

Introductory comments on the Western Sahara rulings of the European Court of Justice (CJEU) of 4 October 2024¹

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Introduction

1. On 4 October 2024, the CJEU (Grand Chamber) issued three judgments in cases concerning Western Sahara. Two of them were pending at the CJEU after an appeal was lodged against the corresponding judgments of the first instance. The following judgments were handed down:

- The judgment on the Fisheries Agreement between the European Union (EU) and the Kingdom of Morocco (Joined Cases C-778/21 P and C-798/21 P (ECLI:EU:C:2024:833 – **first judgment**);
- The judgment on the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States and the Kingdom of Morocco (Joined Cases C-779/21 P and C-799/21 P (ECLI:EU:C:2024:835 – **second judgment**), and
- The judgment on banning import on labelling food products originating from Western Sahara (Case C-399/22 (ECLI:EU:C:2024:839 – **third judgment**).

2. The Council of the EU (one of the appellants) had requested that the judgment on the fisheries agreement be set aside in so far as it annulled the decision on the fisheries agreement; on the judgment on the Association Agreement, the Council had requested that the corresponding

¹ The introductory comments were firstly written as information for the members of “*Freiheit für die Westsahara*”, an association not for gain registered under the law of Germany, after the handing down of the judgments of the CJEU. They were later amended for several presentations on the judgments. *Western Sahara - State and colony. With documentary annexures from court decisions and acts by the Sahrawi Arab Democratic Republic and the POLISARIO Front* by Manfred O. Hinz, Ahmed Mohamed Sidi Aly and Emma Lehibib (LIT Verlag, Berlin, Münster, London, in print) reflects the judgments as part of the European jurisprudence on Western Sahara, notes other academic evaluations and also refers to the attempt to “rectify” the judgments of the CJEU (See: *Order of the Court* of 15 January 2025 (Rectification of judgment), Cases C-779/21 and C-799/21 P-REC, ECLI:EU:C:2025:28.) The documentary annexures to *Western Sahara - State and colony* contain excerpts of judgments relevant for Western Sahara, including the judgment of the CJEU named hereunder “second judgment”.

judgment be set aside. These and all other applications were rejected with a restriction as to the date of effect of the judgment on the Association Agreement.

3. The restriction states that (see paragraph 193 of the second judgment):

the effects of the decision ... on the conclusion of an 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 ... for a period of twelve months from the date of delivery of the present judgment.

4. A corresponding regulation in the dispute over the fisheries agreement was not up for debate for the court, as the necessary implementation protocol had expired on 17 July 2023. Paragraph 217 of the first judgment confirmed:

In the absence of a protocol in force, the Fisheries Agreement shall not allow Union vessels access to the "fishing zone" referred to in the Agreement.

5. Although there is no procedural possibility to request the revision of the extension of the applicability of the per se invalid treaty, it must be noted that the extension as decided by the CJEU is certainly questionable under international law and the European procedural law.

6. As regards the third judgment, confirming the prejudice in the judgment on appeal, it is stated, first, that a member state is not permitted to unilaterally impose an import ban on agricultural products and, secondly, that, at the stages of importation and sale to the consumer, only Western Sahara must be indicated as its country of origin on the label of melons and cherry tomatoes harvested in the territory of Western Sahara.

The grounds of the first and second judgments

7. The first and second judgments have largely identical contents. In accordance with the preliminary rulings, both judgments confirm that F. POLISARIO has capacity to be a party to legal proceedings before the Courts of the EU. The plaintiff, F. POLISARIO, is again affected, in agreement with the lower court, by the orders dealt with in the two judgments.

8. In terms of content, all judgments confirm the European case-law on the status of Western Sahara as a non-self-governing territory in terms of Article 73 of the Charter of the United Nations and international case-law, as it is available in the form of the advisory opinion of the International Court of Justice of 16 October 1975. Western Sahara is a territory on its own right and, therefore, not in any way under the authority of the Morocco.

9. An important point in the judgments with regard to the effect of the right to self-determination is the statement of the CJEU on the requirement of the consent of the Sahrawi people to the treaties in question.

10. First of all, the CJEU declared (this and the following quotations are from the second judgment):

129. As was noted by the Advocate General in points 123 and 124 of her Opinion, there is a difference in that regard between the concept of the ‘population’ of a non-self-governing territory and that of the ‘people’ of that territory. The latter refers to a political unit which holds the right to self-determination, whereas the concept of ‘population’ refers to the inhabitants of a territory.

130. In this instance, the Commission and the EEAS conducted a consultation process with the ‘people concerned’, which, as was noted by the General Court in paragraph 337 of the judgment under appeal, encompasses, in essence, the inhabitants who are currently present in the territory of Western Sahara, irrespective of whether or not they belong to the people of that territory. As was correctly held by the General Court, in essence, in paragraph 373 of the judgment under appeal, that consultation process cannot therefore be equivalent to obtaining the consent of the ‘people’ of the non-self-governing territory of Western Sahara.

11. As far as possible approval of treaties concerning the Sahrawi people is concerned, the judgments of the CJEU differ from the judgments of the lower court. The CJEU held:

145. In that regard, it is true that, as has been held in paragraphs 132 to 135 and paragraph 140 of the present judgment, the General Court was correct to conclude, in essence, that, on the basis of the principles of the right to self-determination and of the relative effect of treaties, as interpreted by the Court of Justice, the consent of the people of Western Sahara to the implementation of the agreement at issue in that territory was a condition for the validity of the decision at issue and that the consultation process conducted by the Commission and by the EEAS was not capable of establishing such consent on the part of that people.

146. On the other hand, it incorrectly interpreted the agreement at issue when it held, in essence, in paragraph 322 of the judgment under appeal, that the effect of that agreement was to impose an obligation on the people of Western Sahara by granting the authorities of the Kingdom of Morocco certain powers, to be exercised in the territory of Western Sahara.

147. Indeed, although the implementation of the agreement at issue means that the acts of the Moroccan authorities carried out in the territory of Western Sahara have legal effects as described in paragraphs 94 to 96 of the present judgment, changing the legal situation of the people of that territory, the fact that that agreement recognises those authorities as having certain administrative powers which are exercised in that territory does not however allow the finding that that agreement creates legal obligations for that people as a subject of international law.

148. In that regard, as is emphasised in the agreement at issue, that agreement does not mean that the European Union recognises the alleged sovereignty of the Kingdom of Morocco over Western Sahara. The people of Western Sahara is not, moreover, the addressee of the certificates of origin or other administrative acts drawn up by the Moroccan authorities in connection with the implementation of that agreement, which it would be required to recognise; nor is it the addressee of the measures taken by the EU authorities and by the authorities of the Member States with regard to them. Moreover, in so far as it is apparent from the agreement at issue that it applies only to products originating in Western Sahara which are subject to controls by the customs authorities of the

Kingdom of Morocco, the conclusion of that agreement does not prevent the Union from providing, where appropriate, for separate arrangements which would apply to products originating in Western Sahara which are not subject to controls by those authorities, including products originating in the part of the territory of Western Sahara controlled by Front Polisario.

149. It follows that the General Court relied on an incorrect premiss in order to find, in paragraph 323 of the judgment under appeal, that the expression of the people of Western Sahara's consent to the agreement at issue had to be explicit.

150. However, it should be borne in mind that, if the grounds of a decision of the General Court reveal an infringement of EU law, but the operative part of that decision can be seen to be well founded on other legal grounds, that infringement is not capable of leading to the setting aside of that decision and a substitution of grounds must be made (judgment of 17 January 2023, *Spain v Commission*, C-632/20 P, EU:C:2023:28, paragraph 48 and the case-law cited).

151. It is therefore necessary to verify whether the operative part of the judgment under appeal, inasmuch as it annulled the decision at issue, can be seen to be well founded on legal grounds other than those vitiated by the error identified in paragraphs 146 to 149 of the present judgment.

12. In this context, the CJEU developed its view on the requirement of consent in the following way:

153. First, the agreement in question must not give rise to an obligation for that people. Second, the agreement must provide that the people itself, which cannot be adequately represented by the population of the territory to which the right of that people to self-determination relates, receives a specific, tangible, substantial and verifiable benefit from the exploitation of that territory's natural resources which is proportional to the degree of that exploitation. That benefit must be accompanied by guarantees that that exploitation will be carried out under conditions consistent with the principle of sustainable development so as to ensure that non-renewable natural resources remain abundantly available and that renewable natural resources, such as fish stocks, are continuously replenished. Lastly, the agreement in question must also provide for a regular control mechanism enabling it to be verified whether the benefit granted to the people in question under that agreement is in fact received by that people.

13. And further:

155. In the event that the two conditions set out in paragraph 153 of the present judgment are satisfied, the consent of the people concerned must be held to have been obtained. The fact that a movement which presents itself as the legitimate representative of that people objects to that agreement cannot, as such, be sufficient to call in question the existence of such presumed consent.

155. In the event that the two conditions set out in paragraph 153 of the present judgment are satisfied, the consent of the people concerned must be held to have been obtained. The fact that a movement which presents itself as the legitimate representative of that people objects to that agreement cannot, as such, be sufficient to call in question the existence of such presumed consent.

14. However, the following applies to "consent":

156. That presumption of consent may nonetheless be reversed so long as legitimate representatives of that people establish that the system of benefits conferred on that people by the agreement in

question, or the regular control mechanism which must accompany it, does not satisfy the conditions set out in paragraph 153 of the present judgment. It is, where appropriate, for the EU judicature to determine that question, with a view to assessing, in particular, whether that agreement adequately preserves the right of the people in question to self-determination or the permanent sovereignty over natural resources which derives from that right and from Article 73 of the Charter of the United Nations. It is also open to the Commission, the Council, the European Parliament, and any Member State to obtain, even before an agreement between the European Union and the Kingdom of Morocco providing for such a system of benefits is signed or concluded, the opinion of the Court regarding the compatibility of the envisaged agreement with the provisions of the Treaties, in particular Article 21(1) TEU.

15. As a result, this means:

157. In this instance, regarding the first of the two conditions set out in paragraph 153 of the present judgment, that condition must be regarded as satisfied. For the reasons set out in paragraphs 147 and 148 of the present judgment, the agreement at issue, although it changes the legal situation of the people of Western Sahara in EU law with regard to the right to self-determination which that people holds in respect of that territory, does not give rise to legal obligations for that people as a subject of international law. 157. In this instance, regarding the first of the two conditions set out in paragraph 153 of the present judgment, that condition must be regarded as satisfied. For the reasons set out in paragraphs 147 and 148 of the present judgment, the agreement at issue, although it changes the legal situation of the people of Western Sahara in EU law with regard to the right to self-determination which that people holds in respect of that territory, does not give rise to legal obligations for that people as a subject of international law.

16. On the other hand:

158. Regarding the second condition, it must be pointed out that any benefit for the people of Western Sahara which displays the characteristics listed in paragraph 153 of the present judgment is manifestly absent from the agreement at issue, as can be seen from, inter alia, the answers given by the Commission to the questions put by the Court of Justice at the hearing before that court.

159. In particular, as was correctly stated by the General Court in paragraphs 318 and 319 of the judgment under appeal, the agreement at issue is not intended to confer rights on the people of Western Sahara as a third party to that agreement. It is the Kingdom of Morocco, as a party to the agreement at issue, which is the beneficiary of the tariff preferences granted by the European Union to products originating in Western Sahara under that agreement. In addition, the Commission explained at the hearing before the Court of Justice that the effect of that agreement was to include products originating in Western Sahara in the scope of the Association Agreement and thus to place them on an equal footing, as regards tariff preferences, with Moroccan products, as well as with products originating in Algeria and Mauritania, which also benefit from tariff preferences.

17. Consequently the court decided that (see paragraph 160) it

cannot be presumed [that the people of Western Sahara has] given its consent to the application of the agreement at issue in that territory.

...

162. Having regard, in addition, to the finding in paragraph 145 of the present judgment that the consultation process conducted by the Commission and by the EEAS was not capable of establishing such consent on the part of that people, the conclusion of the General Court, in paragraph 391 of the judgment under appeal, that, in adopting the decision at issue, the Council had not taken sufficient account of all the relevant factors concerning the situation in Western Sahara and that the Council and the Commission had been wrong to take the view that the current situation in that territory did not make it possible to ascertain the existence of consent on the part of the people of Western Sahara to the agreement at issue, must be held to be well founded.

The third judgment

18. The third judgment concerns a reference from the Conseil d'État of France to establish the application of European law in the dispute between the French Confédération paysanne and ministries in the light of the issues already mentioned above. The CJEU (as already stated above) confirms that the import of goods regulated by trade agreements of the EU is not under the jurisdiction of the members of the EU.

19. On the question of the labelling obligation, the ruling said:

77. In that regard, under Article 60 of the Union Customs Code, goods which are wholly obtained in a given 'country' or 'territory' or which underwent their last substantial processing or working in that country or territory are to be deemed to originate in the country or territory concerned.

78. Consequently, the country of origin of the goods at issue in the main proceedings is the country or territory where they were harvested.

79. As regards, first of all, the term 'country', it should be noted that it is used numerous times in the EU Treaty and the FEU Treaty as a synonym for the term 'State'. Therefore, in order to ensure the consistent interpretation of EU law, the same meaning should be given to that term in the Union Customs Code, in Regulation No 1308/2013, and in Implementing Regulation No 543/2011 ...

80. As regards, next, the concept of a 'State', that concept must be understood as referring to a sovereign entity exercising, within its geographical boundaries, the full range of powers recognised by international law ...

81. As regards, lastly, the term 'territory', it follows from the alternative nature of the wording in Article 60 of the Union Customs Code that that term refers to entities other than 'countries' and, therefore, other than 'States' ...

82. As the Court has already held, such entities include, inter alia, geographical areas which, whilst being under the jurisdiction or the international responsibility of a State, nevertheless have a separate and distinct status from that State ...

...

85. The territory of Western Sahara constitutes a territory distinct from that of the Kingdom of Morocco (judgments of 21 December 2016, *Council v Front Polisario*, C-104/16 P, EU:C:2016:973, paragraph 92, and of 27 February 2018, *Western Sahara Campaign UK*, C-266/16, EU:C:2018:118, paragraph 62).

86. Furthermore, Annex I to Commission Implementing Regulation (EU) 2020/1470 of 12 October 2020 on the nomenclature of countries and territories for the European statistics on international trade in goods and on the geographical breakdown for other business statistics (OJ 2020 L 334, p. 2), applicable to the sphere of Union customs legislation, lays down separate codes and texts for Western Sahara and the Kingdom of Morocco.

87. In those circumstances, the territory of Western Sahara must be regarded as a customs territory for the purposes of Article 60 of the Union Customs Code and, consequently, of Regulation No 1308/2013 and Implementing Regulation No 543/2011. Accordingly, the indication of the country of origin which must appear on the goods at issue in the main proceedings may designate only Western Sahara as such, because those goods are harvested in that territory.

Concluding remark

20. There is no question that the Western Sahara judgments of the CJEU are important decisions that are to be welcomed in principle, and that their orientation not only decisively limits the political framework of the EU Commission, but also sends a clear signal about the right to self-determination of the Sahrawi people.

21. It can be certainly be discussed with good reasons whether the Consideration of the CJEU on the consent of a legitimate holder of the right to self-determination in terms of Article 73 of the Charter of the United Nations are covered by international law. The CJEU submits its position without any reference to sources of international law. If the court had done what is usually expected in legal analyzes, it would have noted that several references would have been available against its interpretation of consent. (Reference is here to the Vienna Treaty Convention).

22. In the expected renegotiation of the EU with Morocco, the interpretation of the consent requirement as forwarded by the CJEU could become relevant and, consequently, a problem. Since explicit consent is not required, a negotiation result could be formulated in such a way that the way it is formulated appears to meet the criteria defined by the CJEU to replace explicit consent. In such a case, the burden of the objection will lie with the Sahrawi people, or their representative, the F POLISARIO. In other words, matter would have again to be submitted to the court to decide. Note that the F. POLISARIO would not have the privilege to request an opinion of the court before the signing of the treaty.

23. *Pacta sunt servanda* seems to be more important to the EU Commission than the realization of the Sahrawi people's right to self-determination. A press release dated October 4, 2024 states:

Joint Statement by President von der Leyen and High Representative / Vice-President Borrell on the European Court of Justice judgements relating to Morocco

Brussels, 4 October 2024

The EU reiterates the high value it attaches to its strategic Partnership with Morocco, which is longstanding, wide-ranging and deep. Over the years, we have established a profound friendship and a solid and multi-faceted cooperation, which we intend to take to the next level in the coming weeks and months.

The EU takes note of the Court of Justice of the European Union's judgments C-778/21 P, C-798/21 P, C-779/21 P, C-799/21 on the appeals against the judgment of the General Court of 29 September 2021 as well as the reply to the preliminary ruling request in case C-399/22 on the labelling of fruit and vegetables from the territory of the Western Sahara. The European Commission is currently analysing the judgments in detail. In this context, we take note that the European Court of Justice preserves the validity of the agreement on agricultural products for an additional 12 months.

In close cooperation with Morocco, the EU firmly intends to preserve and continue strengthening close relations with Morocco in all areas of the Morocco-EU Partnership, in line with the principle of *pacta sunt servanda*.

24. What will be the consequences for the renegotiations with Morocco? Do the decisions of the CJEU not eventually require to accept that the desired good relations with Morocco is one thing, but international legal obligations to respect the right to self-determination of the Sahrawi people is another and this, indeed, a fact that must be respected without compromise?

(Bremen, 2024/2025)