

# The Case *Western Sahara Campaign UK* and the International and Institutional Coherence of European Union External Action. Opening Pandora's Box?

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*The article explores the recent Case Western Sahara Campaign UK and the consequences arising from the Court's findings on European external action and trade policies. The Case represents a landmark decision on the relationship between the European Union and principles of customary international law. In assuming that the territory of Western Sahara is not part of the Kingdom of Morocco, the Court reaffirms its role in interpreting whether international agreements concluded by the Union are compatible with the Treaties and the rules of public international law. What makes the Court's decision particularly interesting is that the Case concerns a controversial international law principle, such as the right to self-determination. This opens many questions on the future approach of the external action with self-determination claims in European Union trading partners. The article comes to the conclusion that the Case shows an evident lack of coherence of European external action, both in its international and institutional dimensions.*

## 1 INTRODUCTION

The Case *Western Sahara Campaign UK* deals with the issue of the validity in the Western Sahara territory of the Fisheries Partnership Agreement concluded between the European Union and the Kingdom of Morocco and entered into force on 28 February 2007.<sup>1</sup> Overall, the Court's findings represent an occasion to reflect on different critical aspects in the international and institutional coherence of the European external policy. The Case originated in 2015 from two actions brought

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<sup>1</sup> 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* (Grand Chamber, 27 Feb. 2018).

by the voluntary organization Western Sahara Campaign UK before the High Court of Justice (England and Wales), Queen's Bench Division (Administrative Court). The judgment of the Court of Justice of the European Union rendered on 27 February 2018 follows the 2016 Case C-104/16 P, *Council of the European Union v. Front Polisario* and gives rise to important questions on the relationship between the European Union external action and customary international law. In finding that the territory of Western Sahara does not fall within the territorial scope of international agreements concluded by the European Union with the Kingdom of Morocco, the Court reaffirmed the necessity that the Union must observe the rules of customary international law. Among such rules, the most relevant for the Case is represented by the right to self-determination of peoples, one of the most controversial international legal principles. On this point, the judgment of the Court should have probably been more pragmatic, specifying within which limits self-determination claims should be taken into account by EU external actions and trade agreements. Therefore, the Case could have a relevant international political impact on similar situations, given the possible presence of self-determination movements in other EU strategic trading partners. Moreover, the Case presents an opportunity for the Court to reaffirm its jurisprudence as to the question whether international agreements concluded by the European Union are compatible with the Treaties and the rules of public international law. However, the Court's findings have been recently contradicted by the Council showing a lack of institutional coherence in the context of European external relations.

## 2 FACTUAL AND LEGAL BACKGROUND

### 2.1 WESTERN SAHARA TERRITORY AND THE 1975 INTERNATIONAL COURT OF JUSTICE'S ADVISORY OPINION

Western Sahara is a 100,000 square miles' territory currently partly occupied by the Kingdom of Morocco, which claims its sovereignty over the land and its natural resources, including rich deposit of phosphates. The territory became a Spanish colony in 1884 after the Berlin Conference, through a military occupation and further agreements with local tribes.<sup>2</sup> Under the pressure of different decolonization claims, in 1966 the UN General Assembly adopted Resolution 2229 (XXI) asking Spain, as administering power, for the organization of a referendum under the supervision of an UN mission, such as to respect of the Saharawi population's right to self-determination.<sup>3</sup> Since then, the referendum was postponed several times by the Spanish administration. On 13 December 1974 Morocco and

<sup>2</sup> See A. Cassese, *Self-Determination of Peoples*, 214–217 (CUP 1995).

<sup>3</sup> GA Res. 2229 (XXI), *Question of Ifni and Spanish Sahara*, para. 4. See also GA Resolutions 2354-II (XXII), 2591 (XXIV) and 2711 (XXV). The territory of Ifni returned to Morocco on 30 June 1969.

Mauritania, which both asserted their sovereignty over the territory, gathered political support in the General Assembly for the approval of the Resolution 3292 (XXIX).<sup>4</sup> The Resolution requested that the International Court of Justice gave an Advisory Opinion on the legal status of the Western Sahara territory and on its relationship with the Kingdom of Morocco and Mauritania.<sup>5</sup> Consequently, on 16 October 1975, the International Court of Justice found that Western Sahara was not *terra nullius* at the time of colonization by Spain because it was already inhabited by socially and politically organized tribes. Moreover, the Court held that there were no legal ties of territorial sovereignty between Western Sahara and either the Kingdom of Morocco or Mauritania. The Court merely recognized the existence of ties of allegiance not able to affect the process of decolonization, the application of the UNGA Resolution 1514 (XV) of 14 December 1960<sup>6</sup> and the principle of self-determination ‘through the free and genuine expression of the will of the peoples’.<sup>7</sup> To put pressure on Spain, on 6 November 1975 the Moroccan government organized a popular demonstration called the ‘Green March’, in which 350,000 unarmed Moroccan civilians crossed the border and ventured into Western Sahara territory. Thereupon, on 14 November 1975 through the ‘*Madrid Accords*’<sup>8</sup> Spain, Morocco and Mauritania agreed on the establishment of a bipartite Moroccan–Mauritanian administration in consultation with the *Djemma*, the Spanish-appointed council of Saharawi members, to guarantee the process of self-determination. Nevertheless, on 11 December 1975 Moroccan armies occupied the capital of Western Sahara El Aaiún and, on 27 February 1976, various liberation movements joined under the armed group ‘*Front Polisario*’ proclaimed the Saharan Arab Democratic Republic (SADR) and commenced a military conflict against Morocco.<sup>9</sup> Currently, the eastern part of Western Sahara is controlled by the *Front Polisario* while the Kingdom of Morocco claims Moroccan sovereignty over the whole territory, which it is quick to point out the

<sup>4</sup> GA Res. 3292 (XXIX), *Question of Spanish Sahara*. See also ICJ, *Western Sahara (Request for Advisory Opinion) (Order)*, ICJ Rep. 6 (1975).

<sup>5</sup> The Advisory Opinion of the International Court of Justice was related to two issues: ‘Was Western Sahara at the time of colonization by Spain a territory belonging to no-one?’ and, in case the answer to the first question was negative, ‘What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?’.

<sup>6</sup> The Resolution 1514 (XV) is officially entitled as the Declaration on the Granting of Independence to Colonial Countries and Peoples.

<sup>7</sup> ICJ, Reports 1975, 68, para. 162. On 15 Oct. 1975, the Report of the UN mission in the Western Sahara concluded that the peoples of the territory wished to be independent not only from Spain, but also from Morocco and Mauritania.

<sup>8</sup> *Declaration of Principles on Western Sahara by Spain, Morocco and Mauritania*, Annex II to U.N. Doc. S/11880 (19 Nov. 1987), in *Security Council Official Records, 30th Year, Supplement for October*, 41 (Nov. and Dec. 1975).

<sup>9</sup> See J. S. Licerias, *International Law and the Western Sahara Conflict*, 79–130 (2014). In 1979 Mauritania ceased its claims and military operations in Western Sahara.

United Nations considers to be a non-self-governing territory.<sup>10</sup> However, as it has been affirmed by international legal scholars, the decolonization process of Western Sahara is currently still unresolved.<sup>11</sup>

## 2.2 THE ECONOMIC AND TRADE RELATIONSHIPS BETWEEN THE EUROPEAN UNION AND THE KINGDOM OF MOROCCO

In the context of the European Neighbourhood Policy, Morocco is a privileged partner of the EU in the field of trade, economic and political cooperation. On 26 February 1996, the European Communities and their Member States and the Kingdom of Morocco signed the Euro-Mediterranean Agreement that represents the current legal basis for the relations between the two Parties (the 'Association Agreement').<sup>12</sup> It established an association between the European Communities and their Member States on the one part, and the Kingdom of Morocco on the other part. The agreement signed in Brussels was concluded on behalf of the European Communities by Council and Commission Decision 2000/204/EC, ECSC of 24 January 2000.<sup>13</sup> In accordance with Article 96 thereof, the Association Agreement entered into force on 1 March 2000, as notified in the Official Journal of the European Communities.<sup>14</sup> The aim of the Association Agreement was to establish the conditions for a gradual liberalization of trade in goods, services and capital, and to promote trade and economic relations between the Parties, through dialogue and cooperation, including in the fisheries and agriculture sectors. Furthermore, in the context of the cooperation established by the Association Agreement, in 2006 the European Community and the Kingdom of Morocco concluded a Fisheries Partnership Agreement which entered into force on 28 February 2007 for a period of four years (the 'Fisheries Agreement').<sup>15</sup> The Fisheries Agreement established a partnership

<sup>10</sup> UN Doc. A/5514 (n. 4) Annex III: *List of Non-Self-Governing Territories under Chapter XI of the Charter at 31 December 1962; Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNGA Res 1514 (XV), 14 Dec. 1960.

<sup>11</sup> See J. Crawford, *Brownlie's Principles of Public International Law*, 248 (OUP 2012).

<sup>12</sup> OJ 2000 L 70, 2 (2000).

<sup>13</sup> *Ibid.*, at 1.

<sup>14</sup> *Ibid.*, at 228.

<sup>15</sup> OJ 2006 L 141, 4 (2006). The conclusion of the Agreement was approved and implemented by Council Regulation 2006/764/EC of 22 May 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco (OJ 2006 L 141, at 1), by Council Decision 2013/785/EU of 16 Dec. 2013 on the conclusion, on behalf of the EU, of the Protocol between the EU and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the EU and the Kingdom of Morocco (OJ 2013 L 349, at 1), and by Council Regulation 2013/1270/EU of 15 November 2013 on the allocation of fishing opportunities under the Protocol between the EU and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the EU and the Kingdom of Morocco (OJ 2013 L 328, at 40).

between the Parties in the sector, providing basic rules for economic, financial, technical and scientific cooperation as well as regulating the access by EU's fishing vessels to Moroccan fishing zones. The Fisheries Agreement was accompanied by a Protocol further specifying the fishing opportunities, which was since renewed, the current version having been signed on 18 November 2013 (the '2013 Protocol') and having entered into force on 15 July 2014.<sup>16</sup> Just two years earlier, in 2012, the EU and Morocco concluded an agreement providing for reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products (the 'Liberalization Agreement') that was approved by Council Decision 2012/497/EU.<sup>17</sup>

### 2.3 THE CASE C-104/16 *Council v. Front Polisario*

On 21 December 2016 the Court delivered a judgment on appeal against the General Court decision in Case T-512/12 *Council v. Front Polisario*. The reason was that in November 2012, the Front Polisario had filed an action to annul Council Decision 2012/497/EU on the conclusion of the Liberalization Agreement, claiming a violation of different EU and customary international law provisions.<sup>18</sup> First, the General Court, found that the Front Polisario was a 'legal person' under Article 263, fourth paragraph, TFEU and therefore, had the capacity to challenge the Decision.<sup>19</sup> Moreover, the Court stated that the action was admissible since the Liberalization Agreement produced legal effects, also on Western Sahara, and consequently the Front Polisario was directly and individually concerned by the contested Decision.<sup>20</sup> As regards the substantive issue, the legality of the Decision itself, the Court found no prohibition under public international law against applying an agreement to a disputed territory.<sup>21</sup> Nevertheless, the General Court found that the Council failed to ensure that the conclusion of the Agreement would not cause detriment to the population of Western Sahara or the

<sup>16</sup> OJ 2014 L 228, 1 (2014). The 2013 Protocol was approved by Decision 2013/785 and entered into force on 15 July 2014.

<sup>17</sup> Agreement in the Form of an Exchange of Letters Between the European Community and the Kingdom of Morocco Concerning Reciprocal Liberalization Measures on Agricultural and Products, Processes Agricultural Products, Fish and Fishery Products, the Replacement of Protocols 1, 2, and 3 of 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, entered into force 1 Oct. 2012, 2012 OJ (L241/4).

<sup>18</sup> See 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)*, 111(3) Am. J. Int'l L. (2017).

<sup>19</sup> Case T-512/12, *Front Populaire pour la Libération de la Saguia-El-Hamra et du Rio de Oro (Front Polisario) v. Council of the European Union*, Judgment (General Court, 10 Dec. 2015), para. 60.

<sup>20</sup> *Ibid.*, para. 114.

<sup>21</sup> *Ibid.*, para. 205.

infringement of their fundamental rights.<sup>22</sup> Therefore, the General Court partly annulled Council Decision 2012/497/EU, namely in so far as it approved the application of the Liberalization Agreement to the territory of Western Sahara. The Council however appealed the judgment and on 21 December 2016, the CJEU set aside the judgment of the General Court. In support of its appeal, the Council criticises the General Court for having assumed that the Front Polisario was directly and individually concerned by the Decision since it applied to Western Sahara. Referring to the previous Case *Commune de Champagne and Others v. Council and Commission* of 3 July 2007,<sup>23</sup> the Council assumed that an international agreement between the EU and a non-Member State has no legal effect in the territories of the other party. According to the Council, such territories are governed exclusively by the provisions adopted by the other State in the exercise of its sovereign powers.<sup>24</sup> Hence, the Court found that the Front Polisario's action was inadmissible since the Liberalization Agreement did not apply to the territory of Western Sahara. The Court affirmed that the principle of self-determination accords a distinct status to the territory of Western Sahara and therefore, the words 'territory of the Kingdom of Morocco' set out in Article 94 of the Association Agreement cannot be interpreted as including the Western Sahara in the territorial scope of that agreement. As a consequence, the Court underlined that the territorial scope and the relative effect of treaty principles, codified in Articles 29 and 34 of the Vienna Convention precluded the application of the Association Agreement to Western Sahara.<sup>25</sup> The Court found that such principles should have been taken into consideration by the General Court since the application of the Association Agreement to the Western Sahara would have had effects on a 'third party' such as the populations living in such territories which should have expressed their consent. Therefore, the Court ruled that the General Court erred in assuming that the EU and the Kingdom of Morocco had tacitly agreed to interpret the words 'territory of the Kingdom of Morocco' in Article 94 of the Association Agreement as to include the territory of Western Sahara.<sup>26</sup> The Court concluded that the Liberalization Agreement did not apply to the territory of Western Sahara and therefore, the Front Polisario was not directly concerned by the Decision, set aside the judgment of the General Court and dismissed the Front Polisario's action as inadmissible.<sup>27</sup>

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<sup>22</sup> *Ibid.*, para. 228.

<sup>23</sup> Case T-212/02, EU:T:2007:194, paras 90–94.

<sup>24</sup> Case C-104/16 P, *Council of the European Union v. Front populaire pour la libération de la saquia-el-hamra et du rio de oro (Front Polisario)*, (Grand Chamber, 21 Dec. 2016), para. 78.

<sup>25</sup> *Ibid.*, para. 92.

<sup>26</sup> *Ibid.*, para. 108.

<sup>27</sup> *Ibid.*, para. 134.

3 THE 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*

The new Case concerns a request for a preliminary ruling on the validity of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, originating in two separate proceedings, between Western Sahara Campaign UK and the Commissioners for Her Majesty's Revenue and Customs, respectively between that same party and the Secretary of State for the Environment, Food and Rural Affairs (United Kingdom), regarding the implementation of the international agreements concluded between the EU and Morocco as well as of the secondary legislation associated with them.

3.1 THE DISPUTES IN THE MAIN PROCEEDINGS

Western Sahara Campaign UK, a voluntary organization which supports the right to self-determination for the people of Western Sahara, brought two actions before the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court). The first action challenged the position taken by the UK's tax and customs Authority that was entitled to accept the importation of certified goods from the Western Sahara territory as originating in the Kingdom of Morocco according to the Association Agreement. The second action concerned the fisheries policy pursued by the UK Secretary of State for Environment, Food and Rural Affairs, and in particular, the inclusion of the waters adjacent to the Western Sahara in the domestic legislation implementing the Fisheries Agreement, the 2013 Protocol and the acts of secondary legislation.<sup>28</sup> Western Sahara Campaign UK claimed that the Association Agreement, the Fisheries Agreement, the 2013 Protocol and the acts of secondary legislation did not respect Article 3(5) TEU. In pursuing its external relations, the claimants argued, the EU should contribute to the strict observance of international law and of the principles of the UN Charter. Particularly, the inclusion of Western Sahara's territory and waters within the territorial scope of EU law and secondary acts would constitute a breach of the right to self-determination, of UN Charter Article 73 and of the Convention on the Law of the Sea. Moreover, they argued, it had not been proven that the people of Western Sahara derived any benefit from the Association Agreement, the Fisheries Agreement and the 2013 Protocol since their representatives had not taken part to the conclusion of such agreements.<sup>29</sup> As these

<sup>28</sup> Case C-266/16, *supra* n. 1, para. 31.

<sup>29</sup> *Ibid.*, para. 32.



arguments raised questions on EU law, the referring court stayed the proceedings and decided to refer the matter for a preliminary ruling and posed the Court on the Kirchberg four questions. The first two questions concerned the interpretation and the validity of the association agreement.<sup>30</sup> The third question had a specific connection with the validity of the Fisheries Agreement under Article 3(5) TEU.<sup>31</sup> The last question concerned the possibility that Western Sahara Campaign UK was entitled to challenge the validity of EU acts based on alleged breach of public international law by the EU. After the delivery of the judgment of 21 December 2016, *Council v. Front Polisario*, the referring court decided to withdraw the first two questions, but to maintain the latter two.<sup>32</sup>

### 3.2 THE OPINION OF THE ADVOCATE GENERAL

In its Opinion, the Advocate General Melchior Wathelet considered different aspects of the Case at issue. With reference to the jurisdiction, the Advocate General found that the Court has jurisdiction on an act of the Council approving the conclusion of an international agreement.<sup>33</sup> Moreover, the Advocate General reaffirmed that, as it was held in the judgment *Council v. Front Polisario*, the Union is bound by the right to self-determination, which is enforceable *erga omnes*.<sup>34</sup> Additionally, the Advocate General reminded the principle stated in *Air Transport Association of America and Others*<sup>35</sup> and, therefore found that both natural and legal persons could rely in legal proceedings on the rules of international law binding on the EU in case such rules are unconditional and sufficiently precise and their nature do not exclude judicial review of the act. Consequently, the Advocate General concluded that such conditions are satisfied with respect of three international law norms relied on by Western Sahara Campaign: (1) the right to self-determination, (2) the principle of permanent sovereignty over natural resources and (3) the rules of international humanitarian law applicable to an international agreement concerning the exploitation of the natural resources of an occupied territory.

<sup>30</sup> In its first question the referring court asked to the Court an interpretation of the Association Agreement and particularly, whether the references to the 'Kingdom of Morocco' were to be interpreted to the sovereign territory of that State, and therefore precluding products originating in Western Sahara from being imported into the EU free of customs duties. By means of its second question, the referring court sought to ascertain whether the Association Agreement was valid having regard to Art. 3(5) TEU.

<sup>31</sup> By its third question the referring court sought to ascertain to what extent the EU was entitled to conclude, with the Kingdom of Morocco, international agreements permitting the exploitation of the natural resources of the waters adjacent to the Western Sahara, having regard to Art. 3(5) TEU.

<sup>32</sup> See Case C-266/16, *supra* n. 1, para. 2.3.

<sup>33</sup> Case C-266/16, Opinion of Advocate General Wathelet delivered on 10 Jan. 2018 (1), para. 54.

<sup>34</sup> *Ibid.*, para. 106, referring to para. 88 of the judgment.

<sup>35</sup> *Ibid.*, para. 78, referring to Case C 366/10, EU: C:2011:864, paras 51–55.



Therefore, such norms fall within the framework of judicial review of an international agreement concluded by the EU. Regarding the right to self-determination, the Advocate General found that the fisheries exploitation of the waters of Western Sahara established by the contested acts constitutes a breach of the right to self-determination of the people of Western Sahara. As a consequence, the EU failed to recognize the illegal situation resulting from the denegation of the right to self-determination to the people of Western Sahara and also to fulfil its obligation not to render aid or assistance in maintaining such situation. Therefore, the Advocate General affirmed that the Fisheries Agreement, and the acts approving and implementing the agreement, are not compatible with the Treaties so far as they apply to the territory of Western Sahara and its adjacent waters.<sup>36</sup> Moreover, the Advocate General concluded that the concept of '*de facto* administering power' does not exist under international law and Morocco is an occupying power that did not respect the rules of international humanitarian law concerning the conclusion of international agreements applicable on occupied territories.<sup>37</sup> Finally, the Advocate General underlined that while the catches made in the waters adjacent to Western Sahara represent around the 91.5 % of the total made in the context of the Fisheries Agreement, the 2013 Protocol does not contain any commitment on the part of the Kingdom of Morocco to use the financial contribution paid by the EU for the benefit of the people of Western Sahara in proportion to the quantities of the catches taken in the waters adjacent to such territory.<sup>38</sup> Therefore, the Advocate General concluded that the Agreement does not respect the principle of permanent sovereignty over natural resources since it does not provide enough legal instruments to ensure the necessary benefit for the people of Western Sahara arising from the fisheries exploitation.<sup>39</sup>

### 3.3 THE COURT'S FINDINGS

#### 3.3[a] *The Jurisdiction of the Court*

The Court deals first with its jurisdiction. This is because, according to the Council, the Court had no jurisdiction to state on the validity of international agreements such as the Fisheries Agreement and the 2013 Protocol in a preliminary ruling procedure. It maintained that the jurisdiction of the Court is limited to ruling on the validity of acts approving the conclusion of international agreements. The Court found that, as provided by Articles 19(3)(b) TEU and 267 TFEU, it has

<sup>36</sup> *Ibid.*, paras 147–186 and 212.

<sup>37</sup> *Ibid.*, para. 232.

<sup>38</sup> *Ibid.*, paras 272 and 280.

<sup>39</sup> *Ibid.*, para. 285.

unlimited jurisdiction to give preliminary ruling on the interpretation and the validity of acts adopted by the EU institutions.<sup>40</sup> International agreements concluded by the EU pursuant to the provisions of the Treaties constitute acts of the institutions of the Union and therefore an integral part of the EU legal order.<sup>41</sup> Also, in the exercises of its powers the EU must observe the rules and principles of customary international law and the provisions of international conventions. Consequently, the Court affirmed its jurisdiction for assessing whether an international agreement concluded by the EU is compatible with the Treaties and with rules of international law binding upon it, not only in case of an action for annulment but also in a request for a preliminary ruling.<sup>42</sup> Since the request for a preliminary ruling concerned the validity of an international agreement concluded by the EU, the request must be understood as relating to the EU acts approving the conclusion of such international agreement. In sum, the Court found that its jurisdiction could encompass the legality of the EU act in light of the content of the related international agreement.<sup>43</sup>

### 3.3[b] *The Territorial Scope of the Fisheries Partnership Agreement*

On the merits, the Court first considers whether the waters adjacent to the territory of Western Sahara were covered by the provisions of the Fisheries Agreement and the 2013 Protocol.<sup>44</sup> The territorial scope of the Fisheries Agreement is determined by Articles 2(a), 5 and 11 of such agreement. In general, according to Article 11 the Fisheries Agreement applies to ‘the territory of Morocco and waters under Moroccan jurisdiction’. With reference to the fishing activities, according to Article 5 vessels flying the flags of a EU Member State are allowed to ‘engage in fishing activities’ in the fishing zones of the Kingdom of Morocco. According to Article 2(a) the term ‘Moroccan fishing zone’ refers to the ‘waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco’. Pursuant to the Court, such provision must be interpreted in accordance with rules of customary international law, Article 31 of the Vienna Convention and the Convention on the Law of the Sea which are binding on the EU institutions.<sup>45</sup> The Court found that the Fisheries Agreement and the 2013 Protocol must be considered as part of the broader legal framework of the Association Agreement. As a consequence, the concept of ‘territory of Morocco’ provided by Article 11 of

<sup>40</sup> Case C-266/16, *supra* n. 1, para. 42.

<sup>41</sup> *Ibid.*, paras 45–46.

<sup>42</sup> *Ibid.*, paras 47–48.

<sup>43</sup> *Ibid.*, para. 51.

<sup>44</sup> *Ibid.*, para. 56.

<sup>45</sup> *Ibid.*, paras 57–58.

the Fisheries Agreement must be interpreted according to the same one in Article 94 of the Association Agreement. As it was previously found by the Court in *Council v. Front Polisario*, such concept refers to the geographical area under which the Kingdom of Morocco exercise its sovereignty according to international law.<sup>46</sup> Therefore, the term ‘territory of Morocco’ used in the Fisheries Agreement does not include the territory of Western Sahara.<sup>47</sup> With reference to the term ‘waters falling within the sovereignty or jurisdiction’ of the Kingdom of Morocco provided by the Fisheries Agreement, there is no a similar definition in the Association Agreement and the Court underlined that the term must be interpreted with reference to the Convention on the Law of the Sea.<sup>48</sup> According to Articles 2 (1), 55 and 56 of the Convention, the waters included in the sovereignty or jurisdiction of the coastal State are the ones adjacent to its territory. Therefore, since the territory of Western Sahara is not part of the Kingdom of Morocco, its adjacent waters are not included in the Moroccan fishing zone according to Articles 2(a) of the Fisheries Agreement. Finally, the Court highlighted that the rules of customary international law prevent the EU and the Kingdom of Morocco from agreeing a special meaning to Article 31(4) of the Vienna Convention to the territorial scope of the Fisheries Agreement. The Court underlined that the Kingdom of Morocco claimed its sovereignty over the territory of Western Sahara and categorically excluded to be occupying or ‘*de facto* administrative power’. Therefore, such definition cannot be used in interpreting the territorial scope of the Partnership Agreement as considered by the Commission and the Council.<sup>49</sup> In conclusion, the Court found that the territorial scope provided by Article 2(a) of the Partnership Agreement does not include the waters adjacent to the territory of Western Sahara.

### 3.3[c] *The Territorial Scope of the 2013 Protocol*

The 2013 Protocol does not contain an own definition of its territorial scope and use the same term ‘Moroccan fishing zone’ provided by Article 2(a) of the Fisheries Agreement. The Court highlighted that the expression must be understood also for the Protocol as referring to ‘waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco’. Therefore, the Court found that the territorial scope of the article does not include the waters of the territory of Western Sahara.<sup>50</sup> With reference to the geographical coordinates of the Moroccan baselines and Moroccan

<sup>46</sup> Case C-104/16 P, paras 95, 132.

<sup>47</sup> Case C-266/16, *supra* n. 1, para. 64.

<sup>48</sup> *Ibid.*, para. 66.

<sup>49</sup> *Ibid.*, paras 70–73.

<sup>50</sup> *Ibid.*, paras 77–79.

fishing zones that the Kingdom of Morocco would have notified to the Commission according to the Annex to the Protocol, the Court found that they were notified on 16 July 2014, one day after the Protocol entered into force and therefore are not part of it.<sup>51</sup> The Court underlined that even a proper notification of the geographical coordinates would have not included the waters adjacent to the territory of Western Sahara since the Fisheries Agreement and the 2013 Protocol must be interpreted according to the rules of customary international law.<sup>52</sup>

### 3.3[d] *The Judgment of the Court*

In answering the first question the Court concluded that the territory of Western Sahara does not fall within the territorial scope of neither the Fisheries Partnership Agreement nor the 2013 Protocol. As a consequence, the Court ruled that the Regulation 2006/764, the Decision 2013/875 and the Regulation 2013/1270 are valid in the light of Article 3(5) TEU. Given such answer, the Court found that it was not necessary to answer the second question.

## 4 EVALUATION

Once again in the history, self-determination seems to be *loaded as dynamite* and able to open a double-faced Pandora's Box on structural issues of European external action.<sup>53</sup> Indeed, the approach of the Court, reaffirming the binding nature of customary international law for the EU legal order, deserves much attention both on possible political consequences with EU trading partners and on the institutional coherence of the EU external action that finds its legal basis in Articles 3 and 13 TEU.<sup>54</sup>

First, with reference to the international consistency of EU foreign and trade policies the Court underlined the necessity of interpreting international agreements with respect to the rules of customary international law and, in particular, the right to self-determination of people.<sup>55</sup> Such findings lead one to investigate the important political repercussions that could arise from this Case on the future of EU external relations. Indeed, there are, and potentially there will continue to be, disputed territories characterized by self-determination claims that are

<sup>51</sup> *Ibid.*, para. 81.

<sup>52</sup> *Ibid.*, para. 83.

<sup>53</sup> See R. Lansing, *The Peace Negotiations: A Personal Narrative* (Houghton Mifflin Co., 1921). Robert Lansing, Secretary of State of Woodrow Wilson, used these words in 1921 to describe the possible consequences arising from self-determination.

<sup>54</sup> See also M. Lerch & G. Schwellnus, *Normative by nature? The role of coherence in justifying the EU's external human rights policy*, 13(2) J. Eur. Pub. Pol'y 304–321 (2006).

<sup>55</sup> See Case C-266/16, *supra* n. 1, para. 64.

concerned by trade agreements with the Union. An unsystematic application of the self-determination principle in international treaties concluded by the EU would be problematic and would open many questions on the coherence of the EU external action. Indeed, in the Western Sahara the legal basis for the recognition of the right to self-determination of the Saharawi people was provided by the International Court of Justice's Advisory Opinion of 16 October 1975.<sup>56</sup> Nevertheless, the Court did not explicitly limit its findings to situations involving decolonization processes and did not refer just to UN Charter Article 73, but also to Article 1 which recognizes the right of self-determination to all people, without making a distinction between colonial and non-colonial situations.<sup>57</sup> Therefore, the Case could have important consequences. Practical questions remain with reference to the possible existence of oppressed minorities within sovereign States that would seek the recognition of their right to self-determination and to freely dispose of their natural resources in the context of a trade agreement concluded by the State with the EU. As a matter of fact, such a situation could expose EU external trade policies to claims by every group which affirms its right to self-determination. Indeed, self-identification plays a vital role in the self-determination, since the right can be invoked by groups that simply consider themselves as separate national group within a State.<sup>58</sup> Therefore, these situations could lead such groups to be interested in asking for *their* territory the application of the same principles affirmed by the Court in *Western Sahara Campaign UK*, potentially creating new international political tensions. Finally, even considering the Western Sahara particular status of territory to be decolonized from the presence of an 'occupying power',<sup>59</sup> nobody can exclude in the future a similar situation could happen in the territory of a different EU trading partner. It is true that the international legal debate on self-determination remains controversial and this was not the occasion to find definitive answers. However, something more could have been said with reference to the possible future consequences of the judgment on EU interests and especially on the balance between economic and humanitarian values. Within which limits should the principle of self-determination be guaranteed by EU external action in the future? And how will the EU concretely ensure the respect of the principle of permanent sovereignty over natural resources in similar situations? In this perspective, the debate remains in part still open and a more detailed position by the

<sup>56</sup> Case C-104/16, para. 28.

<sup>57</sup> Case C-266/16, para. 63.

<sup>58</sup> See W. Connor, *The Political significance of Ethnonationalism within Western Europe*, in *Ethnicity in an international context*, 11–12 (A. Said & L. R. Simmons eds, 1976).

<sup>59</sup> See *supra* n. 36.

Court would have limited contradictory initiatives by other EU institutions and contributed to increase the EU external consistency on such issues.

Second, with respect to the institutional coherence of EU external action, the Court affirms its jurisdiction to rule on the validity of EU international agreements.<sup>60</sup> Nevertheless, the Court's findings in *Western Sahara Campaign UK* may not be respected uniformly in the context of the EU institutions, increasing the risk of a significant lack of internal coherence. Indeed, on 16 April 2018 the Council adopted a mandate to instruct the Commission to renegotiate with Morocco the conclusion of a new fisheries agreement that would also cover the waters adjacent to the Western Sahara territory. Then, on 16 July 2018 the European Union Foreign Affairs Council approved a decision on the extension of tariff preferences in the Association Agreement with Morocco to the Western Sahara and requested the consent of the EU Parliament to adopt the decision.<sup>61</sup> On the one hand, this initiative contradicts a submission by the Commission during the hearings before the Court that it was not its intention to include Western Sahara in the trade agreements with Morocco.<sup>62</sup> On the other hand, it seems an attempt to circumvent the Court's decision that strongly dismissed the possibility to include the Western Sahara territory within the territorial scope of the trade agreements concluded with Morocco. As the Court underlined, agreements concluded by EU institutions are integral part of the EU legal order and the EU must respect customary international law.<sup>63</sup> Consequently, the new initiative is not compatible with the Court's findings and may give rise to a problem of compatibility with principles of public international law.<sup>64</sup> Obviously, it would be naïve to not take into account the importance of Morocco as a political and economic partner and the effects on the related EU interests in the area. However, the conclusion of a new fishing partnership agreement that would apply to the territory of Western Sahara and its adjacent waters would empty the Court's previous findings of any purpose and would contribute to create new uncertainty at the international level about the coherence of EU external action. If the Court found that the Union should respect the right to self-determination, as an *erga omnes* principle of customary international law, how would it be possible that such findings will not be respected by other institutions of the Union? Overall, such

<sup>60</sup> See *supra* ns. 40–41.

<sup>61</sup> See Foreign Affairs Council, *Outcome of the Council Meeting*, 11153/18 (EN), 6 (16 July 2018). On 27 September 2018, the European Parliament Committee on Foreign Affairs in the draft Opinion 2018/0256M (NLE) for the Committee on International Trade, highlighted that the new agreement would not imply the recognition of Morocco's sovereignty over Western Sahara.

<sup>62</sup> Case C-104/16 P, para. 79.

<sup>63</sup> See *supra* n. 39.

<sup>64</sup> P. Eeckhout, *EU External Relations Law*, 383–384 (OUP 2011).

context shows an evident lack of consistency within the EU legal and institutional framework that could have negative consequences on the external relations.

To conclude, the Case shines much light on the importance of improving effectiveness and consistency of EU external action, both in its international and institutional dimensions. Such coherence will be achievable through the contribution of all EU institutions, including (and respecting) the Court's jurisprudence. Strategically, a coherent EU external policy compatible with customary international law would contribute to the strengthening of the EU's reputation as a reliable international actor and thus increase the trust in the EU institutions by both member and third countries.