



## ARTICLES

# THE *COUNCIL V. FRONT POLISARIO* CASE: THE COURT OF JUSTICE'S SELECTIVE RELIANCE ON INTERNATIONAL RULES ON TREATY INTERPRETATION (SECOND PART)

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ABSTRACT: In the context of the debate on the relationship between EU and international law, it has been observed in the literature that the Court's approach to international law seems to have shifted over time. It has been argued that, although in its earlier case-law the Court seemed to have adopted a friendly and open attitude towards international law, more recent case-law evidences a more reserved, inward-looking attitude and a tendency to eschew engagement therewith. In this context, the Court's judgment in *Front Polisario* is highly relevant since the Court relied heavily on international rules on treaty interpretation and, thus, the judgment provides important insights into how the Court treats international law in its practice. This *Article* discusses the findings of the Court and argues that the Court's reliance on international law was artificial and selective. The *Article* concludes by arguing that, ultimately, the *Front Polisario* judgment lends evidentiary force to critical voices in the literature that have casted doubt on the image of the EU, as evidenced by the jurisprudence of its principal judicial organ, as an actor maintaining a distinctive commitment to international law.

KEYWORDS: relationship between international and EU law – treaty interpretation – territorial scope of treaties – *pacta tertiis* principle – non-self-governing territory – right to self-determination.

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## I. INTRODUCTION

On December 21<sup>st</sup>, 2016, the Court of Justice delivered its long-awaited appeals judgment in the *Front Polisario* case.<sup>1</sup> The Grand Chamber overturned the General Court's judgment rendered a little over a year ago and analysed earlier in this journal by the same author.<sup>2</sup> It decided that Front Polisario, the main Sahrawi liberation movement, did not have legal standing to bring an action for annulment against the Council decision<sup>3</sup> adopting the 2010 EU-Morocco Agreement on agricultural, processed agricultural and fisheries products ("Liberalization Agreement")<sup>4</sup> since neither the Liberalization Agreement nor the 1996 EU-Morocco Association Agreement<sup>5</sup> (on which the former is based) legally apply to the territory of Western Sahara.<sup>6</sup>

The judgment is highly important for a number of reasons. First, the judgment will greatly impact on EU-Morocco relations. While Front Polisario's action has been dismissed as inadmissible, the judgment can hardly be seen as a victory either for the Council or for Morocco. As it will be explained in detail below, the Court unequivocally asserted that, by virtue of the right of the people of Western Sahara to self-determination, Western Sahara and Morocco constitute distinct territories and as such, the former is not included within the territorial scope of the agreements concluded between the EU and Morocco.<sup>7</sup> This not only undermines Morocco's long-standing claim

<sup>1</sup> Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council of the European Union v. Front Polisario* [GC].

<sup>2</sup> General Court, judgment of 10 December 2015, case T-512/12, *Front Polisario v. Council of the European Union*. For analysis, see E. KASSOTI, *The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration*, in *European Papers*, 2017, www.europeanpapers.eu, p. 339 *et seq.* See also S. HUMMELBRUNNER, A.-C. PRICKARTZ, *It's not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union*, in *Utrecht Journal of International and European Law*, 2016, pp. 19-40.

<sup>3</sup> Council Decision 2012/497/EU of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part.

<sup>4</sup> Agreement of 13 December 2010 in the form of an Exchange of Letters between the European Community and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 of and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part. (Hereinafter referred to as the "Liberalization Agreement").

<sup>5</sup> Euro-Mediterranean Agreement of 26 February 1996 establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (hereinafter referred to as the "Association Agreement").

<sup>6</sup> *Council of the European Union v. Front Polisario* [GC], cit., paras 92, 123, 132, 133.

<sup>7</sup> *Ibid.*, para. 92.

that Western Sahara constitutes an integral part of its territory,<sup>8</sup> but also requires a careful recasting of EU-Morocco trade relations. As it became apparent from the proceedings, the relevant agreements have been *de facto* applied to the territory in question<sup>9</sup> and as a result, a number of products originating from Western Sahara have in fact ended up in European markets labelled as coming “from Morocco”.<sup>10</sup> The EU and Morocco are now finding themselves in the difficult position of adjusting their actual practice on the ground to match the legal findings of the Court. The sober tone of the EU-Moroccan joint statement on the Court’s ruling reflects the realization of the hurdles that lie ahead for both parties.<sup>11</sup> According to the statement, “both parties will examine all possible implications of the Court’s judgment and will work together on any issue relating to its implementation”.<sup>12</sup> The effect of the judgment on EU-Morocco trade relations could be far-reaching as there are currently two further actions pending before the Court concerning the validity of the 2006 Fisheries Partnership between the EU and Morocco<sup>13</sup> and of the Council Decision on the conclusion of the 2013 Protocol to the 2006 Fisheries Partnership,<sup>14</sup> insofar as these instruments are applicable to the territory

<sup>8</sup> *Front Polisario v. Council of the European Union*, cit., para. 100.

<sup>9</sup> *Ibid.*, paras 77, 83, 87. *Council of the European Union v. Front Polisario* [GC], cit., para. 121.

<sup>10</sup> In 2012, the NGO, Western Sahara Resource watch (“WSRW”), published a report showing that one of the biggest supermarket chains in the Netherlands, Albert Heijn, imports from Morocco part of their tomato range originating from Dakhla, Western Sahara, and sells them labeled as “from Morocco”. See WSRW, report of 18 June 2012, *Label and Liability – How the EU turns a blind eye to falsely stamped agricultural products made by Morocco in occupied Western Sahara*, [www.vastsaharaaktion.se](http://www.vastsaharaaktion.se), p. 12. See also the 2012 statement by the Dutch Minister for Foreign Affairs, U. Rosenthal: “It is possible that products from Western Sahara carrying the label ‘from Morocco’ can be found in Dutch supermarkets”. Reply, also on behalf of the State Secretary for Economic Affairs, Agriculture and Innovation, by Dr. U. Rosenthal, Minister for Foreign Affairs, to questions from Member of Parliament Van Bommel (Socialist Party), of 20 August 2012, available at [www.wsrw.org](http://www.wsrw.org) (translation by the author).

<sup>11</sup> Joint Statement of 21 December 2012 by the High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the Commission F. Mogherini and the Minister for Foreign Affairs and Cooperation of the Kingdom of Morocco Salahddine Mezouar, available at [eeas.europa.eu](http://eeas.europa.eu).

<sup>12</sup> *Ibid.* (translation by the author).

<sup>13</sup> Court of Justice, application lodged on 13 May 2016, case C-266/16, *Western Sahara Campaign UK v. Commissioners for Her Majesty’s Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs* (case pending). This is a preliminary reference ruling concerning the validity of the 2006 Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco. For an analysis of the legality under international law of the Fisheries Partnership Agreement, see E. CANNIZZARO, *A Higher Law for Treaties?*, in E. CANNIZZARO (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford: Oxford University Press, 2011, pp. 430-431; V. CHAPAUX, *The Question of the European Community-Morocco Fisheries Agreement*, in K. ARTS, P.P. LEITE (eds), *International Law and the Question of Western Sahara*, Leiden: International Platform of Jurists for East Timor, 2009, p. 217.

<sup>14</sup> General Court, application lodged on 14 March 2014, case T-180/14, *Front Polisario v. Council* (case pending). This is an action for annulment brought by Front Polisario against Council Decision 2013/785/EU of 16 December 2013 on the conclusion, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and

of Western Sahara. If the same line of reasoning is followed and the relevant instruments are found to be legally inapplicable to Western Sahara, this could potentially have a significant impact on the pattern of trade between the two parties.

Secondly, the importance of the judgment for the Sahrawi people themselves cannot be overstated. Forty-one years after the International Court of Justice's (ICJ) advisory opinion on *Western Sahara*,<sup>15</sup> another major international judicial body upheld in no uncertain terms the right of the Sahrawi people to self-determination.<sup>16</sup> It is hardly surprising that Front Polisario hailed the judgment as a "momentous victory" for the Sahrawi people and has called for "immediate discussions" in the hope that "the conditions will be met, in order to turn the page, and to finally act in respect of the rights of the Sahrawi people".<sup>17</sup>

Thirdly, the judgment rendered by the Court of Justice is also significant in the context of the burgeoning debate on the Court's approach to international law. It has been observed in the literature that the Court's approach to international law seems to have shifted over time.<sup>18</sup> Although in its earlier case-law the Court seemed to have adopted a friendly and open attitude towards international law,<sup>19</sup> more recent case-law, especially after *Kadi*,<sup>20</sup> evidences a more reserved, inward-looking attitude and a tendency to shield the autonomy of the EU legal order by eschewing engagement with international law.<sup>21</sup> More particularly, when it comes to the question of the validity of EU norms conflicting with international obligations, it has been observed that "the Court's general reluctance entails that there are few cases where EU law has been invalidated, in whole or

financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco.

<sup>15</sup> International Court of Justice, *Western Sahara*, advisory opinion of 16 October 1975, para. 12.

<sup>16</sup> *Council of the European Union v. Front Polisario* [GC], cit., paras 88-91.

<sup>17</sup> Front Polisario, *Court of Justice of the European Union: EU-Morocco Agreements do not apply to Western Sahara*, Preliminary Statement ahead of the Press Conference of 22 December 2016, [www.wsrw.org](http://www.wsrw.org).

<sup>18</sup> J. ODERMATT, *The Court of Justice of the European Union: International or Domestic Court?*, in *Cambridge Journal of International and Comparative Law*, 2014, pp. 699-700; C. ECKES, *International Law as Law of the EU: The Role of the European Court of Justice*, in E. CANNIZZARO, P. PALCHETTI, R. WESSEL (eds), *International Law as Law of the European Union*, Leiden: Martinus Nijhoff, 2012, p. 364.

<sup>19</sup> See generally A. ROSAS, *With a Little Help from My Friends: International Case-Law as a Source of Reference for EU Courts*, in *The Global Community Yearbook of International Law and Jurisprudence*, 2005, p. 203; R. HIGGINS, *The ICJ, the ECJ, and the Integrity of International Law*, in *International and Comparative Law Quarterly*, 2003, p. 1.

<sup>20</sup> Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [GC].

<sup>21</sup> C. ECKES, *International Law as Law of the EU: The Role of the European Court of Justice*, cit., p. 368; G. DE BÚRCA, *The European Court of Justice and the International Legal Order After Kadi*, in *Harvard International Law Journal*, 2010, p. 5; J. KLABBERS, *Völkerrechtsfreundlichkeit? International Law and the EU Legal Order*, in P. KOUTRAKOS (ed.), *European Foreign Policy*, Cheltenham: Edward Elgar Publishing, 2011, pp. 95, 97; J. KLABBERS, *The European Union in International Law*, Paris: A. Pedone, 2012, p. 77.

in part, due to incompatibilities with international law".<sup>22</sup> The *Front Polisario* judgment directly feeds into this debate, as the Court largely relied on international law rules on treaty interpretation in order to establish the territorial scope of the Association and Liberalization Agreements.

In this light, the *Article* discusses the findings of the Court of Justice and focuses on how the Court treated international law in its reasoning. The main argument advanced here is that the Court's reliance on international law was artificial and selective. In an obvious attempt to evade a politically sensitive issue, the Court relied selectively on international rules on treaty interpretation in order to limit the legal applicability of the EU-Morocco agreements to the latter's territory, while stopping short of addressing the *de facto* application of the agreements to Western Sahara. The *Article* concludes by arguing that, ultimately, the *Front Polisario* judgment lends evidentiary force to critical voices in the literature that have casted doubt on the image of the EU, as evidenced by the jurisprudence of its principal judicial organ, as an actor maintaining a distinctive commitment to international law.

## II. THE *FRONT POLISARIO* JUDGMENT

The basic facts of the *Front Polisario* case are as follows: Western Sahara is a non-self-governing territory that has been under Moroccan occupation since Morocco invaded it in 1975.<sup>23</sup> Despite an ICJ advisory opinion<sup>24</sup> and numerous UN Security Council and General Assembly resolutions<sup>25</sup> affirming the Sahrawi peoples' right to self-determination, a political solution regarding the future of Western Sahara has not yet been reached and the territory remains under Moroccan control. In 1996, the EU and Morocco concluded the Euro-Mediterranean Agreement establishing an association between the EU and its Member States on the one hand and Morocco on the other ("Asso-

<sup>22</sup> J. KLABBERS, *The Validity of EU Norms Conflicting with International Obligations*, cit., p. 130.

<sup>23</sup> See generally T.M. FRANCK, *The Stealing of the Sahara*, in *American Journal of International Law*, 1976, p. 694. The UN General Assembly has twice characterized the presence of Morocco in Western Sahara as "occupation". See General Assembly: Resolution 34/37 of 21 November 1979, UN Doc. A/RES/34/37, para. 5; Resolution 35/19 of 11 November 1980, UN Doc. A/RES/35/19, para. 3. In the literature it is also widely accepted that Western Sahara is a non-self-governing territory under Moroccan occupation. See for example C. CHINKIN, *Laws of Occupation*, in N. BOTHA, M. OLIVIER, D. VAN TONDER (eds), *Multilateralism and International Law with Western Sahara as a Case Study*, Pretoria: UNISA, 2010, p. 196; B. SAUL, *The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources*, in D. KINGSBURY (ed.), *Western Sahara: International Law, Justice and Natural Resources*, London: Routledge, 2016, p. 47.

<sup>24</sup> *Western Sahara*, cit., para. 162.

<sup>25</sup> See Resolution 34/37 (1979), cit., para. 1; Resolution 35/19 (1980), cit., para. 1. See also Security Council: Resolution 1979 of 27 April 2011, UN Doc. S/RES/1979, para. 6; Resolution 2285 of 29 April 2016, UN Doc. S/RES/2285, para. 9.

ciation Agreement").<sup>26</sup> In 2010 a further treaty was concluded between the two parties, the Liberalization Agreement,<sup>27</sup> the purpose of which was to implement the progressive liberalization of trade in agricultural and fishery products provided for under the Association Agreement.<sup>28</sup>

In 2012, Front Polisario, the main Sahrawi liberation movement, filed an action for annulment against the Council Decision adopting the Liberalization Agreement,<sup>29</sup> on the grounds that it was incompatible with EU law and international law binding on the EU, including the right to self-determination and the principle of permanent sovereignty over natural resources.<sup>30</sup> At first instance, the General Court held that the context in which the Liberalization Agreement was concluded and the subsequent practice of the parties corroborated the conclusion that the territorial scope of the Liberalization Agreement extended to Western Sahara.<sup>31</sup> On this basis, the General Court held that the applicant, an entity enjoying legal personality as it had been treated as a distinct person by the EU institutions,<sup>32</sup> was directly and individually concerned by the contested decision as the only other participant in the UN-brokered negotiations between it and Morocco regarding the status of the territory.<sup>33</sup> In substance, the General Court held that the Council's decision was vitiated by illegality since the Council failed to carefully examine all the relevant facts before adopting the contested decision.<sup>34</sup> In particular, the Council "should have satisfied itself that there was no evidence of an exploitation of the natural resources of the territory of Western Sahara under Moroccan control likely to be to the detriment of its inhabitants and to infringe their fundamental rights". Consequently, the General Court partially annulled the decision in so far as it approved the application of the Agreement to the territory of Western Sahara.<sup>35</sup>

In the judgment on appeal, the Court of Justice pursued a different line of argumentation. The Court of Justice ruled that the General Court erred in law by interpreting the territorial scope of the Liberalization Agreement as extending to Western Sahara. It stressed that the General Court failed to take into account Art. 31, para. 3, let. c), of the 1969 Vienna Convention on the Law of Treaties ("VCLT"),<sup>36</sup> pursuant to which the interpretation of a treaty must be carried out by taking into account "any relevant rules of international law

<sup>26</sup> Association Agreement, cit.

<sup>27</sup> Liberalization Agreement, cit.

<sup>28</sup> *Council of the European Union v. Front Polisario* [GC], cit., para. 18.

<sup>29</sup> Council Decision 2012/497/EU, cit.

<sup>30</sup> *Front Polisario v. Council of the European Union*, cit., para. 115.

<sup>31</sup> *Ibid.*, paras 73-103.

<sup>32</sup> *Ibid.*, paras 46-60.

<sup>33</sup> *Ibid.*, paras 61-114.

<sup>34</sup> *Ibid.*, paras 223-248.

<sup>35</sup> *Ibid.*, para. 247.

<sup>36</sup> Vienna Convention on the Law of Treaties of 23 May 1969.

applicable in the relations between the parties".<sup>37</sup> The Court of Justice pointed out three relevant rules of applicable international law that the General Court failed to take into account: the right to self-determination; Art. 29 VCLT relating to the territorial scope of international agreements; and the principle of the relative effect of treaties (the principle of *pacta tertiis*).<sup>38</sup> It then proceeded to interpret the Liberalization Agreement in the light of these rules and found that the territorial scope of the Agreement did not legally extend to Western Sahara.<sup>39</sup> In this light, it held that Front Polisario did not have legal standing to bring an action of annulment against the Council Decision approving the Liberalization Agreement and accordingly, it dismissed its action as inadmissible.<sup>40</sup>

### III. THE COURT'S RELIANCE ON INTERNATIONAL RULES ON TREATY INTERPRETATION

In this case, the Court of Justice set out to interpret the territorial scope of the Association and Liberalization Agreements on the basis of Art. 31 VCLT. However, the Court's approach to treaty interpretation leaves much to be desired. This *Article* identifies and discusses three main problems pertaining to the Court's application of the Vienna rules on treaty interpretation. First, the excessive reliance on Art. 31, para. 3, let. c), VCLT and the reluctance to engage with the other means of interpretation enshrined therein not only evidences a degree of unfamiliarity with treaty interpretation, but also undermines the very outcome of the Court's interpretative process. Secondly, it is questionable to what extent the rules invoked and relied on by the Court constitute in reality "relevant rules of international law applicable in the relations between the parties". The *Article* argues that, upon further scrutiny, none of the rules invoked by the Court could inform its interpretation of the territorial scope of the agreements at hand. Thirdly, and more importantly, the Court's refusal to engage with the "subsequent practice" of the parties under Art. 31, para. 3, let. b), VCLT calls into question its findings. As it will be shown, there is enough evidence to suggest that, in their subsequent practice, the EU and Morocco considered Western Sahara as falling within the territorial scope of their agreements and, at the very minimum, the Court should have explained why this practice is not relevant for the purpose of interpretation. Overall, the Court's selective use of certain elements of Art. 31 VCLT and the blatant refusal to engage with other elements contained therein that point towards a different interpretative result, vindicates the view that "while the Court constantly affirms that the EU legal order is part of the international legal order [...] [it] is very adept at finding ways to sanctify the EU legal order nonetheless".<sup>41</sup>

<sup>37</sup> *Council of the European Union v. Front Polisario* [GC], cit., para. 86.

<sup>38</sup> *Ibid.*, para. 87.

<sup>39</sup> *Ibid.*, paras 86-127.

<sup>40</sup> *Ibid.*, paras 131-134.

<sup>41</sup> J. KLABBERS, *The Validity of EU Norms Conflicting with International Obligations*, cit., p. 130.

### III.1. GENERAL OBSERVATIONS ON THE COURT'S METHOD OF TREATY INTERPRETATION: THE COURT AND THE "CRUCIBLE" APPROACH TO TREATY INTERPRETATION

From the outset, a general remark regarding the Court's method of treaty interpretation needs to be made. In a nutshell, the absence of an express territorial clause in the Liberalization Agreement meant that the Court had to fall back on the territorial clause contained in the Association Agreement (Art. 94), which was then interpreted in the light of "relevant rules of international law applicable in the relations between the parties", according to Art. 31, para. 3, let. c), VCLT. Thus, the Court of Justice approached the question of interpretation of the territorial scope of the Association Agreement and, by extension, that of the Liberalization Agreement, largely through the lens of Art. 31, para. 3, let. c), VCLT; the principle of self-determination, the "territorial scope" rule codified in Art. 29 VCLT, and the *pacta tertiis* principle were invoked in order to buttress the finding of legal inapplicability of the Liberalization Agreement to the territory of Western Sahara. Although the Court briefly touched upon the question of the impact of the "subsequent practice of the parties" (Art. 31, para. 3, let. b), VCLT) on the interpretation of the Agreement, this was only done in a cursory fashion for the purpose of rebutting the General Court's relevant argumentation and no detailed discussion thereof is to be found in the judgment.<sup>42</sup> Similarly, the judgment does not evidence any sort of engagement with the other means of interpretation listed in Art. 31 VCLT.

The Court's excessive reliance on Art. 31, para. 3, let. c), VCLT and the fact that it paid little or no attention to other elements contained therein go against the interpretative process envisaged thereunder; a process that is predicated on the combined application of *all* means of interpretation set out in Art. 31.<sup>43</sup> The proposition that the different elements of interpretation contained in Art. 31 VCLT are to be viewed and applied together and not in bits is verified by the fact that Art. 31 is entitled "General *rule* of interpretation" in the singular, and not "General *rules* of interpretation" in the plural. According to the International Law Commission (ILC), the choice of the heading of the article was deliberate. In its view,

"the application of the means of interpretation in the article would be a single and combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation [...] [T]he Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule".<sup>44</sup>

<sup>42</sup> *Council of the European Union v. Front Polisario* [GC], cit., paras 117-125.

<sup>43</sup> Draft Articles on the Law of Treaties with commentaries, text adopted by the International Law Commission at its 18<sup>th</sup> session, 1966, in *1966 Yearbook of the ILC*, Vol. II, p. 219, para. 8. See also R. GARDINER, *Treaty Interpretation*, Oxford: Oxford University Press, 2015, pp. 31-32.

<sup>44</sup> *Ibid.*, pp. 219-220, para. 8.



This “crucible approach” to treaty interpretation has been taken up by international adjudicatory bodies whose practice confirms that interpretation under Art. 31 VCLT is a legal operation that requires: a) that all elements of the article should be evaluated together; and b) that no firm conclusion based on particular elements should be reached before the conclusion of the interpretative process.<sup>45</sup> The arbitral tribunal in *Aguas del Tunari v. Bolivia* summarized the ILC approach most succinctly:

“Interpretation under Article 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty’s object and purpose, and by cycling through this three step inquiry iteratively closes in upon the proper interpretation”.<sup>46</sup>

The *Council v. Front Polisario* judgment shows no evidence of the “crucible approach” to treaty interpretation. Rather than starting with the treaty terms and applying the whole process of the Vienna rules systematically, while keeping open the interpretation until the very end of the process, the Court relied almost exclusively on Art. 31, para. 3, let. c), VCLT. This not only shows the Court’s unfamiliarity with the operation of Art. 31 VCLT,<sup>47</sup> but it is also hardly reconcilable with the aim of treaty interpretation in general. According to the ICJ, treaty interpretation is a legal operation that aims at establishing “the *intentions* of the parties as reflected by the text of the treaty and the other relevant factors in terms of interpretation”.<sup>48</sup> Thus, arguably, the excessive focus placed on Art. 31, para. 3, let. c), VCLT transformed the interpretive process from a quest to establish objectively the intention of the parties to a quest for the “relevant rules of international law applicable in the relations between the parties”. More importantly, the Court’s approach calls into question the very outcome of this process. As it will be shown below, had the Court evaluated all the elements of Art. 31 in a holistic fashion, as it was meant to do, it might have reached a different conclusion regarding the interpretation of the territorial scope of the Liberalization Agreement.

<sup>45</sup> S. TORRES BERNÁRDEZ, *Interpretation of Treaties by the International Court of Justice following the Adoption of the 1969 Vienna Convention on the Law of Treaties*, in G. HAFNER, A. REST, G. LOIBL, K. ZEMANEK, L. SUCHAPIRA-BEHRMANN (eds), *Liber Amicorum Ignaz Seidl-Hohenveldern in honour of his 80<sup>th</sup> Birthday*, The Hague: Kluwer Law International, 1998, p. 726. See also ICSID, award of 21 October 2005, case no. ARB/02/03, *Aguas del Tunari v. Bolivia*, para. 91. WTO, Appellate Body report of 12 September 2005, case no. AB-2005-5, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, para. 177.

<sup>46</sup> *Aguas del Tunari v. Bolivia*, cit.

<sup>47</sup> According to Gardiner, in its interpretive practice pertaining to international agreements concluded with non-Member States, the ECJ “has not overtly progressed beyond the first paragraph of article 31 of the Vienna Convention”; R. GARDINER, *Treaty Interpretation*, cit., p. 138.

<sup>48</sup> International Court of Justice, *Dispute Regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), judgment of 13 July 2009, para. 48 (emphasis added).

### III.2. THE COURT'S RELIANCE ON THE RIGHT TO SELF-DETERMINATION OF PEOPLES OF NON-SELF-GOVERNING TERRITORIES

One of the most striking aspects of the judgment is that, although the Court largely relied on Art. 31, para. 3, let. c), VCLT in order to interpret the territorial scope of the agreements at bar, it refrained from identifying and setting out its own understanding of the elements contained in that provision. More problematically, it failed to test the rules it invoked against the background of those elements in order to ensure that, indeed, these rules constitute "relevant rules of international law applicable in the relations between the parties". This omission renders the Court's interpretation of the territorial scope of the Association Agreement on the basis of the right to self-determination of the peoples of Western Sahara, as a non-self-governing territory, particularly problematic.

The Court (correctly) found that the right of peoples to self-determination is a right *erga omnes* and as such it is applicable to the relations between the EU and Morocco.<sup>49</sup> It then relied on the Friendly Relations Declaration,<sup>50</sup> according to which a non-self-governing territory has "under the [UN] Charter, a status separate and distinct from the territory of the State administering it" in order to conclude that the Association Agreement cannot be interpreted in such a way that Western Sahara is included within its territorial scope.<sup>51</sup>

Two points merit attention here. First, the Court's finding is premised on the assumption that the legal status of non-self-governing territories (as entities separate and distinct from the States administering them) also implies that these entities enjoy some form of territorial sovereignty; any other inference would run counter to the finding of legal inapplicability of the Association Agreement to the territory of Western Sahara *exactly because* of its status as a non-self governing territory. According to the Court:

"In view of the separate and distinct status accorded to the territory of Western Sahara by virtue of the principle of self-determination, *in relation to that of any State*, including the Kingdom of Morocco, the words 'territory of the Kingdom of Morocco' set out in Article 94 of the Association Agreement cannot [...] be interpreted in such a way that Western Sahara is included within the territorial scope of the agreement".<sup>52</sup>

However, the Friendly Declaration's reference to the "distinct and separate status" of non-self-governing territories is generally understood to mean that these territories enjoy a separate *legal* status, i.e. a measure of international legal personality, and not necessarily a separate *territorial* status.<sup>53</sup> In this sense, the Declaration has served as

<sup>49</sup> *Council of the European Union v. Front Polisario* [GC], cit., paras 88-89.

<sup>50</sup> General Assembly, Resolution 25/2625 of 24 October 1970, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, UN Doc. A/RES/25/2625.

<sup>51</sup> *Council of the European Union v. Front Polisario* [GC], cit., paras 88-89.

<sup>52</sup> *Ibid.*, para. 92.

<sup>53</sup> J. CRAWFORD, *The Creation of States in International Law*, Oxford: Clarendon Press, 2006, pp. 618-619.

the basis for allowing separate representation of peoples of non-self-governing territories by the Organization of African Unity (OAU) or the UN.<sup>54</sup> Overall, neither Chapter XI of the UN Charter (dealing with non-self-governing territories), nor the Friendly Relations Declaration address matters of territorial title as such, as their focus lies with the development of these territories and the people concerned.<sup>55</sup> The question of territorial sovereignty over non-self-governing territories remains a controversial one and there is evidence to suggest that sovereignty remains with the administering State.<sup>56</sup> The ICJ dealt with the question of sovereignty over non-self-governing territories in the *Right of Passage* case and it clearly accepted that the administering power retained sovereignty over the territory in question.<sup>57</sup> Furthermore, in its advisory opinion on *Western Sahara*, the Court clarified that the request, pertaining to the future status of the non-self-governing territory in question, did not relate to "existing territorial rights or sovereignty over the territory".<sup>58</sup> In the light of the indeterminacy surrounding questions of territorial sovereignty over non-self-governing territories, it is submitted that more by way of evidence should have been furnished by the Court in order to support the proposition that these entities enjoy a separate *territorial* status.

Secondly, the extract from the Friendly Relations Declaration cited by the Court of Justice, clearly refers to, and defines, the legal status of non-self-governing territories *vis-à-vis* their *administering* States. However, Morocco does not administer Western Sahara under Art. 73 of the UN Charter, but militarily occupies it.<sup>59</sup> The UN still recognizes Spain as the *de jure* administering power of Western Sahara,<sup>60</sup> and Spain relies on this status in order to extend its international jurisdiction in criminal matters to crimes committed in Western Sahara.<sup>61</sup>

On this basis, it is difficult to see how the rule invoked by the Court constitutes a relevant rule "applicable in the relations between the parties" for the purpose of informing its interpretation of the term "territory of the Kingdom of Morocco". A closer examination of the scope and content of the right to self-determination further buttresses

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*, p. 613.

<sup>56</sup> *Ibid.* See also A. SCHWED, *Territorial Claims as a Limitation to the Right of Self-Determination in the Context of the Falkland Islands Dispute*, in *Fordham International Law Journal*, 1982, p. 443. *Contra* I. LUKASHUK, *Parties to Treaties – The Right to Participation*, in *Recueil des cours de l'Académie de droit international*, vol. I, 1972, pp. 254-255.

<sup>57</sup> International Court of Justice, *Case concerning Right of Passage over Indian Territory* (Portugal v. India), judgment of 12 April 1960, para. 39.

<sup>58</sup> *Western Sahara*, *cit.*, para. 43.

<sup>59</sup> See footnote 25.

<sup>60</sup> Report of the Secretary General of the 1 February 2016, *Information from Non-Self-Governing Territories transmitted under Article 73 e of the Charter of the United Nations*, UN Doc. A/71/68.

<sup>61</sup> Opinion of AG Wathelet delivered on 13 September 2016, case C-104/16 P, *Council of the European Union v. Front Polisario*, para. 191.

this conclusion. By virtue of this right, peoples are to “freely determine their political status” and to “freely pursue their economic, social and cultural development”.<sup>62</sup> However, as Cassese stresses, “the principle points neither to the various specific areas in which self-determination should apply, nor to the final goal of self-determination (internal self-government, independent statehood, association with or integration into another State, or the free choice of any other political status)”.<sup>63</sup> In this light, self-determination, as a principle setting out the *method* by which States must make decisions concerning peoples, i.e. by taking into account their freely expressed will,<sup>64</sup> can hardly be viewed in and of itself as a rule *relevant* to the interpretation of the territorial scope of the Liberalization Agreement.<sup>65</sup>

### III.3. THE COURT’S RELIANCE ON ART. 29 VCLT

Apart from the right to self-determination, the Court of Justice also grounded its interpretation of the territorial scope of the Association Agreement in Art. 29 VCLT. The text of the article provides that “unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory”. According to the Court, the general rule enshrined in Art. 29 VCLT is that a treaty, in principle, applies to the geographical space where a State exercises its full sovereign powers.<sup>66</sup> In the Court’s view, whenever an international agreement is intended to produce extraterritorial effect, the wording of its territorial scope clause is formulated in such a way as to expressly provide for this effect.<sup>67</sup> Short of a provision expressly allowing the extraterritorial application of the Association Agreement to Western Sahara, it was concluded that the Agreement’s scope could not be understood as including that territory.<sup>68</sup>

The Court’s finding to the effect that Art. 29 VCLT creates a presumption against extraterritoriality is questionable and does not comport with the drafting history of the article. The ILC, in its commentary on the relevant article, made it abundantly clear that the matter of extraterritorial application of treaties was too complicated and it decided to leave it aside.<sup>69</sup> The Commission’s commentary reads:

<sup>62</sup> Art. 1 of the International Covenant on Civil and Political Rights, of 16 December 1966; Art. 1 of the International Covenant on Economic, Social and Cultural Rights of 16 December 1966.

<sup>63</sup> CASSESE, *International Law*, cit., p. 62.

<sup>64</sup> *Western Sahara*, cit., para. 162. CASSESE, *International Law*, cit., p. 62.

<sup>65</sup> “Relevant rules” within the meaning of Art. 31, para. 3, let. c), VCLT are rules that relate to “the same subject matter”. See WTO: Appellate Body report of 11 March 2011, case no. AB-2010-3, *United States – Definitive Anti-Dumping and Countervailing Duties of Certain Products from China*, paras 307-308; Appellate Body report of 18 May 2011, case no. AB-2010-1, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, para. 846.

<sup>66</sup> *Council of the European Union v. Front Polisario* [GC], cit., para. 95.

<sup>67</sup> *Ibid.*, para. 96.

<sup>68</sup> *Ibid.*, paras 96-97.

<sup>69</sup> Draft Articles on the Law of Treaties with commentaries, cit., pp. 213- 214, para. 5.

"[This] Article was intended by the Commission to deal only with the limited topic of the application of a treaty to the territory of the respective parties; [...] The preferable solution was to modify the title and text of the Article so as to make precise the limited nature of the rule. In its view, the law regarding the extra-territorial application of treaties could not be stated simply in terms of the intention of the parties or of a presumption as to their intention; and it considered that to attempt to deal with all the delicate problems of extraterritorial competence in the present Article would be inappropriate and inadvisable".<sup>70</sup>

Accordingly, it is widely acknowledged that Art. 29 VCLT does not create a presumption either in favour or against the extraterritorial application of a treaty, as the matter simply does not fall under the scope of the article.<sup>71</sup> In this light, the Court's conclusion that Art. 29 VCLT "precluded Western Sahara from being regarded as coming within the territorial scope of Association Agreement"<sup>72</sup> seems unsubstantiated.

#### III.4. THE COURT'S RELIANCE ON THE *PACTA TERTIIS* PRINCIPLE

The Court's interpretation and application of the *pacta tertiis* principle is also noteworthy. Here, the Court considered the peoples of Western Sahara as a "third party" (*tertius*) in relation to the EU and Morocco,<sup>73</sup> thereby extending the *pacta tertiis* rule to non-State actors, as it had done before in *Brita*.<sup>74</sup> As Art. 34 VCLT provides that "a treaty does not create either obligations or rights for a third State without its consent", the Association Agreement could not, in the Court's view, be interpreted as being applicable to the territory of Western Sahara to the extent that its people had not expressly consented thereto.<sup>75</sup> However, there are grounds to question the applicability of the principle to international legal persons other than States.

The *pacta tertiis* rule expresses "the fundamental principle that a treaty applies only between the parties to it";<sup>76</sup> and thus, treaties to which a State is not a party to are generally considered as *res inter alios acta* – a matter between others. The *raison d'être* of

<sup>70</sup> *Ibid.*

<sup>71</sup> S. KARAGIANNIS, *The Territorial Application of Treaties*, in D. HOLLIS (ed.), *The Oxford Guide to the Law of Treaties*, Oxford: Oxford University Press, 2012, p. 318. K. ODENDAHL, *Article 29*, in O. DÖRR, K. SCHMALENBACH (eds), *Vienna Convention on the Law of Treaties: A Commentary*, Heidelberg: Springer, 2012, p. 502; M. MILANOVIC, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*, Oxford: Oxford University Press, 2011, p. 11.

<sup>72</sup> *Council of the European Union v. Front Polisario* [GC], cit., para. 97.

<sup>73</sup> *Ibid.*, para. 106.

<sup>74</sup> Court of Justice, judgment of 25 February 2010, case C-386/08, *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen*, para. 52.

<sup>75</sup> *Ibid.*, paras 106-107.

<sup>76</sup> J. CRAWFORD, *Brownlie's Principles of Public International Law*, Oxford: Oxford University Press, 2012, p. 384.

the principle is to ensure that States should not be bound against their will,<sup>77</sup> something that would run counter to two core tenets of international law, namely sovereignty and sovereign equality.<sup>78</sup> Thus, in international law, the principle is viewed as “a corollary of the principles of sovereignty, equality and independence of States”.<sup>79</sup> The principle has been codified in Art. 34 VCLT which provides that “[a] treaty does not create either obligations or rights for a third State without its consent”. The text of the article clearly refers to “third States” and not to “third parties” in general and the ILC in its 1966 commentary highlighted the rule’s intrinsic link to the notion of State sovereignty:

“The rule underlying the present article appears originally to have been derived from Roman law in the form of the well-known maxim *pacta tertiis nec nocent nec prosunt* – agreements neither impose obligations nor confer rights upon third parties. In international law, however, the justification for the rule does not rest simply on this general concept of the law of contracts but on the *sovereignty and independence of States*”.<sup>80</sup>

Relevant legal literature suggests that the rule’s conceptual roots in the notions of State sovereignty and sovereign equality preclude its application to State-non-State actor relationships.<sup>81</sup> State practice also supports the proposition that there are exceptions to the *pacta tertiis* rule vis-à-vis non-State actors. States may create entities with legal personality by means of a treaty and subject them to international obligations. International organizations are a case in point. These actors, while possessing legal personality, are third parties in relation to their constitutive treaties and they may incur obligations (amongst other by means of their constitutive treaties) even absent their consent.<sup>82</sup>

Current theorizing on the legal basis underpinning the application of international humanitarian law treaties to non-State armed groups further supports the view that the *pacta tertiis* rule does not apply to non-State actors. Nowadays, the prevailing view is that non-State armed groups are bound by international humanitarian law treaties because they are active on the territory of States that have ratified these treaties and not

<sup>77</sup> Permanent Court of International Justice, *The Case of the “SS Lotus”*, judgment of 7 September 1927, para. 44.

<sup>78</sup> A. MACNAIR, *The Law of Treaties*, Oxford: Clarendon Press, 1961, p. 35.

<sup>79</sup> M. VILLIGER, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden: Martinus Nijhoff, 2009, p. 467.

<sup>80</sup> Draft Articles on the Law of Treaties with commentaries, cit., p. 226, para. 1 (emphasis added).

<sup>81</sup> D. MURRAY, *Human Rights Obligations of Non-State Actors*, Oxford: Hart Publishing, 2016, pp. 94-105; S. SIVAKUMARAN, *Binding Armed Opposition Groups*, in *International and Comparative Law Quarterly*, 2006, pp. 377-378.

<sup>82</sup> D. MURRAY, *How International Humanitarian Law Treaties Bind Non-State Armed Groups*, in *Journal of Conflict and Security Law*, 2014, p. 118; C. CHINKIN, *Third Parties in International Law*, Oxford: Clarendon Press, 1993, p. 12.

because they have consented thereto.<sup>83</sup> In the literature, the rejection of consent as a justification for the binding force of conventional international humanitarian law on non-State armed groups is premised exactly on the State-centric nature of the *pacta tertiis* rule; since the rule only applies between States, international humanitarian law treaties cannot be considered as *res inter alios acta* in relation to non-State actors operating on the territory of States that have ratified these treaties.<sup>84</sup> This view is corroborated by the practice of the International Committee of the Red Cross (ICRC). In its 2008 document entitled "Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts", the ICRC encourages armed groups to make declarations expressing their consent to comply with international humanitarian law in order to reinforce a sense of *ownership* over the relevant norms.<sup>85</sup> At the same time, the ICRC make it clear that these groups remain bound by international humanitarian law norms irrespective of whether they have consented thereto.<sup>86</sup> In this light, the Court's unqualified assertion that the *pacta tertiis* rule applies to relations between States and non-State actors seems to rest on thin evidentiary grounds.

### III.5. THE COURT'S APPROACH TO THE "SUBSEQUENT PRACTICE OF THE PARTIES": CIRCUMVENTING THE QUESTION OF THE *DE FACTO* APPLICATION OF THE AGREEMENT TO WESTERN SAHARA

From an international law point of view, the Court's reluctance to engage extensively with the parties' "subsequent practice in the application of the treaty" under Art. 31, para. 3, let. b), VCLT for the purpose of interpreting the territorial scope of the Association and Liberalization Agreements renders its findings questionable. The importance attached to the subsequent practice of the parties to a treaty in its interpretation constitutes one of the most distinctive features of the Vienna rules.<sup>87</sup> According to the ILC, "the importance of such subsequent practice in the application of a 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".<sup>88</sup> Treaty terms are given meaning by action and thus, the subsequent practice of the parties is the best evidence of

<sup>83</sup> D. MURRAY, *How International Humanitarian Law Treaties Bind Non-State Armed Groups*, cit., p. 118; S. SIVAKUMARAN, *Binding Armed Opposition Groups*, cit., pp. 381-386. See also A. CASSESE, *International Law*, Oxford: Oxford University Press, 2005, p. 64.

<sup>84</sup> D. MURRAY, *How International Humanitarian Law Treaties Bind Non-State Armed Groups*, cit., p. 118; S. SIVAKUMARAN, *Binding Armed Opposition Groups*, cit., pp. 381-386.

<sup>85</sup> M. MACK, J. PEJIC, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, 2008, www.icrc.org, p. 18.

<sup>86</sup> *Ibid.*

<sup>87</sup> R. GARDINER, *Treaty Interpretation*, cit., p. 253.

<sup>88</sup> Draft Articles on the Law of Treaties with commentaries, cit., p. 221, para. 15 (emphasis added).

their intention.<sup>89</sup> In the words of Simma: “While it is possible to manipulate the other methods [of interpretation] more or less according to the desired outcome, [...], if there exists – and this is a matter of fact – subsequent practice [...], there is, *lege artis*, simply no way to get around it”.<sup>90</sup>

International adjudicatory bodies routinely have recourse to the subsequent practice of the parties in interpreting treaty terms.<sup>91</sup> As the Iran-United States Claims Tribunal stressed: “[F]ar from playing a secondary role in the interpretation of treaties, the subsequent practice of the Parties constitutes an important element in the exercise of interpretation. In interpreting treaty provisions, international tribunals have often examined the subsequent practice of the parties”.<sup>92</sup> The Court has also recognized the relevance of the “settled practice of the parties to the Agreement” for the purpose of treaty interpretation<sup>93</sup> and it has even argued that “the subsequent practice followed in the application of a treaty may override the clear terms of that treaty if that practice reflects the parties’ agreement”.<sup>94</sup>

What is the role that the “subsequent practice” of the treaty parties can play in relation to other means of interpretation? International courts and tribunals use the subsequent practice of the parties in order to establish the “ordinary meaning” of a treaty term in accordance with Art. 31, para. 1, VCLT.<sup>95</sup> Alternatively, subsequent practice can enter the reasoning at a later stage, in order to confirm the result reached from the initial textual interpretation.<sup>96</sup>

The Court’s approach to the element of “subsequent practice” of the parties in the *Front Polisario* judgment does not reflect the importance attached thereto in international jurisprudence. Here, the Court did not take into account this element in establishing the ordinary meaning of the term “territory of the Kingdom of Morocco”, nor did it

<sup>89</sup> R. GARDINER, *Treaty Interpretation*, cit., p. 253.

<sup>90</sup> B. SIMMA, *Miscellaneous Thoughts on Subsequent Agreements and Practice*, in G. NOLTE (ed.), *Treaties and Subsequent Practice*, Oxford: Oxford University Press, 2013, p. 46.

<sup>91</sup> See for example International Court of Justice, *Case concerning Kasikili/Seduku Island* (Botswana v. Namibia), judgment of 13 December 1999, para. 50. WTO, Appellate Body report of 4 October 1996, case no. AB-1996-2, *Japan – Taxes on Alcoholic Beverages II*, pp. 12-13.

<sup>92</sup> Iran-United States Claims Tribunal, Interlocutory Award of 9 September 2004, no. ITC 83-B1-FT (Counterclaim) WL 2210709 (Iran-USCTR), *The Islamic Republic of Iran and the United States of America*, para. 111.

<sup>93</sup> Court of Justice, judgment of 30 November 1977, case C-52/77, *Leonce Cayrol v. Giovanni Rivoira & Figli*, para. 18; judgment of 5 July 1994, case C-432/92, *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others*, paras 43, 50.

<sup>94</sup> Court of Justice, judgment of 11 March 2015, case C-464/13, *Europäische Schule München v. Silvana Oberto and Barbara O’Leary*, para. 61.

<sup>95</sup> ILC, First Report on Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation of 19 March 2013, by Special Rapporteur G. Nolte, UN Doc A/CN.4/660, para. 46.

<sup>96</sup> ILC, Second Report on Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation of 26 March 2014, by Special Rapporteur G. Nolte, UN Doc A/CN.4/671, para. 21.



test the result of its initial textual interpretation against the background of this element in order to confirm its veracity. In a similar vein, the Court's dismissal of subsequent conduct by the EU and Morocco as mere *de facto* instances of application of the agreements at hand to the territory of Western Sahara<sup>97</sup> falls short of convincing since the Court failed to explain why these instances do not constitute subsequent practice within the meaning of Art. 31, para. 3, let. b), VCLT.

It is submitted that a careful examination of the subsequent practice of the parties in the application of the Association and Liberalization Agreements casts serious doubt on the Court's interpretation of their territorial scope. The second report produced by the Special Rapporteur of the ILC on the topic of "subsequent agreements and subsequent practice in relation to the interpretation of treaties" shows that, in order to establish whether certain conduct falls within the scope of Art. 31, para. 3, let. b), VCLT, the interpreters of a treaty are called on to identify whether there is a discernible pattern of acts and pronouncements that reflects the common understanding of the parties regarding the interpretation of a treaty term.<sup>98</sup> In this context, it needs to be stressed that, in assessing whether a certain practice establishes agreement within the meaning of Art. 31, para. 3, let. b), VCLT, it is not necessary that there has to be practice by *all* parties to the treaty. It suffices that there is practice by one of the parties and "subsequent responsive inaction" by the rest.<sup>99</sup> Courts, in their practice, often treat silence or lack of reaction by one party as acceptance of the practice of other parties to the treaty regarding its interpretation.<sup>100</sup>

In this light and on the basis of the evidence put forward to the Court, one can, arguably, identify a discernible pattern of acts and pronouncements that reflects the common understanding of the EU and Morocco that Western Sahara was included in the territorial scope of the agreements at hand *sub silentio*.<sup>101</sup> First, both the Council and the Commission expressly acknowledged during the proceedings that they were aware that Morocco had been applying the Association Agreement to Western Sahara for many years but they never opposed it.<sup>102</sup> Secondly, at the time of the conclusion of

<sup>97</sup> *Council of the European Union v. Front Polisario* [GC], cit., para. 121.

<sup>98</sup> Second Report on Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation, cit., paras 42-48, especially draft conclusion 8, para. 48. See also R. GARDINER, *Treaty Interpretation*, cit., pp. 254-257.

<sup>99</sup> R. GARDINER, *Treaty Interpretation*, cit., pp. 264-265.

<sup>100</sup> International Court of Justice, *Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), judgment of 15 June 1962, p. 23. Court of Arbitration, decision of 18 February 1977, *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, Reports of International Arbitral Awards, Vol. XXI, part II, p. 187, para. 169, let. a).

<sup>101</sup> The same conclusion has been reached by E. KONTOROVICH, *Economic Dealings with Occupied Territories*, in *Columbia Journal of Transnational Law*, 2015, p. 604. See also S. KOURY, *The European Community and Member States' Duty of Non-Recognition under the EC-Morocco Association Agreement: State Responsibility and Customary International Law*, in K. ARTS, P.P. LEITE (eds), *International Law and the Question of Western Sahara*, cit., pp. 188-190.

<sup>102</sup> *Council of the European Union v. Front Polisario* [GC], cit., para. 118.

the Liberalization Agreement, both institutions were not only aware of the *de facto* application of the Association Agreement to the territory in question for a long period of time, but also of Morocco's territorial claim over Western Sahara.<sup>103</sup> As the Council stated at the hearing: "When the Agreement was concluded [...], there was no doubt among [its] members that [the Kingdom of Morocco considered Western Sahara to be part of its territory]".<sup>104</sup> Despite this, no clause expressly excluding the territory from the territorial scope of the Liberalization Agreement was inserted. Thirdly, in its judgment the Court conceded that the system of tariff preferences introduced by the Association Agreement and amended by the Liberalization Agreement is, in practice, applied to products originating in Western Sahara since the conclusion of the latter Agreement.<sup>105</sup> Finally, it was openly admitted that the Commission not only "never opposed the application" of the Association Agreement to Western Sahara, but also that it "to some extent cooperated therein"<sup>106</sup> by approving the inclusion of a number of Moroccan exporters located in Western Sahara to the list of approved exporters under the Association Agreement<sup>107</sup> and by allowing its officials to occasionally visit Western Sahara in order to check the compliance of Moroccan authorities with EU health standards.<sup>108</sup>

The above constitutes compelling evidence of a combination of action by Morocco (application of the agreements to the territory of Western Sahara) and lack of reaction by the EU, which, in accordance with international jurisprudence, should have been construed as acquiescence to the interpretation of the territorial scope of the agreements as including Western Sahara.

Overall, the Court's refusal to engage with the normative significance of this practice severely undermines the outcome of its interpretative process. At the very minimum, one would have expected the Court to explain why the evidence before it constituted disparate instances of factual application of the agreements to Western Sahara and not "subsequent practice" of the parties within the meaning of Art. 31, para. 3, let. b), VCLT.

#### IV. CONCLUSION

The Court's approach to treaty interpretation in the *Front Polisario* judgment leaves much to be desired. The Court's one-sided focus on Art. 31, par. 3, let. c), VCLT; its reluctance to apply all the means of interpretation contained in Art. 31 VCLT systematically; its reliance on rules of international law of doubtful relevance; and, more importantly, its eschewal of the parties' "subsequent practice" cast doubt on its findings and undermine the EU's claim

<sup>103</sup> *Ibid.*

<sup>104</sup> Opinion of AG Wathelet, *Council of the European Union v. Front Polisario*, cit., para. 67.

<sup>105</sup> *Council of the European Union v. Front Polisario* [GC], cit., para. 118.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*, para. 117. *Front Polisario v. Council of the European Union*, cit., para. 80.

<sup>108</sup> *Front Polisario v. Council of the European Union*, cit., para. 79.

as a normative power committed to the strict observance of international law.<sup>109</sup> It is difficult to avoid the conclusion that the Court relied on a particular element of Art. 31 VCLT and refused to engage with the actual practice of the EU and Morocco in order to avoid being drawn into political storms. The fact that the Court reaffirmed the right of the Sahrawi people to self-determination does not diminish the essentially political nature of the judgment. By circumventing the thorny question of the factual application of the agreements to Western Sahara, the Court effectively turned a blind eye to the EU's actual practice on the ground. However, the analysis of the parties' subsequent practice, as discussed above, clearly shows that the EU had tacitly agreed to extend the territorial application of the agreements to Western Sahara. In this light, the judgment lends persuasive force to critical voices in the literature that have pointed out that recent practice of the Court of Justice does not sit comfortably with the traditional *Völkerrechtsfreundlichkeit* narrative;<sup>110</sup> the correct application of the "subsequent practice" rule should have led the Court to invalidate the Council decision adopting the Liberalization Agreement.

More problematically, the Court's artificial and selective reliance on international law in *Front Polisario* adds a new dimension to the ever-burgeoning debate on the relationship between international and EU law. In the past, the Court has arguably shown a great deal of judicial recalcitrance towards international law and a tendency to guard its own identity and the autonomy of the EU legal order through its reluctance to engage with international law.<sup>111</sup> However, the *Front Polisario* judgment manifests a different and more worrisome judicial strategy. While seemingly anchoring its findings in international law, the Court, in essence, showed here a great degree of willingness to stretch international rules on treaty interpretation to a breaking point in order to avoid addressing the political disinterest that the EU has demonstrated in relation to the situation in Western Sahara. In this context, it needs to be borne in mind that, although the EU has, on various occasions, expressed concern about the prolonged nature of the Western Sahara conflict and its implications for security, respect for human rights and cooperation in the region,<sup>112</sup> its language has been rather muted.<sup>113</sup> The 2014 EU Annual Report on Human Rights and Democracy in World states that Western Sahara is a

<sup>109</sup> See for example Arts 3, para. 5, and 21, para. 1, TEU.

<sup>110</sup> J. KLABBERS, *Völkerrechtsfreundlichkeit? International Law and the EU Legal Order*, cit., p. 97.

<sup>111</sup> G. DE BÚRCA, *The European Court of Justice and the International Legal Order After Kadi*, in *Harvard International Law Journal*, 2010, p. 5; J. KLABBERS, *The Validity of EU Norms conflicting with International Obligations*, cit., p. 112.

<sup>112</sup> EU Annual Report of 22 June 2015 on Human Rights and Democracy in the World in 2014, 10152/15, p. 15, [www.consilium.europa.eu](http://www.consilium.europa.eu).

<sup>113</sup> P. WRANGE, *Occupation/Annexation of a Territory: Respect for International Humanitarian Law and Human Rights and Consistent EU Policy*, Study undertaken at the request of the European Parliament's Committee on Subcommittee on Human Rights, 30 June 2015, PE 534.995, p. 43, [www.europarl.europa.eu](http://www.europarl.europa.eu).

“territory *contested* by Morocco and Front Polisario” –<sup>114</sup> without making any reference to the legal status of Western Sahara as an occupied territory. Overall, the EU has restricted itself to expressions of support to UN efforts to resolve the political impasse between the parties to the conflict,<sup>115</sup> which has been described “as a very minimal approach compared to the positions adopted towards very similar situations such as Palestine and Cyprus”.<sup>116</sup> Crawford has dismissed the EU’s position towards Western Sahara as mere “realpolitik”<sup>117</sup> and some Israeli writers have gone as far as to suggest that the differences between the EU’s policy towards Western Sahara and Palestine represent not merely double-standards but also veiled anti-Semitism.<sup>118</sup>

In this light, the *Front Polisario* case represents a missed opportunity for the Court to send a strong message to the institutions and to the international community as a whole regarding the role of international law in the EU legal order. The Court could have arrived at the same result, namely the legal inapplicability of the Liberalization Agreement to the territory of Western Sahara, in a much more straightforward way by addressing the *de facto* application of the Agreement to the territory. In a rather obvious attempt to let the institutions off the hook, it chose to ground its reasoning in international law rules that upon closer scrutiny hardly justify its conclusions, thereby undermining the legitimacy by which its judgments are perceived.<sup>119</sup>

<sup>114</sup> EU Annual Report on Human Rights and Democracy in the World in 2014, cit., p. 186 (emphasis added).

<sup>115</sup> *Ibid.* See also Draft Annual Report from the High Representative for Foreign Affairs and Security Policy to the European Parliament of 2014, as endorsed by the Council on 20 July 2015, *Main aspects and basic choices of the CFSP*, 11083/15, p. 23.

<sup>116</sup> M. BALBONI, *The EU’s Approach to Western Sahara*, Paper presented at the Conference organized by the South African Department of Foreign Affairs on Multilateralism and Western Sahara as a Case Study, 4-5 September 2008, [www.saharawi.org](http://www.saharawi.org), p. 1.

<sup>117</sup> J. CRAWFORD, *Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories*, Legal Opinion of 24 January 2012, Matrix Chambers: London, [www.tuc.org.uk](http://www.tuc.org.uk), para. 131.

<sup>118</sup> G. HARPAZ, *Normative Power Europe and the Problem of a Legitimacy Deficit: An Israeli Perspective*, in *European Foreign Affairs Review*, 2007, p. 102, footnote 24.

<sup>119</sup> T.M. FRANCK, *The Power of Legitimacy Among Nations*, New York: Oxford University Press, 1990, p. 24.