INSIGHT

Working Its Way Back to International Law? The General Court's Judgments in Joined Cases T-344/19 and T-356/19 and T-279/19 *Front Polisario v Council*

ALINA CARROZZINI*

ABSTRACT: The CJEU's approach to international law in the context of territorial disputes has generally attracted substantial criticism, both for its engagement therewith – *i.e.*, its tendency to cherry-pick the applicable rules – and reliance thereon – *i.e.*, its tendency to apply international rules in a dissimilar fashion to their general meaning under international law. These tendencies were however partially remedied in the newest instalments of the *Front Polisario* saga (joined cases T-344/19, T-356/19 ECLI:EU:T:2021:639, and T-279/19 ECLI:EU:T:2021:640), in the context of which the General Court utilised international law as the applicable legal background against which to assess two seminal questions: the standing of Front Polisario and the obligations pending on the Council in EU external relations. This *Insight* focuses specifically on the question of standing, assessing the judgments' contribution to this line of litigation in relation to the question of Western Sahara.

KEYWORDS: standing – national liberation movements – non-state actors - Western Sahara – occupation – Front Polisario.

I. Introductory remarks on the question of Western Sahara

On the 29 of September, the General Court struck down Council Decision 2019/217[1] and Council Decision 2019/441[2] – on the conclusion of fishing and association agreements between the EU and Morocco – in that they were applicable to the coast off – and

* PhD Candidate, Centre of European Law, Dickson Poon School of Law, King's College London, alina.carrozzini@kcl.ac.uk.

[1] Decision 2019/217 of the Council of 28 January 2019 on the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part.

[2] Decision 2019/441 of the Council of 4 March 2019 on the conclusion of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the Exchange of Letters accompanying the Agreement.

EUROPEAN PAPERS
VOL. 7, 2022, NO 1, PP. 31-41
(EUROPEAN FORUM, 7 APRIL 2022)
www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/543
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products originating from – the territory of Western Sahara. The legal dispute at the background of these cases is far from novel and has been submitted before the Court of Justice of the European Union (CJEU) on numerous occasions.[3] The General Court's reasoning – and relevant findings – nevertheless present cogent developments for the EU's external posture and its relations with non-state actors.[4] A few notes on the relevant factual background are thus warranted. Western Sahara is a non-self-governing territory located in North-West Africa which borders Morocco, Algeria and Mauritania and which has been consecutively claimed by Spain (its occupying power until 1975), Mauritania (having withdrawn from the conflict in 1979) and Morocco (its occupying power from 1976 to this day).[5] Front Polisario, in turn, is an internationally recognised national liberation movement representing the Sahrawi people (Western Sahara's population), constituted in 1973, which fights for the independence of the territory from Morocco. The population's right to self-determination and the *status* of Western Sahara as a non-self-governing territory were recognised by the United Nations General Assembly (UNGA), United Nations Security Council (UNSC) and the International Court of Justice (ICJ) on different occasions.[6] This notwithstanding, the EU has concluded a series of agreements with Morocco which have been applied to the territory of Western Sahara and which came under scrutiny in *Front Polisario I*[7] and *Western Sahara Campaign UK*.[8]

In *Front Polisario I,* an action for annulment, Front Polisario had contested the legality of Council Decision 2012/497 on the conclusion of a trade agreement with Morocco, extending to Western Sahara.[9] In support thereof, it argued that the agreement conflicted with international and European law in that its territorial scope extended to Western Sahara.[10] The General Court denied that but annulled the contested decision, holding that the Council had breached the bounds of its discretion by failing to prevent that the

[3] For an in-depth and contextualised analysis of the dispute, see E Kassoti, 'Between Sollen and Sein: The CJEU's Reliance on International Law in the Interpretation of Economic Agreements Covering Occupied Territories' (2020) LJIL 371.

[4] E Kassoti, 'The Long Road Home: The CJEU's Judgments in Joined Cases T-344/19 and T-356/19 and in Case T-272/19 - Front Polisario v Council' (6 October 2021) Verfassungsblog verfassungsblog.de.

[5] Case T-512/12 *Front Polisario v Council* (*Front Polisario I*) ECLI:EU:T:2015:953 paras 1-4.

[6] General Assembly, Resolution of 11 November 1980, UN Doc A/35/596 (1980); General Assembly, Resolution 71 of 6 December 2016, UN Doc A/RES/71/106 (2016); Security Council, Resolution 2351 of 28 April 2017, UN Doc S/RES/2351 (2017); ICJ *Western Sahara* (Advisory Opinion) [16 October 1975] para. 162.

[7] *Front Polisario I* cit.

[8] Case C-266/16 *Western Sahara Campaign UK* ECLI:EU:C:2018:118.

[9] Decision 2012/497 of the Council 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; see also *Front Polisario I* cit. para. 115.

[10] *Ibid*. paras 115-118.

conclusion of the agreement could violate international law.[11] On appeal, the CJEU overturned the findings of the General Court, stating that Western Sahara held a separate *status* under international law, meaning that the Council could not have considered it as being a part of Morocco;[12] thus, the agreement did legally not include that territory in its scope.[13]

Western Sahara Campaign UK was a preliminary reference relating to the legality of the Fisheries and Partnership Agreement (FPA) and the 2013 Fisheries Protocol between the EU and Morocco in light of claims that they were being extended to the waters adjacent to the territory of Western Sahara.[14] Despite a lengthy and affirmative analysis provided by the Advocate General (AG),[15] the Court found that the agreements did not extend to those waters.[16] In particular, it relied on the connection between the contested instruments and the trade and liberalisation agreement under review in *Front Polisario I*,[17] holding that since that trade agreement did not encompass Western Sahara, neither did the FPA.[18] Both judgments have generally been received negatively in the literature in that they arguably display that the Court was willing to ignore the factual application of the agreements to the territory and to misapply international law in order to avoid pronouncing on a politically charged issue involving a major trading partner of the EU.[19]

The judgments issued on the 29 of September – and the recognition that Front Polisario enjoys standing by virtue of its actorness under international law - should thus be assessed against this background. To this end, the following section briefly recounts the General Court's analysis in the cases in order to exemplify how they contributed to the longstanding *Front Polisario* saga. The remainder of this *Insight* will then comment on arguably the most important point raised by these judgments, namely the recognition that Front Polisario enjoys standing by virtue of its actorness under international law. It is argued that the reasoning of the Court displays novel and cogent remarks which may pave the way for further scrutiny of EU external action by non-state actors.

[11] *Ibid*. paras 238-247.

[12] *Ibid*. para. 86.

[13] *Ibid*.

[14] *Western Sahara Campaign UK* cit. para. 32.

[15] Case C-266/16 *Western Sahara Campaign UK* ECLI:EU:C:2018:1, opinion of AG Wathelet.

[16] *Western Sahara Campaign UK* cit. paras 59-60.

[17] *Front Polisario I* cit.

[18] *Western Sahara Campaign UK* cit. paras 61-62.

[19] J Odermatt, 'Council of the European Union v Front Populaire pour la Libération de la Saguia-el-hamra et du rio de oro (Front Polisario)' (2017) AJIL 731; R Frid de Vries, 'EU Judicial Review of Trade Agreements Involving Disputed Territories: Lessons from the Front Polisario Judgments' (2018) Columbia Journal of European Law 497; E Kassoti 'The ECJ and the Art of Treaty Interpretation: Western Sahara Campaign UK' (2019) CMLRev 209; G Van der Loo, 'Law and Practice of the EU's Trade Agreements with Disputed Territories' in S Garben and I Govaere (eds), *The Interface Between EU and International Law* (Hart Publishing 2019) 14–17. See *contra* E Cannizzaro, 'In Defence of Front Polisario: The ECJ as a Global Jus Cogens Maker' (2018) CMLRev 569.

II. Summary of the judgments

II.1. Joined cases T-344/19 and T-356/19

These cases represent a continuation of *Western Sahara Campaign UK*: Front Polisario was once again seeking the annulment of a series of EU measures – specifically, two Council Decisions and a Regulation concluding fisheries agreements with Morocco which were being applied to the waters adjacent to Western Sahara (this latter instrument was not annulled).[20] In support thereof, the applicant entered a number of pleas, ranging from procedural violations – *e.g.*, the Council's alleged lack of competence to conclude said agreement – to substantive violations – such as breaches of international law, a number of legal principles (including legitimate expectations and proportionality) and fundamental rights.[21]

Ahead of assessing the broader questions raised by the case, the General Court engaged in an analysis of the territorial scope of the contested agreement.[22] In this respect, the Court noted that the contested agreement *explicitly* provided for the inclusion of the waters adjacent to Western Sahara in its scope,[23] meaning that not only was it being applied to Western Sahara factually: legally, this application was enabled in writing by the contested instrument. In support of this conclusion, the General Court made reference to a series of provisions in the agreement itself as well as the maps relied upon by AG Wathelet in his Opinion in *Western Sahara Campaign UK.*[24] The Court specified that this conclusion was not prejudiced by its findings in *Front Polisario I*, making two notable points in this respect: (*i*) firstly, that the earlier judgments did not preclude the conclusion of agreements explicitly providing for the inclusion of Western Sahara in their scope;[25] (*ii*) secondly, and consequently, that art. 31(3)(c) of the the Vienna Convention on the Law of Treaties (VCLT) cannot be used to justify a *contra legem* interpretation of the contested agreement to the extent that the agreement *expressly provided* for such an inclusion.[26]

Against this backdrop, the General Court proceeded by analysing the admissibility of the action, specifically for the doubts raised by the Council as to Front Polisario's ability to represent the Sahrawi people and, consequently, to be directly and individually concerned by the measures it was seeking the annulment of. Indeed, the Council argued that Front Polisario: (*i*) did not possess legal personality under the national law of a Member State;[27] (*ii*) was not a subject of international law;[28] (*iii*) did not satisfy the standing criteria

[20] Joined cases T-344/19 and T-356/19 *Front Polisario v Council* ECLI:EU:T:2021:640 paras 94-98.
[21] *Ibid*. para. 269.
[22] *Ibid*. paras 106 ff.
[23] *Ibid*. paras 110, 123.
[24] *Ibid*. paras 109-110.
[25] *Ibid*. paras 118-119.
[26] *Ibid*. paras 120-22.
[27] *Ibid*. para. 132.
[28] *Ibid*.

foreseen by EU law for entities without legal personality.[29] The General Court began by noting that the question of whether an applicant has legal personality under the national law of a Member State is immaterial for their capacity to bring proceedings under art. 263(4) TFEU.[30] It then further noted that there existed significant reasons to consider that Front Polisario had the capacity to do so, in that it was internationally recognised as the representative of the people of Western Sahara and had been treated as such by the institutions of the Union.[31]

Having ascertained this, the General Court assessed whether Front Polisario was directly and individually concerned by the contested decisions.[32] In this context, the Court engaged in a lengthy analysis of the effects of the inclusion of Western Sahara in the scope of the agreement, eventually finding in favour of Front Polisario. In relation to the criterion of direct concern, it reasoned firstly that the rights flowing from the United Nations Convention on the Law of the Sea (UNCLOS) "are capable of being exercised for the benefit of the peoples of non-self-governing territories", which meant that the inclusion of the waters adjacent to Western Sahara would create legal effects for the applicant.[33] The General Court thus concluded that the contested agreements could affect the position of Front Polisario as a third-party to this agreement.[34] These considerations warranted the existence of individual concern as well.[35]

Having ascertained the admissibility of the claim, the General Court proceeded to assess the substantive pleas raised by the applicant and swiftly rejecting the first plea – alleging that the Council lacked the competence to conclude the contested agreement – holding that there was no rule precluding the Council from doing so.[36] The analysis proceeded with the third plea raised, namely that the Council had failed to comply with art. 266 TFEU and specifically the principles of self-determination and relative effect of treaties as expressed in the previous instalments of the Front Polisario saga by including Western Sahara in the scope of the agreement.[37]

The premiss made by the applicant was the following: since in *Front Polisario I* and *Western Sahara Campaign UK* the CJEU concluded that the *hypothetical* conclusion of agreements applicable to Western Sahara would violate international law, it should *a fortiori* recognise a violation thereof in this case, since the agreement *explicitly* provided for it.[38] The General Court objected to this view. In support of this finding, it reasoned that

[29] *Ibid*.
[30] *Ibid*. para. 136.
[31] *Ibid*. paras 148-153.
[32] *Ibid*. paras 171 ff.
[33] *Ibid*. paras 227-234.
[34] *Ibid*. para. 252.
[35] *Ibid*. paras 260-265.
[36] *Ibid*. para. 273.
[37] *Ibid*. paras 276 ff.
[38] *Ibid*. para. 296.

earlier jurisprudence had simply ruled out the conclusion of an agreement *implicitly* applying to Western Sahara when its territorial scope speaks only of Morocco – a situation to be distinguished from the one under review, which involved an *explicit* reference to Western Sahara in the agreement's territorial clause.[39] In this context, it recalled that, pursuant to art. 29 VCLT, treaties bind parties with respect to their *own* territories, unless the parties agree differently.[40] Against this background, the General Court moved on to assess whether the parties (*i.e.*, the EU and Morocco) violated the principle of relative effect of treaties (art. 34 VCLT) by failing to seek Front Polisario's consent before including Western Sahara in the territorial scope of the agreement.[41] The General Court engaged in a lengthy examination of the negotiation phase, which evinced that, while the parties had nominally invited the participation of the representatives of Western Sahara, they had failed to seek their *consent* within the meaning of arts 35 and 36 VCLT. Pursuant to these provisions, the form of consent depends on the content of an agreement: where an agreement bestows rights upon that third party, consent may be implicit; by contrast, when the agreement imposes obligations, consent must be explicit. Against this background, the General Court made two cogent observations. The first was that the agreement did not grant rights to the people of Western Sahara, but only to Morocco and the EU.[42] The second was that, by taking away from the people of Western Sahara the power to exercise their "competence"[43] in this respect, the agreement was imposing on them an obligation.[44] Thus, the parties ought to have sought their explicit consent to do so. However, the steps taken by the parties were insufficient for this purpose and did not comply with the conditions of consent under international law.[45] Indeed, it was stressed that the Council had merely sought to receive the support of the majority of the local populations through dialogue with Moroccan state bodies – a process to be opposed to that imposed by art. 35 VCLT. Instead, art. 35 VCLT would have required dialogue with – and *explicit* consent from – the representatives of Western Sahara itself.[46] The Court further noted that the institutions are under an obligation to comply with the General Court's interpretation of the relevant rules of international law – and not to modify their meaning with a view to eschewing compliance therewith.[47] Against this background, it was considered unnecessary to continue the analysis of the remaining pleas. the Council's wrongful assessment of the relevant legal and factual circumstances was such as to warrant the annulment of the

[39] *Ibid*. para. 301.

[40] *Ibid*. para. 299.

[41] *Ibid*. paras 304 ff.

[42] *Ibid*. paras 312-313.

[43] Author's translation. The original (and only) version, issued in French, uses the expression *"une compétence sur le territoire d'un tiers"*.

[44] *Ibid*. para. 318.

[45] *Ibid*. paras 360-364.

[46] *Ibid*. paras 350-360.

[47] *Ibid*. para. 362.

contested decision as a whole.[48] The effects of the contested decision were nonetheless temporarily maintained for the purpose of legal certainty.[49] By way of contrast, the action based on the contested regulation was dismissed for lack of direct concern.[50]

II.2. Case T-279/19

This second judgment relates to the review of Council Decision EU 2019/217 on the conclusion of the amendments to the EU-Morocco Association Agreement.[51] The applicant was challenging, specifically, the Joint Declaration inserted therein by which goods originating in Western Sahara would have been given the same treatment as goods originating in Morocco.[52] In a similar vein to joined cases T-344/19 and T-356/19 *Front Polisario v Council*, the General Court began the enquiry by assessing the question of standing of Front Polisario, reaching the same conclusions as above, namely that Front Polisario is a legal person within the meaning of art. 263(4) TFEU[53] and that it enjoyed legal personality as the representative of the Sahrawi People. It is worth noting that in this context the General Court rejected the Commission's view according to which recognising Front Polisario as being capable of bringing an action for annulment would transform the Court into an international court.[54] Indeed, it differentiated between the dispute under art. 263 TFEU – that is, the annulment of an EU act – from the overarching international dispute involving the applicant and Morocco[55], stressing that it was assessing Front Polisario's legal personality in relation to the former.[56] In this context, it also noted that considerations on political expediency and policy could not override the rules on admissibility provided within art. 263 TFEU.[57]

Having ascertained Front Polisario's legal personality, the General Court assessed the remaining questions posed by art. 263(4) TFEU, namely whether the applicant was directly and individually concerned by the contested decision. Both questions were answered affirmatively by the Court. In relation to the criterion of direct concern, the General Court noted firstly that the contested decision could produce legal effects on the applicant, reasoning that a dissimilar finding would prejudice a legal person's ability to seek review of the stipulations leading to the adoption of an international agreement.[58]

[48] *Ibid*. paras 364-365
[49] *Ibid*. paras 366-369.
[50] *Ibid*. paras 382-394.
[51] Case T-279/19 *Front Polisario v Council* ECLI:EU:T:2021:639 paras 54-75.
[52] *Ibid*. paras 76-77.
[53] *Ibid*. paras 79-114.
[54] *Ibid*. para. 109.
[55] *Ibid*. para. 110.
[56] *Ibid*.
[57] *Ibid*. para. 113.
[58] *Ibid*. para. 159.

The direct concern on the applicant was in turn proven by reference to the explicit provision, within the agreement, of preferential treatment for products originating from Western Sahara,[59] as well as the applicant's role in the political process relating to the Western Sahara question.[60] This latter consideration warranted the existence of individual concern as well.[61] The assessment of the merits by the General Court in this case largely mirrors that undertaken in the judgment discussed above, both in the number of pleas assessed and in their content – two pleas on the Council's alleged lack of competence and its failure to comply with the requirements the Court had set in previous litigation.[62] As such, due to considerations of brevity, they will not be elaborated upon anew in this section.

III. Analytical remarks on the judgments

The most important contribution made by the two judgments consists in the confirmation that subjects of international law such as Front Polisario[63] have standing under art. 263(4) TFEU.[64] In doing so, the Court broadened the set of actors which may constitute a "legal person" within the meaning of this provision. As previously highlighted, the question of whether an entity is a legal person for the purpose of art. 263(4) TFEU is answered by reference to EU law: this implies that an applicant must be a legal person under the law of a Member State[65] – irrespective of the existence of direct and individual concern. In situations where this criterion cannot be met, the Court accepts standing in two situations: (*i*) if it is recognised that the applicant is "in a position to act as a responsible body in legal matters" pertaining to the situation being challenged (*Union Syndicale*);[66] (*ii*) or if it has been given separate treatment by the Union institutions (*Groupement des Agences de Voyages*).[67] The already stringent standing requirement thus posed further difficulties for third-country entities whose legal personality would therefore not be construed on the basis of their *status* under international law, but rather solely by reference to EU law.

[59] *Ibid*. paras 179, 193.

[60] *Ibid*. paras 201-224.

[61] *Ibid*. paras 225-238.

[62] *Ibid*. paras 239-251.

[63] The view that non-state actors can be considered subjects of international law has found support in the writings of different legal scholars, among which Lauterpacht and Kelsen. See H Lauterpacht, 'The Subjects of International Law' in A Bianchi (ed), *Non-State Actors and International Law* (Ashgate 2009) 3, 8–10; H Kelsen, *Pure Theory of Law* (The Lawbook Exchange Ltd 2009) 325.

[64] *Front Polisario v Council (Fisheries)* cit. paras 148-153; *Front Polisario v Council (Association Agreement)* cit. paras 79-114.

[65] Case 175/73 *Union Syndicale and Others v Council* ECLI:EU:C:1974:95 paras 9-17; case 18/74 *Syndicat personnel européen v Commission* ECLI:EU:C:1974:96 paras 5-13.

[66] *Ibid*. paras 9-17.

[67] Case 135/81 *Groupement des agences de voyages v Commission* ECLI:EU:C:1982:371 paras 9-11; case T-229/02 *PKK v Council* ECLI:EU:T:2005:48 para 37 ff.; case C-19/16 P *Al-Faqih and Others v Commission* ECLI:EU:C:2017:466 para. 40.

And while the standing of third countries has been conclusively ascertained in the recent *Venezuela v Council*,[68] the standing of third-country non-State actors was still moot and generally determined in relation to their legal relationship with the Union (*i.e.*, a *Groupement des Agences de Voyages*-type of situation). An example thereof is *PKK and KNK v Council,* where the Court of First Instance (CFI) denied standing to challenge a restrictive measure to the PKK (the Kurdistan Workers' Party),[69] arguing that it did not possess legal personality – while being directly and individually concerned by the contested measure.[70] The cases under review however resolved these questions through a series of important pronouncements. The first is that the notion of "legal person" within the meaning of art. 263(4) TFEU cannot be addressed too formalistically and may extend to entities which are not legal persons under the law of a Member State, if effective judicial protection so mandates.[71] The second is that Front Polisario has legal personality not because of its legal relationship with the Union,[72] but because, as the representative of the people of Western Sahara, it is a subject of international law.[73] The explicit acceptance of a subject of international law in the context of this assessment represents a welcome development because it guarantees access – where direct and individual concern can be proven – without tying the question of the existence of an actor to the measure they are seeking to challenge. A number of reasons militate in favour of this conclusion.

From a procedural viewpoint, the Court's opening of *locus standi* to non-State third-country actors by reason of their legal personality under international law represents a coherent choice. Indeed, the limitation enshrined in art. 263(4) TFEU expresses a core tenet of administrative theory, *i.e.*, that it is the public administration that determines the public interest.[74] Thus, a private applicant may only challenge that general interest if it is personally affected by it.[75] However, difficulties with framing the legal personhood of an entity by virtue of the legal framework within which it came about cannot justify undue limitations to this ability, especially where legal effects are produced on the applicant.[76] This is especially the case where the contested *status* of the applicant may prevent their

[68] Case C-872/19 P *Venezuela v Council (Affectation d'un État tiers)* ECLI:EU:C:2021:507 para. 53.

[69] *PKK v Council* cit. paras 37 ff.

[70] *Ibid*. para. 41. For a commentary, see A Cuyvers, 'Case C-229/05 P *PKK and KNK v Council,* Judgment of the Court of Justice (First Chamber) of 18 January 2007[2007] ECR I-439' (2007) CMLRev 1496.

[71] *Front Polisario v Council (Association Agreement)* cit. para. 86.

[72] *Ibid*. para. 105.

[73] *Ibid*. paras 101, 103, 104.

[74] R Barents, 'EU Procedural Law and Effective Legal Protection' (2014) CMLRev 1448.

[75] JM Woehrling, 'Le controle juridictionnel de l'administration en Europe et la distinction entre droit objectif et droits subjectif' in J Schwarze (ed), *L'État Actuel et les perspectives du droit administratif européen* (Bruylant 2010) 297.

[76] This very reasoning was advanced by AG Kokott when discussing the legal personhood of the PKK: if the PKK did not exist, there would be no reason to include it on a restrictive measure. See case C-229/05 P *PKK and KNK v Council* ECLI:EU:C:2006:606, opinion of AG Kokott para. 53.

participation in the procedure leading to the adoption of the contested measure – as had been the case in earlier instalments of the Front Polisario saga.[77]

Upholding a dual test – whereby an applicant is either a legal subject under the law of a Member State or it exists somehow *vis-à-vis* the EU – risks prejudicing standing in situations where this prior participation is not possible,[78] aside from nullifying the liberalisation efforts that art. 263(4) TFEU is supposed to encapsulate.[79] It also discounts the fact that art. 11 TEU does not necessarily bestow rights upon non-state entities,[80] thus rendering pre-judicial participation more difficult. Further, such an opening is a welcome development as it aligns legal theory with legal practice in the context of judicial review before the CJEU. Indeed, as the Court itself expresses, art. 263 TFEU is a core component of the system of effective legal protection set up by the Treaties[81] and it is also the provision enabling the Court to scrutinize acts of the EU administration.[82] Construing standing in a way that it forecloses participation of entities which may be affected by EU action weakens the Court's teleological commitment to the maintenance of the rule of law because, as restated by the Court itself on multiple occasions, "the very existence of effective judicial review [...] is of the essence to the rule of law".[83] The reference to the rule of law and effectiveness made by the Court in the context of this analysis is not casual: it recalls that procedural rules – such as those regulating standing - have to be read in light of arts 19 TEU and 47 CFREU, which both encapsulate a participatory model of procedural fairness as they stress that the concept of effectiveness depends not only "on the function of a court in the procedures before it, [but also] the position of parties in the proceedings".[84] Admittedly, one may object to this development: if the Treaties did not originally envisage individuals as being able to challenge measures having general application,[85] why giving subjects of international law such an ability?

This line of reasoning nonetheless presents some shortcomings as it conflates the question of legal *personality* with that of legal *concern*. In other words, it is one thing to recognise a given actor as capable of filing a claim before the Court – it is another to

[77] *Front Polisario I* cit. paras 44 ff.

[78] This very point is raised by the Court itself. See *Front Polisario v Council (Association Agreement)* cit. para. 159.

[79] M Safjan and D Dusterhaus, 'A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Art. 47 CFREU' (2014) Yearbook of European Law 6.

[80] E Korkea-Aho, 'Evolution of the Role of Third Countries in EU Law – Towards Full Legal Subjectivity?' in S Bardutzky and E Fahey (eds) *Framing the Subjects and Objects of EU Law: Exploring a Research Platform* (Edward Elgar Publishing 2017) 223.

[81] *Front Polisario v Council (Association Agreement)* cit. para. 106.

[82] *Ibid*. See also R Barents, 'EU Procedural Law and Effective Legal Protection' cit. 1445.

[83] Case C-72/15 *Rosneft* ECLI:EU:C:2017:236 para. 73; case C-362/14 *Schrems* ECLI:EU:C:2015:650 para. 95; case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117 para. 36.

[84] R Barents, 'EU Procedural Law and Effective Legal Protection' cit. 1449.

[85] K Bradley, 'Judicial Review of EU Administrative Rules: to Lisbon and Beyond' in C Harlow, P Leino and G della Cananea (eds) *Research Handbook on EU Administrative Law* (Edward Elgar Publishing 2017) 424.

assert that that actor possesses the ability to effect change over a given measure. The contribution made by the cases analysed relates to the former and arguably symbolises the General Court's coming to terms with the awareness that the EU interacts with – and produces legal effects upon – a multiplicity of external actors, not all "recognised under a body of principles and rules";[86] and that a shift from "grammar to pragmatism"[87] in the context of art. 263 TFEU is therefore necessary. Finally, it also signals a transition to a more internationalised outlook to litigation, as it does away with the "alternative forum" approach to standing the Court adhered to throughout its jurisprudence - whereby judicial review is left upon national courts where possible.[88]

IV. Conclusion

All things considered, the two judgments represent a positive turn in the line of litigation pertaining to the question of Western Sahara: in the first place, as pointed out, they conclusively settle the question of standing of Front Polisario by reference to international law, thus potentially paving the way to Luxembourg for other non-State actors. At the same time, they reflect the Court's willingness to exercise control over the conduct of external relations via an adjustment of the intensity of review exercised over the Council's discretion: this is because the Court stresses that the Council's margin of discretion is a privilege of method, not of action; and that it exists within the confines laid by the rules of international law binding upon it in the given domain it wishes to act. The question of whether such an approach will be reflected on appeal is moot at this point – earlier instalments of the Front Polisario saga may suggest that the Court of Justice may re-evaluate some of the General Court's pronouncements. Nonetheless, the developments featured are promising and reveal a progressive coming to terms of the Court with the broader international legal framework regulating the *status* of Western Sahara and non-State actors before the CJEU.

[86] I Vianello, 'From Objects to Subjects: Paving the Way for Third Countries and their Natural and Legal Persons' in S Bardutzky and E Fahey (eds) *Framing the Subjects and Objects of EU Law: Exploring a Research Platform* (Edward Elgar Publishing 2017) 228.

[87] *Ibid*.

[88] T Tridimas and S Poli, 'Locus Standi of Individuals Under Article 230(4): The Return of Euridice?' in A Arnull, P Eeckhout and T Tridimas (eds) *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press 2009) 26-27.