

CJEU's Landmark Ruling the EU-Morocco Agreements: The Western Sahara and Front Polisario's Bittersweet Victory

Case Note on Joined Cases C-779/21 P and C-799/21

1. Introduction

On October 4, 2024, the Grand Chamber of the Court of Justice of the European Union (CJEU) delivered a landmark decision in *Front Polisario II*,¹ confirming a 2021 decision of the General Court annulling the fisheries and trade agreements between the European Union (EU) and Morocco.² The CJEU ruled that the agreements were void in respect to their application to Western Sahara (WS) – a Non-Self-Governing Territory (NSGT) under Art. 73 of the UN Charter, which Morocco partially occupies – without the consent of the Sahrawi people.

2. Front Polisario's Standing

A first critical victory for the Sahrawi cause is the CJEU's reaffirmation of the *locus standi* of the national liberation movement, Front Polisario (FP), in line with its case-law on previous trade agreements between the EU and Morocco applicable to WS.³ The Court confirmed that Front Polisario, as a representative of the Sahrawi people, had legal capacity to bring the action before the Court.⁴ In addition to standing, the Court emphasised that FP is "individually concerned" by the EU-Morocco agreements in the sense of Art. 263 (4) TFEU, reinforcing its status as a legitimate representative (para. 108). This recognition strengthens FP's authority as a political actor, although the CJEU also noted that FP is a "self-proclaimed" national liberation movement (para. 67) and has never been given the status officially either by the United Nations or by the EU and its Member States (para. 69). This may reflect a shift in narrative, but the practical effect of the ruling remains clear: FP is acknowledged as a "privileged interlocutor" (para. 89) and an authentic representative of the Sahrawi people's interests.

3. Status of Western Sahara and the Right to Self-Determination

This ruling is also significant as it reaffirms WS' "separate and distinct" status from Morocco (para. 134) and confirms that the Sahrawi people must consent to any economic activities involving its

¹ CJEU, *European Commission v Front Polisario (Front Polisario II)* (Joined Cases C-779/21 P and C-799/21 P), Judgment of the Court, Grand Chamber, 4 October 2024.

² CJEU, *Front populaire pour la libération de la Saguia el-Hamra et du Rio de oro (Front Polisario) v Council of the European Union* (Joined Cases T-344/19 and T-356/19), Judgment of the Court, General Court, 29 September 2021.

³ CJEU, *Council of the European Union v Front populaire pour la libération de la Saguia-el-Hamra et du Rio de Oro (Front Polisario I)* (Case C-104/16 P), Judgment of the Court, Grand Chamber, 21 December 2016.

⁴ Jed Odermatt, 'Whose Consent? On the Joined Cases C-779/21 P, Commission v Front Polisario and C-799/21 P, Council v Front Polisario' (Verfassungsblog, 5 October 2024).

territory, as it holds a right to self-determination. This principle derives from WS' status as a NSGT under Art. 73 of the UN Charter, which establishes a "sacred trust" for the international community to protect the interests of the territory's indigenous people, as well as the International Court of Justice's Advisory Opinion of 1975 on the Sahrawi people's self-determination.⁵ The CJEU explicitly distinguished between the "people" of WS and the "population" living in the (occupied) territory (para 129). The former refers to the indigenous Sahrawi people, including those living in exile (notably in refugee camps in Algeria), in the liberated territories, and in the occupied territory. By contrast, the "population" includes Moroccan settlers in the occupied territory, who are excluded from the political unit holding the right to self-determination under international law.

4. Principle of Relative Effect of Treaties and Implied Consent

The principle of relative effect of treaties (*pacta tertiis* rule) prohibits the imposition of treaty obligations on third parties without their consent.⁶ The CJEU confirmed that the people of WS is a "third party" to the EU-Morocco agreements, and therefore, its consent is required. The Court rejected the EU's attempt to satisfy this obligation through consultations with the local population of the territories under Morocco's *de facto* control, instead insisting on the consent of the Sahrawi people as a whole. This aligns with international standards for Free, Prior, and Informed Consent (FPIC) under the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).⁷ However, the CJEU introduced a problematic concept of implied consent. The Court suggested that consent could be presumed if two conditions were met: 1) no obligations are imposed on the third party, and 2) the people receives "a specific, tangible, substantial, and verifiable benefit" from the exploitation of the natural resources proportional to the degree of that exploitation (para. 153). A periodic review mechanism should be introduced to assess ongoing compliance with these conditions.

This "benefit test" is controversial: the existence of benefits should not be equated with consent for the purpose of self-determination.⁸ This concept is neither rooted in international law nor recognised in the Vienna Convention on the Law of Treaties. It also diverges from the 2021 decision of the General Court, which required expressed consent.⁹ Furthermore, the CJEU's position that consent can be "reversed" if FP or other "legitimate representatives" prove that these

⁵ [International Court of Justice, *Advisory Opinion on Western Sahara*, 16 October 1975, ICJ Reports 1975, p 12.](#)

⁶ [See Vienna Convention on the Law of Treaties \(opened for signature 23 May 1969, entered into force 27 January 1980\) 1155 UNTS 331, art. 35.](#)

⁷ [United Nations Declaration on the Rights of Indigenous Peoples, UN Doc A/RES/61/295 \(2007\), art. 19.](#)

⁸ [Pelliconi A M and Odermatt J, 'Benefit v Consent: CJEU's Front Polisario II Judgment and the Law of Self-Determination' \(15 November 2024\) CIL Dialogues.](#)

⁹ [CJEU, *Front Polisario v Council*, paras. 310-311, 318. See also \[CJEU, *Front Polisario I*, para. 106.\]\(#\)](#)

conditions are unmet (para. 156) unduly reverses the burden of proof. Conversely, it is arguably the European Commission's task to demonstrate that the agreements are concluded in line with the international law on self-determination, given the illegality of Morocco's occupation of WS.¹⁰

5. Suspension of the Annulment's Effects and the EU's Political Response

While the Court annulled the Council Decision concluding the EU-Morocco Association agreement, it also provided for a 12-month suspension of the judgment's effects pursuant to Art. 264 (2) TFEU, following the principle of ensuring legal certainty – a rationale previously applied by the Court in the context of EU foreign policy, such as the 2008 *Kadi* judgment.¹¹ This will give the European Commission a chance to renegotiate new agreements with Morocco and attempt to comply with the two conditions for implied consent. However, under international law, agreements that contravene *jus cogens*, including the right to self-determination,¹² are considered null and void from the outset (*tamquam non esset*).¹³ If the agreements violated the peremptory norm of self-determination, they should be considered null *ab initio*, so the effects of the annulment decision could not be suspended.

Instead, in the aftermath of the *Front Polisario II* decision, the Commission President *Ursula von der Leyen* and the (now former) Vice-President and High Representative *Josep Borrell* issued a joint statement reaffirming the EU's "strategic partnership" with Morocco and emphasizing the principle of *pacta sunt servanda*.¹⁴ They suggested that, despite the CJEU ruling, cooperation would continue. The European Council also reaffirmed "the high value the European Union attaches to its strategic partnership with Morocco" and reiterated "the need to preserve and continue strengthening close relations with Morocco in all areas of the Morocco-EU partnership."¹⁵ This highlights the tensions between the judicial and political branches of the EU, with the latter undermining the former's efforts to uphold international law.¹⁶ Perhaps in the attempt to reconcile these frictions, the Court introduced the benefit test as a proxy for implied consent which opens the door for future EU-Morocco deals bypassing self-determination. This

¹⁰ Cf. [Sebastian von Massow, 'Joined Cases C-779/21 P, Commission v Front Polisario and C-799/21 P, Council v Front Polisario: The Unresolved Contest Between "Benefits" and "Consent"' \(Ejil:Talk!, 23 October 2024\).](#)

¹¹ [CJEU, *Kadi and Al Barakat International Foundation v Council and Commission \(Kadi I\)* \(Joined Cases C-402/05 P and C-415/05 P\), Judgment of the Court \(Grand Chamber\), 3 September 2008.](#)

¹² [See International Court of Justice, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion of 19 July 2024, para. 233.](#)

¹³ [See Vienna Convention on the Law of Treaties \(opened for signature 23 May 1969, entered into force 27 January 1980\) 1155 UNTS 331, art. 53.](#)

¹⁴ [European Commission, 'Joint Statement by President von der Leyen and High Representative/Vice-President Borrell on the European Court of Justice Judgements Relating to Morocco' \(4 October 2024\).](#)

¹⁵ [European Council Conclusions of 17 October 2024, para. 51.](#)

¹⁶ [Pola Cebulak & Kushtrim Istrefi, 'The Polisario II Judgment: Tensions with International Law and with the EU Political Institutions' \(EULawLive, 4 December 2024\).](#)

approach, coupled with the Commission's position, raises concerns about EU compliance with international law, especially given the legal requirement to respect WS' status as a NSGT, and the Sahrawi people's right to self-determination.

6. Conclusion

The CJEU's decision represents a legal victory with bittersweet taste for FP and the Sahrawi people. With high-level EU officials signalling continued support for Morocco, this legal victory may not translate into immediate political action. Nonetheless, the ruling has been welcomed by the Sahrawi people. The CJEU acknowledged FP as a legitimate actor with standing to challenge EU agreements, strengthening FP's position in future negotiations, and reconfirmed the Sahrawi people's right to self-determination in unequivocal terms. Moreover, in another judgment delivered on the same day, the Court ruled that products originating from WS must be labelled as such to clearly distinguish them from Moroccan products.¹⁷ Overall, the judgment can be viewed as a significant step forward in the Sahrawi people's long struggle for self-determination, and a further recognition of FP's legitimacy as the people's representative in the international scene.

¹⁷ [CJEU, *Confédération paysanne v Ministre de l'Agriculture et de la Souveraineté alimentaire, Ministre de l'Économie, des Finances et de la Souveraineté industrielle et numérique* \(Case C-399/22\), Judgment of the Court \(Grand Chamber\), 4 October 2024.](#)