: <https://www.jus.uio.no/lm/un.law.of.treaties.convention.1969/31.html>.

¹⁸² *Supra* note 178. para. 86-106.

¹⁸³ *Supra* note 114. pp. 26.

¹⁸⁴ *Supra* note 178. para. 79.

¹⁸⁵ *Ibid.* para 123.

¹⁸⁶ Odermatt, Jed. The EU's economic engagement with Western Sahara: the Front Polisario and Western Sahara Campaign UK cases. In: Duval, A. & Kassoti, E. (Eds.). *The Legality of Economic Activities in Occupied Territories: International, EU Law and Business and Human Rights Perspectives*. London: Routledge. 2020. pp. 22.

simply because it usually respects its international obligations. When examining whether something is the case, the Court states that it is usually the case and therefore it must also be the case here.

The Court ruled that the agreement did not and could not apply to the territory of Western Sahara without explicitly mentioning this in the agreement and consent being given freely by the people of Western Sahara. Since Western Sahara is not mentioned in the agreements the EU must not have intended to include the territory of Western Sahara and thus the agreements are still valid and in place.¹⁸⁷

4.2.3 Court of Justice of the European Union Case C-266/16

The latest court case in the saga of court cases concerning bilateral agreements between Morocco and EU, besides the one in focus in this thesis, is the 2018 C-266/16 case before the ECJ called *Western Sahara Campaign UK*.¹⁸⁸ This case was initially brought against the UK authorities in the British High Court by the Western Sahara Campaign UK, an NGO focusing on the rights of Western Sahara. After the initial hearings, the case was referred to the ECJ by the UK High Court.¹⁸⁹ The bilateral agreement contested in this proceeding is the Fisheries Partnership Agreement (FPA) between EU and Morocco and the 2013 amending protocols, which makes this case particularly interesting in relation to the SFPA under scrutiny in this thesis.

In this court ruling, it was established that the FPA could not be applied in the adjacent waters of Western Sahara.¹⁹⁰ The reasoning for this conclusion is derived from multiple international obligations including the right to self-determination of Western Sahara as described in the previous sections, the right to natural resources and the articles regarding territorial waters and exclusive economic zones as laid down in article 2(1), 55 and 56 of the UN Convention on Law of the Sea (UNCLOS).¹⁹¹ Because the agreements should not and could not apply to the

¹⁸⁷ *Supra* note 178, para. 131-133.

¹⁸⁸ European Court of Justice. *Western Sahara Campaign UK v. Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*. Case C-266/16. *Curia*. Judgement. 27 February 2018.

¹⁸⁹ *Supra* note 19. pp. 14.

¹⁹⁰ *Supra* note 188. Para 71.

¹⁹¹ *Supra* note 39. Article 2(1), 55 & 56.

territory of Western Sahara, the Court did not find it necessary to examine the *locus standi* of the Polisario Front, as it was argued the agreements did not have an effect on Western Sahara.¹⁹²

This ruling followed the line of arguments and conclusions from the C-104/16 case, outlined above, which also emphasised the lack of direct and individual concern and thus dismissed the legal standing of the Polisario Front.¹⁹³ These rulings go counter to the ruling of EGC in case T-512/12, which clearly stated that the Polisario Front did have a direct and individual concern and thereby a right to make legal proceedings before the European Courts.¹⁹⁴

Furthermore, the ruling also emphasised that the EU position on Morocco as the “*de facto* administrative power” of Western Sahara cannot be a legal argument for including the waters of Western Sahara in the agreements. Morocco itself has consequently and categorically denied being an administrative power of Western Sahara.¹⁹⁵ Morocco has, as explained in section 3.4.1, persistently claimed that Western Sahara is an integral part of its territory. Therefore, to rely on the inclusion of Western Sahara in the agreement of Morocco’s status as the *de facto* administering power is not only a fallacy in International Law it also contradicts the Moroccan perspective.

As with the C-104/16 case the Court put much weight on the EU’s obligations under VCLT article 31(3)(c) in this ruling.¹⁹⁶ This extensive focus on other international obligations as a means of interpretation by the Court has gathered some criticism, as it leaves aside a focus on the actual practice of the involved parties, which is another means of interpretation under VCLT article 31(3)(b).¹⁹⁷ Senior Researcher Eva Kassoti has been vocal in this criticism, explaining that the practice and actions of EU and Morocco has been problematic, and shows clear evidence that both parties *de facto* include the waters adjacent to Western Sahara.¹⁹⁸

¹⁹² *Supra* note 188. Para 86-87.

¹⁹³ *Supra* note 178. para 133-134.

¹⁹⁴ *Supra* note 147. para. 54.

¹⁹⁵ *Supra* note 188. para. 72.

¹⁹⁶ Kassoti, Eva. The ECJ and the art of treaty interpretation: Western Sahara Campaign UK. *Common Market Law Review*. 2019. Vol. 56. No. 1. pp. 219.

¹⁹⁷ *Supra* note 39. Article 31(3)(b).

¹⁹⁸ *Supra* note 196. pp. 219; 227.

Another criticism of the ruling also follows similar lines as outlined previously; the court argues that the application of the agreements to the waters of Western Sahara is contrary to EU's international obligations, whereby this cannot be the intention of the EU.¹⁹⁹ The reasoning therefore mirrors the argument that the EU usually abides by its international obligations and thus the EU cannot intend to set aside its obligations. This is an odd line of reasoning, as it rests on the assumption that the EU simply would not do anything wrong or contrary to its international obligations, when this is exactly what is under scrutiny.²⁰⁰

4.2.4 Summary of previous cases

The previous rulings regarding bilateral agreements between the EU and Morocco have, as shown, attracted some criticism. Especially the court's special focus on VCLT article 31(3)(c) and exclusion of other means of interpretation stipulated in VCLT article 31 was received with scepticism by the scholarly community. Concurrently, in both C-104/16 and C-266/16 it also attracted some criticism that the normative expressions of the EU were given too much weight, on the expense of looking at the actual practice of the treaty parties. The International Law Commission has argued that the subsequent practice constitutes one of the key elements in legal interpretation because: "*The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.*"²⁰¹ This clearly shows that there is something to criticise regarding the previous cases as the sections above also illustrate. These observations will be crucial when scrutinising the case in focus here. Below the table will summarise the key similarities and differences of the previous three cases.

Table 1: Summary of previous court cases.

Case	T-512/12	C-104/16	C-266/16
Court	EGC	ECJ	ECJ
Year	2015	2016	2018
Agreements concerning	AA & Liberalisation Agreement	AA & Liberalisation Agreement	SFA & Protocol
Appeal case	No	Yes	No
Legal Standing of PF	Approved	Dismissed	Dismissed
Direct concern of PF	Yes	No	No

¹⁹⁹ *Supra* note 188. para. 71.

²⁰⁰ *Supra* note 196. pp. 220.

²⁰¹ International Law Commission. Draft Articles on the Law of Treaties with commentaries. *United Nations*. 1966. Article 28, para 15. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf.

Annulment of agreements	Yes	No	No
Main legal arguments by court	1. Western Sahara not included in the territorial scope 2. Polisario Front has legal standing 3. Western Sahara is <i>de facto</i> included in agreements	1. Western Sahara not included in the territorial scope 2. Western Sahara is not included in agreements 3. Polisario Front does not have legal standing	1. Western Sahara not included in the territorial scope 2. Western Sahara is not included in agreements 3. Polisario Front does not have legal standing
Main criticism of rulings	1. The argument that acquiescence does not amount to acceptance of the situation.	1. The emphasis on EU's usual "good behaviour" 2. Extensive focus on VCLT 31(3)(c)	1. The emphasis on EU's usual "good behaviour" 2. Extensive focus on VCLT 31(3)(c)

As it is formulated by Collado and Contini: *"In a blurred scenario where realpolitik prevails over international and European law, the FPA saga is far from over; the Polisario Front has presented a new case before the CJEU concerning the protocol adopted in 2019."*²⁰² It is exactly this court case that will be the focus of the following sections.

4.3 Polisario Front v. Council - The case in question

In the sections above I have outlined the international legal obligations for the EU especially in relation to its external action. Thereafter, I have briefly examined the main arguments, criticisms and conclusions with regards to the previous court cases concerning the EU-Morocco bilateral agreements on agriculture and fisheries. Despite variations, the court cases all conclude that the agreements cannot be applied to the territory of Western Sahara without its explicit consent because of the distinct legal status of Western Sahara, which also entails sovereignty over its own natural resources.

In light of these court cases, the Council decided to amend protocol 1 and 4 of the AA and the SFPAs as to include the territory and the waters adjacent to Western Sahara explicitly in the agreements²⁰³, as described in section 2.1.2.1 and 2.1.2.2 respectively. In this amendment process the Commission claims to have held negotiations with "the people concerned".²⁰⁴

²⁰² *Supra* note 19. pp. 16.

²⁰³ *Supra* note 33. pp. 1.

²⁰⁴ European Commission. Commission Staff Working Document. Report on the benefits for the people of Western Sahara on extending tariff preferences to products from Western Sahara. *European Commission*. SWD(2018) 481 Final. 11. June 2018. pp. 29.

However, despite these alleged efforts, the Polisario Front quickly launched another proceeding before the General Court of Justice in order to get these agreements including their protocols annulled.^{205;206} It is these court cases that will be scrutinised in the sections below in order to assess whether the EGC arrived at the correct conclusion in accordance with the relevant international obligations and the case law, especially the previous cases concerning the agreements.

As described and indicated by the use of the plural sense, the court cases concern two different agreements; the AA and the SFPA. This also means, that we are here dealing with multiple court cases simultaneously *i.e.* the T-279/19 regarding the legality of the protocol amendments of the AA²⁰⁷ and the T-344/19 and the T-356/19 cases regarding the legality of the SFPA and of fishing licences in the waters adjacent to the territory of Western Sahara respectively²⁰⁸. Despite concerning different agreements and officially constituting different court cases, the cases will largely be treated as one single case in the coming sections, as the legal disputes in the cases are almost identical. This also follows the logic from both the EGC itself with its press release covering all three cases simultaneously and by Senior Researcher Eva Kassoti commenting on the case.^{209;210} If relevant I will clearly state distinctions and discrepancies between the cases in question.

4.3.1 Commission work on securing consent

As shown, the previous court cases all concluded that Western Sahara should not and could not be included in the AA and SFPA without obtaining explicit consent from the people of Western Sahara. These rulings led to the establishment of a consultation process, during which the Commission and the European External Actions Service (EEAS) sought to gain the consent from the “people concerned”.²¹¹ This consultation with the people concerned included both different civil society organisations, elected officials and the general public.²¹² According to the Commission these negotiations were carried out by the Commission and EEAS themselves, when dealing with the Polisario Front and civil society organisations dealing with the interests

²⁰⁵ *Supra* note 152.

²⁰⁶ *Supra* note 153.

²⁰⁷ *Supra* note 152.

²⁰⁸ *Supra* note 154.

²⁰⁹ *Ibid.*

²¹⁰ *Supra* note 68.

²¹¹ *Supra* note 204. pp. 28.

²¹² *Ibid.* pp. 1.

of Western Sahara.²¹³ As it is stated in the Staff Working Document: “*The second level of consultations, carried out directly by the Commission and the EEAS, involved the broadest possible range of stakeholders from Western Sahara.*”²¹⁴ Moroccan authorities on the other hand conducted the consultation of regional elected officials.²¹⁵

Generally, these negotiations showed a recognition of the socio-economic progress in recent years and an acknowledgement of the significance of the trade agreements in achieving such progress.²¹⁶ Most of the politically elected officials of Western Sahara consulted also expressed an acknowledgement of the importance of Morocco’s development efforts in the area, and that access to the European market through the bilateral agreements with Morocco are essential when it comes to further diversifying and strengthening the Western Saharan economy.²¹⁷

Despite these rather positive views on the bilateral agreements by some of the representatives of the Sahrawi people, the most significant of them all, the Polisario Front, was not inclined to give its consent to the agreements.²¹⁸ The discussions between the Commission and the Polisario Front clearly showed that the latter was in stark opposition to the protocols being amended.²¹⁹ The Polisario Front expressed that the EU’s actions undermined the UN-led peace process, that all economic benefits from the bilateral agreements would be taken by the Moroccan authorities and that the Polisario Front would challenge the agreements in Court should they be amended to include the territory of Western Sahara.²²⁰ Conversely, the Council argued that the inclusion of the territory of Western Sahara: “(...) *does not imply that it recognises Morocco's sovereignty over Western Sahara.*”²²¹

The rejection of the agreements from the Polisario Front has led to many actors doubting the legality of the process of consent. Sweden has for instance called into question, if the process

²¹³ *Ibid.* pp. 28.

²¹⁴ *Ibid.* pp. 29.

²¹⁵ *Ibid.* pp. 28.

²¹⁶ *Ibid.* pp. 29.

²¹⁷ *Ibid.* pp. 29-30.

²¹⁸ *Ibid.* pp. 30.

²¹⁹ *Ibid.* pp. 2.

²²⁰ *Ibid.* pp. 31.

²²¹ European Council. Council Decision (EU) 2018/1893. *Official Journal of the European Union*. 16 July 2018. L310/1. Para. 10. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018D1893&from=EN>.

has led to a free and informed consent of the people of Western Sahara.²²² In a similar vein, the Legal Service of the European Parliament expressed upon request that it is: “(...) *difficult to confirm with a high degree of certainty whether these steps [taken by the Commission] meet the Court’s requirement of consent by the people of Western Sahara (...)*”²²³ Furthermore, many of the civil society organisations of Western Sahara that are listed in the Commission’s staff working document as having been consulted deny taking part in the consultation process, which further calls into question the validity of this process and the righteousness of the Commission and the EEAS.²²⁴ Amongst these organisations denying their participation are important actors such as the Western Sahara Resource Watch and the Western Sahara UK Campaign, which was the initiating part of the latest court case in 2018 summarised above.²²⁵

After the consultation process from the Commission, the Council accepted the amending of Protocol 1 and 4 and the SFPA to include Western Sahara explicitly in the two agreements.^{226;227} As the Polisario Front proclaimed it would, it launched two new court cases with the European General Court in order to test the validity of these agreements. It is these court cases that will come under scrutiny in the following sections.

4.3.2 Application by the Polisario Front

In these court cases, the Polisario Front presented 10 and 11 pleas in the T-279/19 case concerning the AA and in joint cases T-344/19 and the T-356/19 respectively.^{228;229} These pleas are all very similar in nature and mainly revolve around the claims that the Council has not taken the self-determination of Western Sahara into consideration when negotiating these agreements with Morocco and therefore these agreements cannot be applicable to the territory of Western Sahara, and thereby they mirror the previous court cases. Another plea is that the

²²² Kassoti, Eva. The Empire Strikes Back: The Council Decision Amending Protocols 1 and 4 to the EU-Morocco Association Agreement. *European Papers*. 2019. Vol. 4. No.1. pp. 314.

²²³ *Ibid.* pp. 314-315.

²²⁴ *Ibid.* pp. 315.

²²⁵ Western Sahara Resource Watch. Here, the EU Commission is lying about WSRW - and 93 other groups. In: *Western Sahara Resource Watch*. 14 June 2018. Available at: <https://wsrw.org/en/a105x4180>.

²²⁶ *Supra* note 33.

²²⁷ European Union. Council Decision (EU) 2019/441. *Official Journal of the European Union*. 4 March 2019. L77/4.

²²⁸ *Supra* note 152.

²²⁹ *Supra* note 153.

Council does not regard the inherent right and identity of the Sahrawi people by consistently referring to the “population concerned” instead of the “people of Western Sahara”.²³⁰

The pleas are therefore centered around the fundamental issues of consent, right to self-determination and sovereignty over natural resources, which again closely resemble the previous court cases. The overlapping pleas in the joined cases T-344/19 and T-356/19 and the T-279/19 case also reiterates the notion that the cases can be treated as a single case instead of three distinct cases. The only substantial difference between the pleas of the three cases is the seventh plea in case T-344/19, which argues that the waters of Western Sahara are not identical with the waters of Morocco pursuant to article 61 and 62 of the UNCLOS.²³¹ However, this difference is a direct consequence of the fact that the T-344/19 case concerns the fisheries resources of Western Sahara whereas the T-279/19 case concerns the agricultural resources. In table two, I have briefly summarised the content of the pleas put forward in the cases to illustrate the degree of similarity between the cases.

Table 2: Summarising pleas of Polisario Front^{232;233}

Plea	T-344/19 ; T-356/19	T-279/19
1	Council lacks competences to enter into agreements covering Western Sahara	Council lacks competences to enter into agreements covering Western Sahara
2	Failure by the Council to consider international humanitarian law and fundamental rights	Failure by the Council to consider international humanitarian law and fundamental rights
3	Council does not live up to obligations derived from case C-266/16	Council does not live up to obligations derived from case C-104/16
4	Council breaches essential principles and values such as i) respect for national unity ii) people’s right to sovereignty over natural resources iii) disregard of Morocco’s policy of annexation	Council breaches essential principles and values such as i) respect for national unity ii) people’s right to sovereignty over natural resources iii) disregard of Morocco’s policy of annexation
5	Breach of principle of legitimate expectations	Breach of principle of legitimate expectations
6	Not for the Council to assess whether the benefits derived from the agreements are proportional for Western Sahara	Not for the Council to assess whether the benefits derived from the agreements are proportional for Western Sahara
7	Western Saharan waters are distinct from the waters of Morocco.	Agreements infringe on the right of self-determination as it i) denies the national unity of the people ii) disregard the right to administer own natural resources iii) denies the distinct status of Western

²³⁰ *Supra* note 152. Fourth plea.

²³¹ *Supra* note 153. Seventh plea.

²³² *Supra* note 152.

²³³ *Supra* note 153.

		Sahara and hides the genuine country of origins of goods.
8	Agreements infringe on the right of self-determination as it i) denies the national unity of the people ii) disregard the right to administer own natural resources iii) denies the distinct status of Western Sahara and supports the Moroccan division of Western Sahara.	The agreement infringes the principle of relative effect of treaties as it treats the people of Western Sahara as a party to the agreement and not a third party.
9	The agreement infringes the principle of relative effect of treaties as it treats the people of Western Sahara as a party to the agreement and not a third party.	The agreement is in violation of international law as i) it is concluded by Morocco, which does not have <i>jus tractatus</i> to enter into agreements on the basis of Western Sahara ii) the use of the term “the people concerned” endorses the transfer of Moroccans into the territory of Western Sahara.
10	The agreement is in violation of international law as i) it is concluded by Morocco, which does not have <i>jus tractatus</i> to enter into agreements on the basis of Western Sahara ii) EU will subsidise Moroccan infrastructure in the occupied territory and iii) the use of the term “the people concerned” endorses the transfer of Moroccans into the territory of Western Sahara.	The EU breaches its international obligations and endorses the actions of the Moroccan occupying forces.
11	The EU breaches its international obligations and endorses the actions of the Moroccan occupying forces.	

On the basis of these pleas the applicant *i.e.* the Polisario Front seeks for the Court to annul the contested decisions and to order the Council to bear the costs of the proceedings.²³⁴ Unsurprisingly, the defendants, the Council and the Commission, contend that the EGC should dismiss the application and order the applicant to pay the costs.²³⁵ The Council argues that the Polisario Front cannot have legal standing in front of the court, as it does not have legal personality and therefore the court should rule the case inadmissible.²³⁶ The next section will analyse the claim that the Polisario Front does not possess legal personality before the EGC.

²³⁴ European General Court. Polisario Front v. Council. Case T-279/19. *Curia*. 29 September 2021. Judgement. Available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=246701&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1657239>. Para 71.

²³⁵ *Ibid.* Para 72.

²³⁶ *Ibid.* Para. 78.

4.3.3 Legal personality of Polisario Front

The pleas in the section above outline the basis upon which the European General Court needs to focus its efforts. However, before considering the contents and validity of the pleas the EGC needs to assess whether the Polisario Front is entitled to present a case in front of the court, in other words, does the Polisario Front have *locus standi* before the court? This section will therefore examine whether the Polisario Front is an organisation with a legal personality. Next section will analyse whether Polisario Front has a direct and individual concern in relation to the case in question. Both elements need to be fulfilled in order for the Polisario Front to have *locus standi*.

As stated above, the defendant claims that the Polisario Front does not possess legal personality in accordance with article 263 of the TFEU, which outlines that natural or legal persons with direct and individual concern can bring proceedings to the court, as I also described in section 4.2.1. The Council alleges that the Polisario Front lacks both the standing to bring forward legal proceedings to the European courts in general and to bring forward legal proceedings against the contested decision in particular.²³⁷ These claims also call into question the role of the Polisario Front in relation to Western Sahara and especially as the sole representative of the Sahrawi people.²³⁸

The Council argues that the applicant does not have any legal personality under domestic law of a member state, that it is not a subject under international law and that the Polisario Front does not live up to the criteria used by the EU Courts when allowing for other entities to bring forward proceedings.²³⁹ It is argued that even if the applicant is internationally recognized as the representative of the people of Western Sahara, this recognition only relates to the question in the auspices of the UN and does not derive any special status outside this realm.²⁴⁰

Conversely, the Polisario Front claims that it represents the Sahrawi people and “*act on behalf of the Sahrawi people*”²⁴¹ As a liberation movement acting on behalf of a non-self-governing territory and as the representative of Western Sahara in UN-led negotiations with the capacity

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ *Ibid.* Para 79.

²⁴⁰ *Ibid.* Para 97.

²⁴¹ *Ibid.* Para 77.

to enter into legally binding agreements it claims to hold legal personality and live up to the criteria laid down in article 263 of the TFEU.²⁴²

The EGC ruled that the Polisario Front does not derive its legal personality under any domestic law, as it is the representative of a non-self-governing territory.²⁴³ It would be counterintuitive to derive legal personality under any domestic law, as it is the establishment of a legal and self-determining domestic order that the Polisario Front is fighting for. Instead, the legal personality of the applicant should be derived from its status as a subject under international law. As is also stated in UNGA resolutions 34/37 and 35/19, the Polisario Front has the right to participate in negotiations on the question of self-determination as the representative of the people of Western Sahara.²⁴⁴ The Court therefore follows the perspectives from these resolutions. The role of the Polisario Front as representatives of the Sahrawi people is also the main viewpoint of the scholars examining this question, for example Dr. Sidi M. Omar who states: *“The movement immediately gained overwhelming support among the Sahrawi population and was later recognized as the sole and legitimate representative of the Sahrawi people.”*²⁴⁵

Furthermore, the EGC emphasises the right to self-determination as a principle of customary law, which also puts obligations on the actions of the EU as an international organisation in its relations to Morocco.²⁴⁶ Lastly, the participation of the Polisario Front in the negotiations on self-determination under the auspices of the UN is evidence of a degree of autonomy and responsibility that gives it legal personality under international law and which is only further emphasised by its level of organisation and structure.²⁴⁷ On this basis, the EGC concluded that: *“In the light of all these circumstances, the applicant must be classified as a legal person, within the meaning of fourth paragraph of article 263 TFEU, having the capacity to be a party to legal proceedings before the EU Courts for the purpose of bringing the present action.”*²⁴⁸ Therefore, the claim by the Council had to be rejected by the Court.²⁴⁹

²⁴² *Ibid.* Para 81.

²⁴³ *Ibid.* Para 88.

²⁴⁴ *Supra* note 66.

²⁴⁵ *Supra* note 60. pp. 46.

²⁴⁶ *Supra* note 234. Para. 91.

²⁴⁷ *Ibid.* Para 96.

²⁴⁸ *Ibid.* Para 101.

²⁴⁹ *Ibid.* Para 114.

This judgement also follows the conclusion of the previous court cases, as outlined in section 4.2. In the EGC case T-512/12 it was similarly argued that due to the internal structure and level of organisation of the Polisario Front alongside its mandate to enter into agreements in UN negotiations it did possess legal personality, as also stated in section 4.2.1.²⁵⁰ This status of the Polisario Front is further acknowledged in the *Council v. Polisario Front* appeal case.²⁵¹ However, as described in section 4.2 both of the previous Court cases on this issue in the ECJ have dismissed the legal standing of the Polisario Front. They have done so because of the lack of direct and individual concern of the Polisario Front. This second element in the question of *locus standi* will be the topic of the next section.

4.3.4 Direct and individual concern

I will here examine if a direct and individual concern can be established between the Polisario Front and the issue in question. Individual concern is understood as the situation where a regulation has particular effect on an actor due to this actor's certain characteristics or where an actor can be distinguished from other legal persons affected due to the factual circumstances. This definition is derived from European case law.²⁵² Direct concern is established if the decision directly has legal effects towards the applicant.²⁵³ It is these criteria, which is stipulated in article 263(4) of the TFEU²⁵⁴, and which the Polisario Front must live up to in order to be deemed admissible to bring forward the proceeding.

The Council claims that the Polisario Front cannot be said to be directly and individually concerned, as the agreements do not relate to third parties and therefore only have effect on the EU, its member states and Morocco.²⁵⁵ This argumentation follows the same reasoning as in the previous cases, which was also the ruling from the ECJ in court case C-104/16 and C-266/16 as described in sections 4.2.2 and 4.2.3 respectively.

²⁵⁰ *Supra* note 147, para. 54.

²⁵¹ *Supra* note 178, Para 105.

²⁵² European Court of Justice. *Bacteria Industriehygiene-Service Verwaltungs GmbH V. Commission*. Order of the Court. *Curia*. Judgement. 12 December 2003. Para. 47. Available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=48821&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5050951>.

²⁵³ Practical Law EU. *Actions for annulment under Article 263 of the TFEU by private parties before the General Court*. *European Union*. 2022. pp. 7. Available at: [https://uk.practicallaw.thomsonreuters.com/w-018-6881?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a192404](https://uk.practicallaw.thomsonreuters.com/w-018-6881?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a192404).

²⁵⁴ *Supra* note 170, Article 263(4).

²⁵⁵ *Supra* note 234, Para. 133.

On the other side the Polisario Front argues that they are directly concerned in this issue, because of the explicit application of the agreements to the territory of Western Sahara, thereby altering the legal situation of the people in the territory.²⁵⁶ As the representative of the people of Western Sahara the Polisario Front also argues that it is individually concerned.²⁵⁷ Furthermore, it is argued that the Polisario Front is individually concerned as the practice of treating products originating from Western Sahara as Moroccan ignores the distinct and separate status of the territory as a non-self-governing territory.²⁵⁸ Thus the Polisario Front uses the same line of argumentation that was apparent in the first EGC case T-512/12.

The EGC argues that the defendant is wrong in claiming that the agreements do not have any effect in Western Sahara.²⁵⁹ As it is phrased in the summary of the judgement: “*Consequently, the Court concludes that the contested decisions produce direct effects on the applicant’s legal situation as the representative of that people and as a party to the process of self-determination in that territory.*”²⁶⁰

This direct and individual concern is further emphasised by the expressly inclusion of Western Sahara in the agreements, which distinguishes the amended agreements from the agreements prior to the amendment process.²⁶¹ In the two previous court cases the ECJ dismissed the direct and individual concern of the Polisario Front due to the fact that Western Sahara was not included in neither the AA nor the SFPA. With the explicit inclusion of the territory of Western Sahara in the agreements, it is hard to argue that Western Sahara is not directly affected by the conclusion of the amendment process, which is why the EGC arrives at the direct opposite conclusion than the ECJ has previously arrived at.

However, just because the Polisario Front is directly and individually concerned and possesses legal personality it does not necessarily mean that the agreements are illegal. It only means that

²⁵⁶ *Ibid.* Para 142.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.* Para 148.

²⁵⁹ *Ibid.* Para 153.

²⁶⁰ European General Court. Joined Cases T-344/19 and T-356/19. *Curia*. Abstract. 29 September 2021. pp. 4. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=246742&pageIndex=0&doclang=EN&mode=_lst&dir=&occ=first&part=1&cid=5078007.

²⁶¹ *Supra* note 234. Para. 195.

the Polisario Front has *locus standi* before the EGC.²⁶² In the next section I will analyse if the people of Western Sahara has provided its consent to be included in the agreements, and if not, whether such a consent is fundamental for the legality of these agreements.

4.3.5 Pacta tertiis nec nocent nec prosunt and consent

In the two sections above, it has been established that the Polisario Front is an organisation with legal personality and with direct and individual concern in the matter at hand, and thus they are allowed to bring proceedings before the Court. In this section I will dive into the material issue of this case. I will analyse whether the principle of *pacta tertiis nec nosent prosunt*, or the relative effect of treaties, has to be applied in this case and as a corollary, if consent by the relevant parties has been given. These elements are fundamental when it comes to this issue, as it plays into the majority of the pleas put forward by the Polisario Front as outlined in section 4.3.1.

The principle of *pacta tertiis nec nosent prosunt* is laid down in VCLT article 34, which simply states that: “A treaty does not create either obligations or rights for a third State without its consent”²⁶³ This is also more commonly known as the relative effect of treaties. Article 34 clearly refers to “third States” and not “third parties”, and therefore at face-value only applies to internationally recognized states. Because of the status of Western Sahara as a non-self-governing territory as described in depth in section 3, it must firstly be established whether this principle also applies to Western Sahara, when it is not internationally recognized as an independent state.

As a non-self-governing territory Western Sahara has a status that is distinct and separate from its administering power and the occupying power as laid down in UNGA resolution 2625.²⁶⁴ One of the key characteristics of a non-self-governing territory according to UNGA resolution 1541 is that it, as a termination of this status as a non-self-governing territory, should either emerge as an independent and sovereign state, have free association with an established state or complete inclusion in an established state as described in section 3.3.2. The new status should come about by the expression of free and voluntary will of the non-self-governing territory. Given the actions and expressions of the Polisario Front, as the representative of the

²⁶² *Ibid.* Para 238.

²⁶³ *Supra* note 181. Article 34.

²⁶⁴ *Supra* note 113.

Sahrawi people, it is abundantly clear that it wishes full sovereignty and independence for the territory of Western Sahara, which is also the reason why it has not endorsed Morocco's autonomy plan proposal as explained in section 3.4.1.

This expression of the will of the Sahrawi people is important in relation to *pacta tertiis nec nosent prosunt* as the International Law Committee has given the following commentary on article 34 of the VCLT: "*In international law, however, the justification for the rule does not rest simply on this general concept of the law of contract but on the sovereignty and independence of States.*"²⁶⁵ It follows from this that the principle is not only a matter of good relationship and contractual obligations, but is fundamentally an expression of sovereignty and independence of states, which is exactly what the Polisario Front seeks.

Despite the state-centric nature of article 34 of the VCLT it is still relevant when dealing with non-state actors of the kind in question here. In other words, Western Sahara needs to consent to the agreements in order for them to be bound by the agreements. This is also the perspective of Eva Kassoti stating that: "*(...) the requirement of consent of the people of Western Sahara is still relevant in assessing the lawfulness under international law of the Council Decision at bar.*"²⁶⁶ Furthermore, this understanding has been evident throughout the court cases concerning Western Sahara, as for example in case C-266/16, stating that the AA cannot be applied to the territory of Western Sahara without consent as this would be a violation of Article 34.²⁶⁷

4.3.5.1 The ruling of EGC

As seen above, the consent of the people of Western Sahara must be secured in spite of the state-centric nature of article 34 of the VCLT. As shown in section 4.3.1 the Commission initialled a process to secure this consent. The validity of this process was disputed by many different actors including the Polisario Front, which is why this court case exists in the first place. Now it is time to analyse the views of the EGC regarding consent and if the Commission through its consultation process has secured a sufficient degree of consent by the people concerned.

²⁶⁵ *Supra* note 201. Article 30.

²⁶⁶ *Supra* note 222. pp. 313.

²⁶⁷ *Supra* note 188. Para. 63.

As mentioned previously, the EGC argues that the main difference between the present court case and the previous ECJ cases is that the ECJ ruled on agreements where Western Sahara was not expressly mentioned.²⁶⁸ In this present court case, the Council decision to include Western Sahara is a clear derogation from earlier, where the agreements only expressly included the Kingdom of Morocco.²⁶⁹ With this inclusion, the EGC clearly states: “(...) *that the territorial scope of the agreement at issue includes the territory of Western Sahara and that, accordingly, the agreement is likely to affect the people of that territory and therefore to require their consent.*”²⁷⁰ This unmistakably shows what has already been evident, that the agreements in question do have effect on the legal status of the people of Western Sahara and thus consent must be clearly and freely given.

Having now established that consent must be given by the people of Western Sahara, it is time to see whether the consultation process initiated by the Commission, as described in section 4.3.1, is sufficient in the view of the Court. In the view of the defendants, *i.e.* the Council and Commission, the Polisario Front is not the sole representative of the people of Western Sahara in trade and tariff related issues. In their view, the Polisario Front is only the legal representative of the people in relation to the UN-led process to determine the international legal status of the territory of Western Sahara.²⁷¹

Contrary to the claim by the defendant, the Court finds that the Polisario Front is the sole representative of the people of Western Sahara, as there is no other organisation than the Polisario Front, which has been authorised with representing Western Sahara.²⁷² The Polisario Front is the only organisation, which have been recognized as legitimately representing the interests of the people of Western Sahara by the UN, and this recognition is not only limited to issues under the auspices of the UN but extends to all legal matters with relation to the legal status of Western Sahara and thus the agreements under scrutiny.²⁷³

²⁶⁸ *Supra* note 234. Para. 188-189.

²⁶⁹ *Ibid.* Para. 195.

²⁷⁰ *Ibid.* Para. 200.

²⁷¹ *Ibid.* Para. 205.

²⁷² *Ibid.* Para. 208.

²⁷³ *Ibid.* Para 207-209.

As seen by the Commission's Staff Work Document the consultation process did not result in any consent given by the Polisario Front.²⁷⁴ It therefore follows from all the foregoing that the agreements cannot have effect on the territory of Western Sahara without explicit, authentic and freely given consent expressed by the Polisario Front. The EGC dedicates a substantial part of its ruling on this issue and especially the efforts from the Commission and the EEAS in securing the consent of "the people concerned".²⁷⁵ In the view of the Court the concept "people concerned" differs substantially from the concept "people of Western Sahara", as the former concept includes all people currently living in the territory whereas the latter only encompass the part of the population identifying as Sahrawi people.²⁷⁶

This distinction between people living in the area and people of the area made by the Court derives from the historical shift of the population in the territory, which began with the Green March described in section 2.2.2. The view of the Court thus correctly takes into consideration the actual facts on the ground contrary to the Commission, which consulted all of the people living in the territory. As is stated in the judgement: "*That being the case, it must be held that the various items of evidence relating to the particular situation of Western Sahara on which the Council and the Commission relied in order to justify the decision (...) cannot be accepted.*"²⁷⁷ In other words, the consultation process upon which it was argued that Western Sahara had consented to the agreements is not valid in the eyes of the Court.

Lastly, the EGC held the view that the agreements do in fact change the legal status of the territory of Western Sahara and as a corollary has a potential impact on the legal situation of the territory as such.²⁷⁸ It is explicitly stated in the agreements that they are concluded without prejudice to the differing positions held by the EU and Morocco on the legal status of Western Sahara.²⁷⁹ As described in section 3.4.1 and 3.4.2 Morocco sees Western Sahara as an integrated part of the kingdom and the EU recognises it as a non-self-governing territory, albeit its vague statements on the issue. It is these distinct positions, which the EU claims that it does not change by adopting the contested agreements.

²⁷⁴ *Supra* note 204. pp. 30.

²⁷⁵ *Supra* note 33. Recital 10.

²⁷⁶ *Supra* note 234. Para 337.

²⁷⁷ *Ibid.* Para. 354.

²⁷⁸ *Supra* note 234. Para. 212 & 218.

²⁷⁹ *Supra* note 42.

However, in the view of the Court, there is a potential for these agreements to undermine or at least influence the UN-led self-determination process.²⁸⁰ The parties have found it necessary to clarify that the agreements did not establish a common position on the legal status of Western Sahara, which indicates that they at least acknowledge that it could be interpreted in such a way.²⁸¹ According to the Court and contrary to the actual text of the agreements and the expressed intention of the Council and Morocco the agreements have a very real risk of influencing the self-determination process at least indirectly by reaffirming Morocco as the *de facto* administering power, which the EU officially classify Morocco as in opposition to the UN.²⁸²

With this potential impact on the legal status of Western Sahara, the EU also breaches its obligation of non-recognition of the illegal *status quo* situation, as described in section 4.1.²⁸³

As Eva Kasotti formulates it:

*“(...) it is difficult to escape the conclusion that by extending the territorial scope of the EU-Morocco Association Agreement to expressly include Western Sahara, the EU falls foul of its international law duty of non-recognition – despite the claim that such extension does not imply the recognition of Moroccan sovereignty over the territory.”*²⁸⁴

The EU has an international obligation derived from customary law to recognise the right to self-determination for a non-self-governing territory. Because of this right to self-determination the principle of *Pacta tertiis nec nocent nec prosunt* and consent must be followed, which is something the EU did not manage in this case. Finally, the Court ruled that the EU potentially breaches its obligation of non-recognition of an illegal *status quo*, by including the territory of Western Sahara in the agreements. In conclusion, the Court held that the EU did not live up to its international obligations and thus, as is summarised in paragraph 392 of the judgement: *“It follows from all of the foregoing that (...) the contested decision must be annulled.”*²⁸⁵

²⁸⁰ *Supra* note 234. Para. 212.

²⁸¹ *Ibid.*

²⁸² *Ibid.* Para. 218.

²⁸³ *Supra* note 117. pp. 19.

²⁸⁴ *Supra* note 222. pp. 311.

²⁸⁵ *Supra* note 234. Para. 392.

4.3.6 Future developments

On the basis of the relevant international law, the historic specificities and the case law it is my assessment that the conclusion to annul the two agreements reached by the EGC, is the correct conclusion. The Polisario Front, as the legitimate representative of the people of Western Sahara, did not give its explicit and free consent to be included in the AA and the SFPA between the EU and Morocco. Despite the lack of consent, the agreements were still adopted by the Council, explicitly including the territory of Western Sahara. The adoption of the agreements clearly disregards the inherent right to self-determination of a non-self-governing territory and potentially render legitimacy to the position of Morocco in the conflict, which has been defined as an occupying power by the UN. Therefore, this adoption might uphold an illegal status quo.

We hereby arrive at the first conclusion to my problem statement set out in section 1.1, namely that the effect of the international legal status of Western Sahara, as a non-self-governing territory, is that the people of Western Sahara must give their free and explicit consent as a third party to the bilateral agreements between the EU and Morocco. Because the Polisario Front, as the sole representative of the Sahrawi people, has not done so, the agreements under scrutiny must be considered illegal in accordance with applicable international law and relevant case law, as is also the conclusion reached by the EGC.

Despite the evidence that the EGC did in fact arrive at a valid and correct conclusion, the Commission decided to launch an appeal to the European Court of Justice on the 14th of December 2021.²⁸⁶ In this appeal case the Commission once again contests the *locus standi* of the Polisario Front as well as the EGC's assessment of the validity of the consent given by the people of Western Sahara, and thus the representativeness of the Polisario Front.²⁸⁷ On these grounds, the Commission seeks for the ECJ to set aside the judgement by the EGC.²⁸⁸

It is my assessment that this appeal case before the ECJ will reach a conclusion along similar lines as the one reached by the EGC. As we saw in sections 4.2.2 and 4.2.3 the Court of Justice

²⁸⁶ European Commission. Appeal against the judgment of the General Court delivered on 29 September 2021 in Case T-279/19, Front Polisario v Council. *Curia*. C-779/21 P. 14 December 2021. Available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=255709&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=105567>.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

has previously dismissed the *locus standi* of the Polisario Front, due to the fact that Western Sahara was not included in the agreements and thus the Polisario Front could not claim to be either directly or individually concerned. However, as also stated in paragraph 195 of the judgement of EGC, the main difference between the earlier agreements and the agreements after the amendments is that Western Sahara is now explicitly mentioned as covered by the agreements.²⁸⁹ With this important alternation, it is difficult to see that the ECJ can dismiss the *locus standi* of the Polisario Front and thus eventually arrive at a similar conclusion as the EGC.

4.4 Partial Conclusion

In this part of the thesis, I have scrutinised the court case concerning the bilateral agreements between Morocco and the EU. Firstly, I introduced the international legal responsibilities of the EU as an international organisation and by looking at the previous cases concerning similar questions handled by the EGC and ECJ. This analysis showed that the EU has an obligation to respect the right to self-determination of the people of Western Sahara and not to aid or assist in upholding an unlawful *status quo*. Through the examination of the former court cases it became evident that Western Sahara is not included in the territorial scope of the agreements due to its distinct and separate status from Morocco.

On this basis I analysed the most recent court case concerning both the AA and the SFPA in three distinct, but highly interconnected cases, which was also evident through the pleas put forward by the Polisario Front. This part of the thesis was dedicated to answering the question: *What effect does the international legal status of Western Sahara have on the legality of the bilateral fisheries and agricultural agreements between the Kingdom of Morocco and the European Union?*

This analysis showed that free and express consent must be given by the people of Western Sahara in order for the territory to be legally included in the agreements due to the legal status of Western Sahara as a non-self-governing territory. The principle of *Pacta tertiis nec nocent nec prosunt* is therefore highly relevant in this case. Because the Commission did not manage to receive consent by the Polisario Front, as the representative of the people of Western Sahara, the agreements, which the Council adopted, must therefore be annulled. Furthermore, the EGC

²⁸⁹ *Supra* note 234. Para. 195.

also came to the conclusion that the EU could very well be in violation of its obligation not to render aid or assistance to an unlawful situation. Even though the EGC laid down some very compelling arguments in accordance with the applicable international law to reach its conclusion, the EU has decided to appeal the judgement to the ECJ. Therefore, the last word in this case has not yet been spoken.

This could very well be the final conclusion of this thesis, and most analyses would stop here. However, as indicated in the beginning of the thesis, I wish not only to answer the question “what”, but equally important and interesting I wish to answer the question “why” the EU acts in this way and more specifically what these actions might indicate for the future of EU’s external policies. This will be the focus of the next part.

Part 5 - Legal and political implications

5.0 Introduction to part 5

There are of course some very apparent possible reasons for the EU to challenge the judgement by the EGC. Firstly, by appealing the judgement, the contested agreements will still be in force during the entire appeal process.²⁹⁰ With an average length of the proceedings being 14,5 months with the ECJ, this is a substantial time for the contested agreements to still be in place.²⁹¹ Another possible quite obvious reason for the EU to appeal the judgement is that they honestly believe that the ECJ will dismiss the ruling by the EGC, as it has previously done in the appeal case C-104/16. However, as stated earlier, it is difficult to see that the ECJ could arrive at a different conclusion from the EGC when taking into the consideration the legal and moral obligations of the EU alongside the quite clear violation Western Sahara’s right to self-determination.

As much as these two reasons stipulated might hold some power of explanation, I argue, on the basis of theoretical assumptions, that the reasons for the actions of the EU in this case are much more politically and strategically driven. I believe that this is an indication of the EU’s willingness to set aside its values and moral principles due to the *realpolitik* faced by the union.

²⁹⁰ *Supra* note 234. Para. 396.

²⁹¹ Riehle, Cornelia. CJEU - Annual Report 2019. In: *eu crim*. 31 August 2020. Available at: <https://eu crim.eu/news/cjeu-annual-report-2019/>.

What the analysis above clearly shows, is that the principles and international obligations of the EU have not been met with regards to Western Sahara. Article 21 of the TEU, in which it is stipulated that the EU must respect human rights, rule of law and international law in its external actions, has not been followed which all the court cases, including the most recent, also show.

This conclusion is also mirrored by academics in the field. As Suárez-Collado and Contini formulate it: “(...) *in the case of the Western Sahara conflict, EU economic and geopolitical interests have prevailed over the application of European and international law.*”²⁹² This also follows the opinion of James Crawford as expressed here: “*Finally, as a matter of realpolitik, the European Union has demonstrated political disinterest in upholding the right to self-determination in relation to the analogous situation in Western Sahara.*”²⁹³ But maybe this should not surprise us, as Jan Klabbers states: “*It will be my contention that the EU has a much less friendly disposition towards international law than is commonly assumed (...)*”²⁹⁴

As these quotes show, scholars have previously noted that the EU does not necessarily live up to its obligations due to economic and/or geopolitical interests. I agree with these observations. However, these scholars have not answered the question of “why” this is the case. In order to do so, we must depart the path of strictly legal analysis and venture into the realm of political science analysis. In this last part of the thesis before the final conclusion I will therefore try to answer the second element of my problem statement: *what potential political implications might derive from the (il)legality of the agreements?* In order to do so, I will firstly summarise the theoretical foundation upon which this discussion will depart.

5.1 Normative Power Europe vs. Structural Realism

I will base this discussion upon the Normative Power Europe (NPE) framework and the structural realism theory, here represented primarily by Professor John J. Mearsheimer. As described in section 1.2.2. I have derived two hypotheses from the different reasoning of these

²⁹² *Supra* note 19. pp. 1.

²⁹³ Crawford, James. Opinion. Third Party Obligations with respect to Israeli Settlements in Occupied Palestinian Territories. *Tuc.org*. Para 131. Available at: <https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf>.

²⁹⁴ Klabbers, Jan. The Validity of EU Norms Conflicting with International Obligations. In: Maresceau, Marc (ed.). *International Law as Law of the European Union*. *Martinus Nijhoff Publishers*. 2012. pp. 112.

frameworks. From the NPE approach, I subtracted the hypothesis: “*The European Union will abide by the court rulings, as it strengthens its position as a normative power in world politics*”. From structural realism I deduced the hypothesis: “*The European Union acts in the interest of its own material capabilities regardless of the ruling of the court*”. In this section I will look by closer at the assumptions within these two theoretical frameworks, and how the two different hypotheses can be derived from these theories.

5.1.1 Normative Power Europe

The Normative Power Europe framework rests on the assumption that Europe, and the EU in this instance, will try to maximise its power in the world. This framework proclaims that “*The EU has been, is, and always will be a normative power in world politics.*”²⁹⁵ In this framework “normative” is understood as principles and values that are seen as universally applicable and acknowledged within world politics and especially in the UN system.²⁹⁶ According to Professor Ian Manners, the EU, as a normative power, promotes nine universally applicable principles; sustainable peace, freedom, democracy, human rights, rule of law, equality, social solidarity, sustainable development and good governance.²⁹⁷ These values correspond to the values listed in article 21 of the TEU.²⁹⁸ The Normative Power Europe framework focuses partly on what is promoted, but equally important is how these values are promoted. The EU promotes these values: “*(...) by virtue of ‘living by example’; by duty of its actions in ‘being reasonable’; and by consequences of its impact in ‘doing least harm’.*”²⁹⁹ The normative power of the EU should therefore be assessed on the basis of its principles, its actions and the impact of these actions.³⁰⁰

This framework therefore also resembles the reasoning within the growing literature on the “The Brussels Effect” championed by Anu Bradford, in which the power of the EU is analysed through its standard-setting and regulatory influence on markets and products across the world.³⁰¹ Both Normative Power Europe and “the Brussels Effect” emphasise values, standards and principles when assessing the EU’s power projection abilities in world politics. As it is formulated: “*Fundamentally, normative power can only be applied credibly under a key*

²⁹⁵ *Supra* note 9. pp. 45.

²⁹⁶ *Ibid.* pp. 46.

²⁹⁷ *Ibid.*

²⁹⁸ *Supra* note 156. Article 21(b).

²⁹⁹ *Supra* note 9. pp. 46.

³⁰⁰ *Ibid.* 47.

³⁰¹ Bradford, Anu. Exporting Standards: The Externalization of the EU’s Regulatory Power via Markets. *International Review of Law and Economics*. 2015. Vol. 42. No. 1.

condition: consistency between internal policies and external prescriptions and actions."³⁰² If the EU does not live up to its moral and international obligations and show consistency between its internal values and its external conduct, it cannot claim to hold a distinct normative power. Hence, we would expect that the EU would abide by the EGC ruling as this ruling questions the fundamental values of the EU, which is exactly the foundation upon which the power of the EU is rested according to the Normative Power Europe framework. For these reasons, I arrive at the hypothesis within the Normative Power Europe framework that: "*The European Union will abide by the court rulings, as it strengthens its position as a normative power in world politics*"

5.1.2 Structural Realism

As a form of opposition, we have the structural realists for whom values and principles are subsidiary to more "traditional" modes of power, at best. For the structural realists it is the structural balance of power, which determines the policies pursued whether by national states or inter-state organisations such as the EU, as laid down in section 1.2.2. States are subject to an anarchic world structure meaning that there is no governing power in the realm of international politics.³⁰³

States and organisations will try to maximise their security in a hostile world structure through the build-up of their own capabilities. Values and principles do not play a role in this framework, as it is secondary or tertiary to the security concerns, contrary to the NPE theoretical approach. States live in a self-help system, where they need to fight with other states for the limited resources available in the world in order to secure their own survival.³⁰⁴ In such a world states compete for scarce resources, and will regard the realm of politics as a zero-sum game.³⁰⁵ Based on these theoretical assumptions, I deduct that the EU will act rationally in relation to its material capabilities and ultimately with regards to its own existential interests without looking towards moral obligations or values. I hereby arrive at the structural realism

³⁰² Nicolaïdis, Kalypso Aude and Nicolaïdis, Dimitri. *The EuroMed Beyond Civilisational Paradigms*. UC Berkeley: *Institute of European Studies*. 2004. Working Paper AY0406-18. pp. 16. Available at: <https://escholarship.org/content/qt83m7b47x/qt83m7b47x.pdf>.

³⁰³ Schweller, Randall. *Managing the Rise of Great Powers: History and Theory*. In: Johnston, Alastair Iain & Ross, Robert S. (eds). *Engaging China: The Management of an Emerging Power*. London: *Routledge*. 1999. pp. 5.

³⁰⁴ Mearsheimer, John J. *The Tragedy of Great Power Politics*. New York: *W.W. Norton & Company, Inc.* 2014. pp. 32.

³⁰⁵ *Ibid.* pp. 35.

hypothesis: *“The European Union acts in the interest of its own material capabilities regardless of the ruling of the court”*.

5.2 EU’s conduct in relation to Western Sahara

It will come as no surprise, given all the arguments laid down in this thesis so far, that the EU abides by the logic formulated by the structural realists more than by the Normative Power Europe academics. I will in this section briefly discuss the potential reasons for why this is the case as well as give some projections of the influence of this suggested shift in the underlying logic of the conduct of the EU.

The Council and the Commission have, as stated earlier, appealed the Court case. This behaviour is expected through the reasoning of structural realism, because of the significance of the agreements but equally important because of the significance of Morocco and a stable relationship with this key partner for the EU. It is in the EU's economic and strategic interest to nurture a good relationship with Morocco, and in this reasoning the plight of the people of Western Sahara is by no means the first concern for the EU.

Contrary, the NPE framework, with its focus on values and principles as the main constituent of the EU’s power projection abilities, does not hold a high power of explanation in this instance. Within this framework we would expect the EU to act in a way, which is consistent with its expressed values, and furthermore do anything in its power to correct a possible breach of internal and external coherency of its values. By trying to establish consent through a flawed consultation process, adopting the agreements despite the lack of consent from the Polisario Front and ultimately appealing the ruling stating that the EU has not lived up to its international obligations and as a consequence its proclaimed values and principles the EU has clearly indicated that it wishes to do anything in its power to keep the agreements in place, and thereby please Morocco at the expense of abiding by its own internal values and principles.

As demonstrated in section 2.1.3 Morocco is of utmost importance for the EU. It has been a key partner for the EU and the neighbouring European countries for a very long time, but in recent years this significance has only increased. Morocco is important both economically, which the agreements under scrutiny are the key examples of, but also more strategically. As described earlier, Morocco plays a key role as a destination and transit country in relation to sub-Saharan migration. As has been seen, both historically with the Green March and recently

with the influx of migrants into Ceuta, Morocco does not refrain from using migration as a pressure tool to obtain its political goals. Furthermore, Morocco has also been revitalised in the area of energy supply due to the Russian invasion of Ukraine. Because of this, the EU must nurture a strong and stable relationship with Morocco if you follow the logic of the structural realists where self-interest is key when explaining state behaviour. This is also the viewpoint of a French diplomat stating: *“In these times of crisis and global difficulties, we need a lot of solidarity with Morocco, which is a friendly country”*³⁰⁶ The friendliness of Morocco expressed here is clearly towards the EU and not towards the people of Western Sahara.

The EU finds itself immersed in internal turmoil both in relation to the disagreements over the trade and cooperation agreement with the UK after Brexit and the division over rule of law questions mainly led by Hungary and Poland against the other Member States. Furthermore, it must deal with a militarily aggressive Russia, an increasingly unpredictable China and a USA which focuses more and more on its own security at the expense of being the omnipresent policeman. Member states of the EU also increasingly focus on their own security in their internal policies with the Finnish and Swedish applications for NATO memberships, the German U-turn in its defence policy with the 100 billion euro investment in its military and the Danish referendum on its EU defence opt-out as the most obvious examples.

It is this structural pretext within which the actions and the conduct of the EU must be analysed in the future. It is here my claim that the EU, because of the increasingly hostile global environment, in the near future will conduct itself according to the logic of the structural realists, where focus is on increasing its material capabilities in accordance with its self-interest. Perhaps there is a wish to live up to one’s own values and principles within the EU, also in the case of Western Sahara, but in the current political climate, a value-based foreign policy is simply a luxury the EU cannot afford, and the actions of the EU in the case of Western Sahara might be an indication of how the EU’s external policies will be handled in the future. I therefore, on the basis of all the arguments laid down in this thesis, argue that the structural realists hold a higher power of explanation than the Normative Power Europe theorists both in relation to the issue in question and in regards to the future of the European external actions.

³⁰⁶ The North African Post. Sahara: France reiterates support for Autonomy Plan as serious and credible. In: *The North African Post*. 22 March 2022. Available at: <https://northafricapost.com/56404-sahara-france-reiterates-support-for-autonomy-plan-as-serious-and-credible.html>.

In the next section I will briefly examine what these predictions might mean for the future conduct of the EU.

5.3 The future of European external actions

Evidently, one should never infer conclusions from a single case study to cover the entirety of a broad field, and the coming section will be utterly filled with conjecture and predictions that will not materialise in the real world. However, I find it both interesting and informative to try to predict the possible policy changes we will see in the near future despite it being completely impossible to get right.

Nevertheless, if I am correct that the actions of the EU in relation to Western Sahara are indeed indications of the future actions of the EU, it is natural to ask the question of how the EU's future external actions will unfold. And in this highly unlikely scenario that I am correct in my analysis, I will predict that we will see a much stronger tendency by the EU to act in its own self-interests than we have been witnessing in the past decades. It is beyond the scope of this thesis to venture into a discussion of whether the world of tomorrow will be characterised by traditional multipolarity³⁰⁷, be in a state of multi-order³⁰⁸ or be a world in disorder.³⁰⁹ Whatever the political structure (or lack of structure) of the world in the near future, it is evident, given all the things listed in the previous section, that we now see a fundamental shift in the unipolar and Western-led structure we have experienced since the end of the Cold War.

With a new world order, I predict that the EU will focus much more on its near and close relations than previously. It will need to focus on rebuilding a strong relationship with the UK, which is based on trust and mutual respect. It will focus much more on arming the militaries of the member states, both to signal internal strength but also to keep the good relationship with a U.S. that does not wish to stand alone with the bill for collective security. This will be a world where the EU's external policies will be rationalised with reference to self-interests and not to liberal values. Where foreign aid must be explained in terms of the good it causes the European citizens and not the local recipients of this aid.

³⁰⁷ Arif, Fatima. Transition of Balance of Power from Unipolar to Multipolar World. In: *Modern Diplomacy*. 19 September 2020. Available at: <https://moderndiplomacy.eu/2020/09/19/transition-of-balance-of-power-from-unipolar-to-multipolar-world-order/>.

³⁰⁸ Flockhart, Trine. The coming multi-order world. *Contemporary Security Policy*. 2016. Vol. 37. No. 1.

³⁰⁹ Tharoor, Shashi & Saran, Samir. The New World Disorder and the Indian Imperative. *Aleph Book Company*. 2020.

As the former champion of liberal values and good behaviour in its external policies, the EU will now find itself in a position where these principles are no longer in high demand. It must pursue its foreign policy in a strictly rational and utility-maximising manner in which economic and security gains must be regarded as a zero-sum game.

This rather grim picture is the product of a world in rapid change, and we have unfortunately not reached the end of history as was once famously proclaimed. The EU has long been in a position where it could allow itself to place its policy decisions on its values and principles, but I claim that this era is over. As George Friedman states: *“It is simply that the things that appear to be so permanent and dominant at any given moment in history can change with stunning rapidity. Eras come and go.”*³¹⁰ I believe that the new era, which we are about to enter, will be dominated by the logic outlined above, and the EU should and must follow suit if it is not to lose influence.

5.4 Partial conclusion

The aim of this part of the thesis was to provide an answer to the second element in my problem statement: *What can the actions of the EU potentially tell us about the underlying logic of the EU’s external policies?*

The former European Commissioner for humanitarian affairs stated in 1998 that: *“I am becoming more and more convinced that a foreign policy which is based solely on interests, whether on a national or a regional perception thereof, is no longer sustainable. In my view Europe needs a foreign policy firmly anchored in ethics, and based on universally accepted values and principles.”*³¹¹ My conclusion is quite the opposite. I am becoming more and more convinced that the foreign policy of the EU has started transforming from a value-driven policy to an interest-driven zero-sum policy.

The case of the EU’s actions in relation to the Western Saharan conflict possibly indicates a fundamental shift in the reasoning of the EU compared to what is expressed both by the quote above but more interestingly by the Normative Power Europe framework. I here argue that we

³¹⁰ Friedman, George. *The Next 100 Years*. London: Allison & Busby Limited. 2009.

³¹¹ Bonino, Emma. *Principled Aid in an Unprincipled World*. Speech delivered at: ECHO - Overseas Development Institute (ODI) Conference. *European Commission*. 07 April 1998. Speech/98/69. pp. 2.

see a return to more “traditional” understandings of power projection where the material capabilities *i.e.* military and economic resources have again come to the forefront in EU’s internal and external policies. The union has thereby departed from the path of values and principles unto the path of power politics, and it is my projection that we will see an intensification of this tendency in the future due to the increasingly hostile political environment in Europe in particular but also and in the international society generally.

This is not to say that values and principles are completely abandoned in the external policies of the EU and that they do not have any bearing on the external actions pursued, but only that such reasoning will solely be applied should it be politically feasible and in accordance with the self-interest of the EU.

Part 6 - Conclusion

This thesis seeks to answer whether the bilateral agreements covering agricultural and fisheries products between the EU and Morocco are illegal due to their express inclusion of the territory of Western Sahara. If they could be found to be in violation of applicable international law, I sought to give an explanation of why the EU has persistently hold on to the agreements.

On the basis of a legal dogmatic approach building on an extensive use of different sources in accordance with article 38 of the ICJ statute I have tried to provide a valid and correct answer to my problem statement: *What effect does the international legal status of Western Sahara have on the legality of the bilateral fisheries and agricultural agreements between the Kingdom of Morocco and the European Union, and what can the actions of the EU potentially tell us about the underlying logic of the EU’s external policies?* This problem statement also required me to venture into a discussion, which was based on theoretical literature from the international relations discipline.

However, before I could answer my problem statement, I needed to answer two important sub-questions *i.e.* i) *What does the bilateral agreements between EU and Morocco entail, and why is Morocco generally an important partner for the EU?* And ii) *What characterises the international legal status of Western Sahara and how does the different relevant actors describe this legal status?*

Through the examination of the first question, it became evident that Morocco constitutes a key partner for the EU both economically, which the bilateral agreements were an example of. In addition, Morocco is strategically significant for the EU as a partner in managing sub-Saharan migration and as a transit country for much of the Algerian and Nigerian gas supply, which is vital for some of the Southern European countries. A good relationship between the two parties therefore means that collaboration and stability in these areas are secured. Nevertheless, if the relationship turns sour, Morocco can quickly evolve from being an ally to an adversary, using its political muscles to get considerable political concessions. It is therefore in the strategic self-interest of the EU to nurture a good and stable relationship with Morocco.

Hereafter, I went on to answer the second sub-question relating to the international legal status of the territory of Western Sahara. From this analysis a few important conclusions were reached. Firstly, it was established that people have an inherent right to self-determination, which is one of the basic principles of international law. It also became clear, that the Sahrawi people, the indigenous people of Western Sahara, constitute a people with a distinct history, religion and structure, thereby constituting a distinct identity and thus a “people”. The analysis also revealed that the international legal status of Western Sahara is highly disputed and controversial, and it is this dispute which forms the basis for the conflict between Western Sahara and Morocco. In the eye of Morocco, Western Sahara is an integrated part of the Kingdom, and should be treated as such. Both the UN and the ICJ, through its advisory opinion, hold that Western Sahara is something distinct and separate from Morocco. The UN emphasises the Western Saharan status as a non-self-governing territory and thereby its inherent right to self-determination, calling the Moroccan presence an occupation in violation of international law. EU positions itself somewhere in the middle of the Moroccan and the UN positions, claiming that Morocco is the *de facto* administering power, a concept which has no bearing under international law, of Western Sahara. The EU does however stress that a final solution to the dispute should be reached under the auspices of the UN. Through the examination I concluded that the UN and ICJ hold the positions that are mostly in line with the applicable international law.

On the basis of these examinations, I could go on to answer the first part of my research question on the legality of the bilateral agreements and the role of the status of Western Sahara in this question. I started out by establishing the international legal obligations of the EU, where I showed that the EU, as an international organisation with a mandate to enter into binding

agreements, have similar rights and obligations as traditional states, where especially the obligation not to render aid or assistance to uphold an illegal *status quo* is of interest. Hereafter, I analysed three previous court cases before the European General Court and the European Court of Justice between the EU and the Polisario Front concerning the legality of agreements between Morocco and the EU. Here it became clear that despite differences all cases concluded that the territory of Western Sahara could not be included in the agreements between Morocco and the EU without the consent of the people of Western Sahara.

From here I ventured into my analysis of the most recent court case between the Polisario Front, the liberation movement of Western Sahara, and the EU, represented by the European Council. The Council called into question the *locus standi* of the Polisario Front in this issue. The EGC concluded that the Polisario Front holds legal personality due to its involvement in the UN-led peace negotiations. If the Polisario Front can have a legal personality to enter into agreements before the UN, it also holds legal personality to challenge EU decisions. The Council also challenged whether the Polisario Front was directly and individually concerned in matter. Here the EGC ruled, in accordance with the previous cases that, with the express inclusion of Western Sahara, the agreements have legal effect in the territory and thereby has effect on the people of the territory. As the representative of the people of Western Sahara, the Polisario Front is therefore individually and directly concerned. On this basis the EGC ruled that the Polisario Front had *locus standi* in the present case.

Because of the international legal status of Western Sahara as a distinct and separate territory from its administering power, whether this be Spain or Morocco, the people of Western Sahara needed to give their explicit consent in order to be bound by international agreements. This had not been satisfactorily secured by the EU in this case, and therefore the agreements could not have effect on Western Sahara, and the agreements should therefore be annulled as they wrongfully included Western Sahara in their territorial scope. The EU had therefore not sufficiently lived up to the principle of *pacta tertiis nec nosent prosunt*. Furthermore, the Court held that the direct inclusion of Western Sahara without the consent of the people in agreements between Morocco and the EU would potentially render legitimacy to the actions of Morocco, and thereby have an influence on the UN-led negotiations to find a mutually acceptable solution to the dispute. Therefore, the Court claimed, the EU was in violation of its international obligation not to render aid and assistance to an unlawful situation.

Despite reaching conclusions, which are in accordance with the previous court cases and the international law presented in this thesis, the EU has decided to appeal the judgement of the EGC to the ECJ. This decision was the focus of the last part of the thesis, where I discussed the question: *what can the actions of the EU potentially tell us about the underlying logic of the EU's external policies?* It was my assumption that the actions of the EU could be an indication of how the EU conducts its external policies.

In this discussion I build on the theoretical assumptions of the Normative Power Europe and the Structural Realism frameworks, which would predict completely different responses from the EU. Within the Normative Power Europe framework, in which the power of the EU comes from its power to spread its liberal values and principles within itself and to other parts of the globe, we would expect the EU to quickly correct its actions if they are in violation of the values that they try to project. Without internal coherency it is difficult to project one's normative power with authority. Conversely, the Structural Realism assumes that the EU will do whatever is in its power to secure its material self-interests, as we live in a hostile and anarchic self-help system without an international sovereign. Values and principles do not have an important part to play within this framework as it is the military and economic capabilities which are the essential building blocks when considering international security.

Given Morocco's economic and strategic importance towards the EU, the fact that the EU appeals a valid and correct judgement and the increasingly hostility of the international political environment, it is my assessment that the EU here acts rationally in accordance with the Structural Realism assumptions. The EU should do anything in its power to nurture a stable and strong relationship with Morocco, as it is in its self-interests. If the choice is between living up to its internal values and principles or potentially turning a key ally into an adversary, the EU should choose to abandon its values, which is exactly what has happened here.

Furthermore, it is my prediction that the EU will more and more abide by the logic of Structural Realism at the expense of the Normative Power Europe logic in the near future. If values and principles can go hand in hand with self-interests, then the EU will of course choose this political course, but if the EU must decide between these two paths, I predict that strategic self-interests will prevail.

The aim of this thesis was thus two-fold. Both to examine the conclusions reached by the EGC in relation to the bilateral agreements, which were found to be valid and correct, but also to provide an explanation on why the EU acts the way it does. Hopefully this can inspire to future academic work on the EU's external actions, where the interconnectedness of legal and political analysis could be further examined. I believe that the two academic disciplines used in concert can provide us with insights and perspectives, which we could not arrive at without such interdisciplinarity.

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