

Exploiting Non-Self-Governing Territory Status: Western Sahara and the New EU/Morocco Sustainable Fisheries Partnership Agreement

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Abstract

The 2018 EU/Morocco Sustainable Fishing Partnership Agreement (SFPA) was negotiated in the aftermath of the CJEU's 2018 *Western Sahara Campaign* judgment, which concerned a challenge to the 2006 EU/Morocco Fishing Partnership Agreement (and its 2013 Protocol). This article first sets out the way in which the CJEU harnessed Western Sahara's status as a Non-Self-Governing Territory (NSGT) for the purpose of its finding that the EU/Morocco fisheries agreements were inapplicable to Western Sahara's coastal waters in the absence of third-party consent. However, the Court's approach left open the possibility that such agreements could be revised and extended to this marine area. Against this background, the article considers how the EU Commission and Council have responded to the CJEU's judgment in this case and, specifically, the way they have sought to justify the SFPA's *de jure* application to the waters off Western Sahara. In so doing, it shows the extent to which the SFPA's terms, and the circumstances surrounding its development, are deeply problematic as far as the exploitation of the Territory's marine living resources are concerned. In this regard, it is hard to avoid the conclusion that the renewed EU/Morocco fisheries partnership undermines the EU's proclaimed commitment to the duty of non-recognition, and the operation of the right to self-determination in this fraught context.

Key Words: Western Sahara, Non-Self-Governing Territories, Self-determination, Fisheries Agreements, Exploiting Natural Resources.

1. Introduction

The EU/Morocco Sustainable Fishing Partnership Agreement (SFPA) was adopted by the EU Council in March 2019.¹ The treaty was negotiated in response to the CJEU's judgment in the *Western Sahara Campaign Case*,² which concerned a challenge to the 2006 EU/Morocco Fishing Partnership Agreement (FPA), and its 2013 Protocol. This decision was, in turn, substantially informed by the Court's earlier judgment in *Council v Polisario*, a tariff privileges case against the application of successive

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¹ Council Decision 2019/441, (4 March 2019) OJ L77/4.

² *R (Western Sahara Campaign UK) v HMRC & Secretary of State for the Environment* (Case C-266/16), CJEU judgment, 27 February 2018. EU:C:2018: 18. Also see the Divisional Court's judgment: [2015] EWHC 2829 (Admin).

EU/Morocco trade agreements to Western Sahara.³ The Applicants in these cases alleged that the EU's long-standing involvement in the exploitation of the Territory's natural resources meant it has violated the people of Western Sahara's right to self-determination and their natural resource entitlements under customary international law (CIL) as well as impliedly recognising Morocco's sovereignty claim.

First, this article examines the way in which the CJEU harnessed Western Sahara's status as a Non-Self-Governing Territory (NSGT) to address the *de facto* application of the EU/Morocco agreements to Western Sahara, and its coastal waters, for the purpose of invoking the customary principle of *pacta tertiis nec nocent nec prosunt*.⁴ As a result, the Court ruled that the treaties were inapplicable to Western Sahara in the absence of third party consent. But while this approach left open the possibility that such agreements could be extended to Western Sahara, the CJEU did not signal how such consent could be obtained in the exceptional conditions prevailing in that Territory. The article then considers the Commission and Council's responses to the *Western Sahara Campaign* judgment. It pays attention to the way in which these institutions have sought to justify the *de jure* application of the SFPA to Western Sahara and it assesses whether the Treaty's provisions satisfy international law's requirements regarding the exploitation of the Territory's marine living resources. The essay shows the extent to which the SFPA's terms, and the circumstances surrounding its development, are deeply problematic as far as the duty of non-recognition, and the operation of the right to self-determination are concerned. As a consequence, it considers whether the EU's close co-operation with Morocco has had the effect of sustaining Morocco's unlawful control of the Territory, thereby undermining the key principle of *ex injuria jus non oritur*, and it asks whether the EU's actions in this setting have contravened its proclaimed commitment to the strict observance of international law.⁵

2. Background

³ *Council v Front Polisario*, (Case C-104/16P), CJEU judgment, 21 December 2016. EU:C:2016:973

⁴ It holds that a treaty cannot create rights and/or duties for a third State without its consent. The principle is now codified in Art 34, Vienna Convention on the Law of Treaties (VCLT) (1969) 1155 UNTS 331.

⁵ Art 3(5) TEU provides that the EU shall contribute to the strict observance and development of international law. Art 21(1) adds that its international action is guided by respect for the principles of the UN Charter and international law.

In 1963, the UN listed Western Sahara as a NSGT under the provisions of Chapter XI of the UN Charter, with Spain as its Administering power.⁶ In 1974, Spain conducted a census of the Territory's inhabitants, a process which led to the announcement of its intention to hold a referendum regarding the Territory's future status. Morocco and Mauritania, which both maintained claims to parts of Western Sahara, lobbied against such a move in the General Assembly. It subsequently requested an Advisory Opinion from the ICJ concerning the historical status of Western Sahara and it called on Spain to postpone its planned plebiscite as a result.⁷ In 1975, the ICJ ruled that although both Morocco and Mauritania had legal ties with societal groups based in the Territory they were not of a sovereign nature. In keeping with the international law relating to decolonisation,⁸ the Court declared such ties did not affect the exercise of the entitlement to self-determination which it 'defined as the need to pay regard to the freely expressed will of peoples'.⁹

Morocco and Mauritania reacted badly.¹⁰ By the end of 1975, they had forcibly occupied parts of Western Sahara, Spain having already withdrawn,¹¹ and a protracted military conflict with the Polisario – the Territory's national liberation movement – ensued.¹² Mauritania withdrew from the conflict in 1979,¹³ but Moroccan forces took over the area it had previously held. Morocco's annexation of the Territory has frustrated the exercise of the people of Western Sahara's entitlement to self-determination but no third State (or International Organisation) has expressly recognised its sovereignty claim to Western Sahara in the intervening period. The active phase of the conflict came to an end in 1988, when a ceasefire was agreed; a

⁶ Report of the Committee of Information from Non-Self-Governing Territories, General Assembly (XVIII) (1963) UN A/5514, Annex III.

⁷ UNGA Res 3292 (XXIX) (13 December 1974).

⁸ See the Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 December 1960); UNGA Res 1541(XV) (15 December 1960); and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970).

⁹ Western Sahara Advisory Opinion (1975) ICJ Rep 12, [59].

¹⁰ See the Declaration of Principles on Western Sahara by Spain, Morocco and Mauritania, 14 November 1975, 988 UNTS 259. The General Assembly took note of the Declaration in UNGA Res 3458B (XXX) (10 December 1975).

¹¹ Spain later renounced its role as the Administering power: letter to the UN Secretary-General from Spain's Permanent Representative, 26 February 1976, UN Doc A/31/56-S/11997. The Sahrawi Arab Democratic Republic (SADR) was unilaterally declared in response.

¹² The Polisario was founded on 10 May 1973. See T Franck, 'The Stealing of the Sahara' (1976) 70 *AJIL*, 702; and M Dawidowicz, 'Trading Fish or Human Rights in Western Sahara' in D French (ed), *Statehood and Self-Determination* (CUP, 2013).

¹³ Mauritania concluded a peace treaty with the Polisario in 1979.

peace settlement followed, which was endorsed by the UN Security Council in 1991.¹⁴ Both the General Assembly and the Security Council have acknowledged the Polisario as the legitimate representative of the people of Western Sahara.¹⁵

In 1991, the Security Council established MINURSO and gave it the task of making the arrangements for a referendum on the Territory's final status. The 1974 census had identified 74,000 individuals who were eligible to participate in Spain's planned referendum. According to the 1991 Settlement Plan, eligibility for participation in the revived referendum was to be determined according to whether a given individual was an inhabitant of Western Sahara at the time of the Spanish census, or a direct descendant thereof. However, significant population transfers have occurred since Morocco occupied the Territory and many Sahrawis have been compelled to leave Western Sahara during this period. By 2000, 86,425 individuals had been identified by MINURSO as being eligible to participate in the planned referendum out of a total population of 250,000 individuals;¹⁶ and, by 2017, the Territory's total population stood at 567,000.¹⁷ The Polisario remains committed to holding a plebiscite, which includes the option of independence, but Morocco is only prepared to concede a degree of internal autonomy for its 'Saharan region',¹⁸ despite the fact that the implementation of this proposal would contradict the established modalities of decolonisation. The Security Council is still committed to the task of 'finding a just, lasting and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara'.¹⁹ Nonetheless, in the meantime, the lack of progress towards this goal has tested the limits of the collective duty of non-recognition, as the *Western Sahara Cases* in the EU courts show.

3. The Western Sahara Cases in the EU Courts

3.1. *Polisario v Council: The Trade Preferences Case*

Polisario v Council concerned a challenge to Council Decision 2012/497, which approved the 2010 EU/Morocco Liberalization Agreement regarding agricultural and

¹⁴ See UNSC Res 621 (1988); UNSC Res 658 (1990); and UNSC Res 690 (1991).

¹⁵ See, eg UNGA Res 34/37 (1979) [7].

¹⁶ *Western Sahara Campaign judgment*, (Divisional Court) n 2, [17]. However, the process of registering voters stalled in 2004 with the demise of Baker Plan II: J Soroeta Licerias, *International Law and the Western Sahara Conflict* (2014) 244-252.

¹⁷ See: <<https://www.un.org/dppa/decolonization/en/nsqt>> accessed 26 January 2020.

¹⁸ In 2010, the Security Council expressed the view that Morocco's autonomy proposal for Western Sahara was a 'serious and credible proposal': UNSC Res 1920 (2010).

¹⁹ See, eg, UNSC Res 2468 (30 April 2019).

fisheries products.²⁰ The 2010 Agreement amended certain aspects of the 1996 EU/Morocco Association Agreement, which, through Article 94, applied to ‘the territory of the Kingdom of Morocco’. The Polisario argued that the tariff privileges established under these successive treaties had been applied to products originating in Western Sahara and this was conceded by the Council and Commission during the proceedings. The General Court held that the Council was under an obligation to ensure that products entering the EU from this NSGT were not being treated in ways that were detrimental to the fundamental rights of the people of Western Sahara.²¹ Consequently, it decided that the two Agreements should be interpreted as being applicable to Western Sahara.²²

On appeal, the CJEU saw things very differently. It held that the EU/Morocco Agreements only applied to the territory over which Morocco exercises sovereign authority, in accordance with international law.²³ The Court also decided that the Agreements did not generate legal effects for the people of Western Sahara because they had not consented to them, in keeping with the CIL norm of *pacta tertiis*.²⁴ To this end, the CJEU pointed out that Western Sahara has a separate legal identity from Morocco by virtue of its NSGT status and pursuant to the right to self-determination.²⁵ Finally, the Court held that the *de facto* application of the Agreements to products coming from Western Sahara was not legally relevant.²⁶ It reasoned that self-determination manifests an *erga omnes* character, which binds the EU as a matter of international law.²⁷ As a result, it decided that any contraventions of the EU/Morocco Agreements were not capable of displacing the territorial application clause contained in the 1996 Agreement.²⁸

²⁰ *Polisario v Council*, Case T-512/12: EU:T:2015:953. 1996 EC/Morocco Euro-Mediterranean Association Agreement, OJ 2000, L 70/2; and 2010 EU/Morocco Liberalization Agreement, OJ 2012, L 241/4.

²¹ *ibid*, [241].

²² *ibid*, [101-103].

²³ CJEU judgment, n 3, [97].

²⁴ *ibid*, [106].

²⁵ *ibid*, [106-107]. The Declaration on Friendly Relations, n. 10, provides that: ‘the territory of a [...] Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it [...]’. As discussed below, Morocco is not the Administering Power of Western Sahara pursuant to the provisions of the UN Charter in any event.

²⁶ CJEU judgment, *ibid*, [122-125]. Art 31(3) VCLT provides that: ‘There shall be taken into account, together with the context: (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’.

²⁷ CJEU judgment, *ibid*, [88 and 123]. This interpretation was informed by the East Timor (*Portugal v Australia*), Judgment (1995) ICJ Rep, 90, [29]; and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (2004) ICJ Rep 136, [88, 155 -156].

²⁸ CJEU judgment, *ibid*, [122].

3.2. The Western Sahara Campaign Case

In the *Western Sahara Campaign Case*, the CJEU was asked to give a preliminary ruling about whether certain EU acts performed in connection with the adoption and implementation of the EU/Morocco 2006 FPA and its 2013 Protocol, were in accordance with international law.²⁹ In this context, the Applicant claimed that these arrangements violated the people of Western Sahara's rights over their natural resources as a matter of CIL, by recourse to the Permanent Sovereignty over Natural Resources (PSNR) doctrine, which constitutes a component of their broader entitlement to self-determination.³⁰ Under the FPA, EU-flagged vessels were permitted to fish in the 'Moroccan Fishing Zone' (MFZ) which was defined, in Article 2(a), as the 'waters falling within sovereignty or jurisdiction of the Kingdom of Morocco'.³¹ A number of designated fishing sectors established in successive Protocols, revealed that Morocco had authorised EU vessels to fish in the coastal waters adjacent to Western Sahara.³² The Applicant argued that the EU's fishing activities in this marine area were both widespread and substantial. The Advocate-General agreed with this contention. He observed in his Opinion that, between 2014 and 2018, the vast majority of the EU fleet's total catches were caught by pelagic fishing vessels in this particular marine area.³³ The Applicant argued that the ordinary

²⁹ Preliminary Ruling Reference, Case 266/16 (13 May 2016). EU Regulation 764/2006 (22 May 2016), Council Decision 2013/785 (16 December 2013); and Regulation 1270/2013 (15 November 2013).

³⁰ UNGA Res 1803 (XVII) (14 December 1962) on the Permanent Sovereignty over Natural Resources (PSNR) provides:

2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.

....

7. Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations [...]

The ICJ confirmed that the doctrine constitutes a CIL norm in *Armed Activities on the Territory of the Congo (DRC v Uganda)* (Judgment) (2005) ICJ Rep 168, [244].

³¹ Art 2(a) FPA and see Arts 5 and 11.

³² The internationally recognised maritime boundary between Morocco and Western Sahara is located at latitude 27°42' north. However, the geographical co-ordinates for certain fishing sectors were identified as 'south of 29°00'. This approach enabled the EU fleet to engage in fishing activities in the coastal waters adjacent to Western Sahara. See the Advocate-General Wathelet's Opinion, Case C-266/16, EU:C:2018:1, [66-70].

³³ The Advocate-General drew attention to the fact that pelagic fishing by EU vessels in one fishing sector, identified as falling with Western Saharan waters, accounted for approximately 91.5% of the EU fleet's total catch within the relevant period: *ibid*, [70 and 272]. The material fishing opportunities were substantial: the 2013 Protocol set the fishing quotas for pelagic and semi-pelagic fishing at 80,000 tonnes p.a.

meaning of Article 2(a) had been displaced by such extensive and consistent subsequent conduct, which showed that the parties shared an intention that the waters off Western Sahara came within the MFZ at the time the FPA, and its 2013 Protocol, were concluded.

The CJEU chose to approach this case by first deciding whether, or not, the waters adjacent to Western Sahara fell within the scope of the FPA and its Protocol.³⁴ As far as interpreting the concept of Moroccan territory was concerned, the Court adopted the approach it had previously devised in *Council v Polisario*.³⁵ As a result, the CJEU reaffirmed the view that ‘the territory of Morocco’ referred to the geographical area over which Morocco exercises sovereign authority under international law.³⁶ It also reiterated that this construction was supported by the applicability of the CIL principles of self-determination and *pacta tertiis* to Western Sahara,³⁷ which are binding on the EU.³⁸ As far as the phrase ‘the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco’ was concerned, the Court employed the LOSC’s provisions with a view to establishing the MFZ’s geographical scope.³⁹ It observed that, under Article 2(1), a coastal State exercises sovereignty over its Territorial Sea while the notion of ‘jurisdiction’, under Articles 55 and 56, relates to the rights and duties a coastal State possesses in relation to its declared Exclusive Economic Zone (EEZ).⁴⁰ As, according to the CJEU, the EU was incapable of agreeing a special meaning for these terms, it concluded that the waters off Western Sahara could not be interpreted as falling within the MFZ.⁴¹ Consequently, it held that the FPA, and its 2013 Protocol, could not be interpreted in a manner that would render them applicable to Western Sahara and its coastal waters.⁴²

4. Extending the EU/Morocco Agreements to Western Sahara’s Waters

4.1. Exploiting the Natural Resources belonging to NSGTs

³⁴ CJEU judgment, Case 266/16, n 2, [53].

³⁵ *ibid*, [59-61].

³⁶ *ibid*, [62 and 64].

³⁷ *ibid*, [63].

³⁸ *ibid*, [58].

³⁹ It noted that the LOSC was specifically mentioned in the FPA’s preamble and in Art. 5(4): *ibid*, [58 and 66].

⁴⁰ *ibid*, [67].

⁴¹ *ibid*, [69-70].

⁴² *ibid*, [83-84]. The Court decided that any geographical co-ordinates supplied by Morocco, under Chapter III of the Annex to the 2013 Protocol, in respect of specific fishing sectors could not displace the meaning attributed to the MFZ in the FPA: [80-82].

Consistent with its general responsibility for bringing about the end of colonialism, the General Assembly has taken a special interest in monitoring those economic activities undertaken by Administering powers which affect the interests of the peoples of NSGTs. For instance, paragraph 7 of the 2018 resolution:

‘Calls upon the administering Powers to ensure that the exploitation of the marine and other natural resources in the Non-Self-Governing Territories under their administration is not in violation of the relevant resolutions of the United Nations, and does not adversely affect the interests of the peoples of those Territories.’⁴³

However, the situation in Western Sahara is complicated by the absence of an active Administering power, even though Spain still retains this responsibility, according to the UN.⁴⁴ Consequently, the extent to which the orthodox approach remains relevant where a third State, which is not subject to the ‘sacred trust’ imposed by Article 73 of the UN Charter, controls a NSGT and is involved in the exploitation of its natural resources, is not at all obvious.

This was the challenge that confronted Hans Corell, UN Under-Secretary for Legal Affairs in 2002 when he was asked, by the President of the Security Council, to provide advice regarding the lawfulness of contracts entered into by Morocco and certain foreign companies in connection with the exploration for natural resources in Western Sahara.⁴⁵ Corell observed that the exploitation of a NSGT’s natural resources, by a third party, is not prohibited by international law per se.⁴⁶ However, he noted that such activities could not be undertaken in disregard for the interests and wishes of the people of the Territory in question. Corell concluded that such interests and wishes could be determined by a process of consultation (either with the affected people’s representatives or an institution empowered to act on their behalf). He added that any benefits generated by the exploitation of such natural resources must be enjoyed by the people concerned.⁴⁷ As the Security Council does not regard Morocco

⁴³ UNGA Res 73/104, 7 December 2018, [8]: ‘Invites all Governments and organizations of the United Nations system to take all possible measures to ensure that the permanent sovereignty of the peoples of [NSGTs] over their natural resources is fully respected and safeguarded in accordance with the relevant resolutions of the United Nations on decolonization’.

⁴⁴ See: <<https://www.un.org/dppa/decolonization/en/nsgt/western-sahara>> accessed 26 January 2020.

⁴⁵ ‘Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council’, 12 February 2002: UN Doc S/2002/161.

⁴⁶ *ibid*, [23].

⁴⁷ *ibid*, [24-25].

to be the Territory's occupying power, Corell could not invoke the corpus of rules and principles of International Humanitarian Law (IHL) for the purpose of producing his Opinion.⁴⁸ Consequently, he chose to reason by analogy with the obligations set out in Chapter XI of the UN Charter.⁴⁹ It is abundantly clear that Corell was not proposing that Morocco should be treated as the Territory's Administering power, instead he was simply trying to detect a minimum standard by which the legality of Morocco's actions could be assessed.⁵⁰ However, Corell's approach has been subsequently misinterpreted by the EU's political institutions in their efforts to find a plausible way of justifying Morocco's legal authority vis-à-vis Western Sahara.

The EU Commission's approach to the exploitation of fisheries in the waters adjacent to Western Sahara has long been conditioned by an acceptance that Morocco controls the Territory's coastal waters.⁵¹ For example, in May 2006, the Commission intervened in a Parliamentary debate on the EU/Morocco FPA to assert that Morocco's control 'implies that Morocco is a *de facto* administering Power of the Territory' in line with the operation of Chapter XI.⁵² Here, the Commission was invoking the approach devised by Corell in relation to Western Sahara with one vital difference – it sought to present Morocco as the Territory's *de facto* Administering power. On that occasion, the Commission argued that the EU/Morocco FPA was compatible with the obligations of an Administering power under the UN Charter and the PSNR principle.⁵³ The *de facto* Administering power argument was reiterated by the EU's High Representative for Foreign Affairs, in response to the controversy regarding the draft 2011 Protocol to the FPA. In this context, she stated that:

'According to the United Nations position on the subject, which the EU adheres to, Western Sahara is considered a 'non-self-governing territory' and Morocco its *de facto* administering power. To the extent that exports of products from Western Sahara are 'de facto' benefitting from the trade preferences, international law regards activities related to natural resources undertaken by an administering power in a non-self-governing territory as lawful as long as they are not undertaken

⁴⁸ See section 5.1 below.

⁴⁹ Corell, n 45, [21].

⁵⁰ Corell has stated that this approach applies equally to renewable and non-renewable natural resources. See H Corell, 'The Legality of Exploring and Exploiting Natural Resources in Western Sahara' in N Botha, M Olivier and D van Tonder (eds), *Multilateralism and International Law with Western Sahara as a Case Study* (Verloren Van Themaat Centre 2010), 240-242.

⁵¹ Eg, in 1995, the EU Fisheries Commissioner was reported as saying that the EU had to deal with whichever authority exercises control over this marine area: Licerias, n 16, 274.

⁵² Licerias, *ibid*, 272-3. Intervention by J Borg on behalf of the Commission (debate, 15 May 2006).

⁵³ *ibid*.

in disregard of the needs, interest and benefits of the people of that territory. The 'de facto' administration of Morocco in Western Sahara is under a legal obligation to comply with these principles of international law.'⁵⁴

While this statement perpetuates the apparent confusion between *de jure* and *de facto* status in order to further the EU's interests it also has the effect of ensuring Morocco's supposed status means that any legal responsibilities regarding the exploitation of natural resources in Western Sahara rest with Morocco.⁵⁵ In his 2018 Opinion in the *Western Sahara Campaign Case*, the Advocate-General observed that the notion of a *de facto* Administering power has no currency in international law.⁵⁶ The CJEU subsequently found it unnecessary to examine this argument, which was advanced by the Commission and Council in that case. In its view, the EU was bound to act in conformity with the principles of self-determination and *pacta tertiis* and it noted that Morocco had denied it was acting as an Administering power anyway.⁵⁷

4.2. The CJEU and the Pacta Tertiis Principle

In *Council v Polisario*, the CJEU chose not to endorse Corell's approach explicitly. Perhaps this was because it was mindful of the difficulties flowing from any effort to use an Administering power's obligations in order to establish the putative duties of a State that controls a NSGT without such Charter responsibilities. Instead, it invoked the *pacta tertiis* principle. The Court agreed with the Advocate-General that this principle was material to the question of whether the EU/Morocco Association and Liberalisation Agreements were applicable to Western Sahara.⁵⁸ This standpoint follows from the approach the Court had adopted in its earlier *Brita judgment*, where it held that the Palestinian authorities (PLO) constituted a third party as far as the EC/Israel Association Agreement was concerned in relation to a dispute regarding the application of tariff privileges to products originating in Palestinian territory.⁵⁹ There, the CJEU had ruled that such products could not enjoy preferential status under the

⁵⁴ Baroness Ashton's statement was quoted in the Divisional Court's judgment, n 2, [31].

⁵⁵ See E Milano, 'The new Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco: Fishing too South?' (2006) 22 *Anuario Español de Derecho Internacional* 413–457, 19–21.

⁵⁶ AG Wathelet's Opinion, Case 266/16, n 32, [223].

⁵⁷ CJEU judgment, Case 104, [72].

⁵⁸ AG Wathelet's Opinion, Case 104, 13 September 2016, [101–112].

⁵⁹ *Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] EU:C:2010:91. See E Kassoti, 'Between Völkerrechtsfreundlichkeit and Realpolitik: The EU and Trade Agreements covering Occupied Territories' (2016) 26 *Italian Yearbook of International Law* 139, 152–157.

EC/Israel Agreement because the EC had entered into a separate trade agreement with the PLO. At first instance, in *Polisario v Council*, the General Court decided that *pacta tertiis* was inapplicable because an equivalent EU/Western Sahara agreement had not been concluded with the Polisario.⁶⁰ Nevertheless, on appeal, the CJEU held that Western Sahara's status as a NSGT, and the applicability of the right to self-determination, meant that *pacta tertiis* was relevant to the case.⁶¹ Notwithstanding its ultimate finding that existing EU/Morocco trade agreements had no application to Western Sahara, the Court considered that the Territory could be brought within the scope of an EU/Morocco trade agreement – and, thus, by implication, the fisheries agreements, too – if it could be shown that the Territory's people had consented to their extension to Western Sahara, and its coastal waters.⁶²

The CJEU's use of *pacta tertiis* in *Council v Polisario* has attracted criticism on the basis that the principle, as codified in Article 34 VCLT, refers to third *States* rather than third *parties* and on the ground that the principle's origins are found in the principles of sovereign equality and *pacta sunt servanda* as opposed to the private law tenet that agreements do not confer rights or impose duties, on third parties.⁶³ Nonetheless, the contours of *pacta tertiis* have been influenced by the expansion in the range of actors that are now regarded as being subjects of international law. Specifically, it is apparent that the peoples of NSGTs, have the capacity to conclude international agreements.⁶⁴ As a result, the idea that the people of a NSGT could be a third party for the purpose of the operation of this principle is credible but whether its application to the situation in Western Sahara is justified warrants further investigation.

It is arguable that the situations of Palestine and Western Sahara are broadly comparable cases of military occupation.⁶⁵ However, the fact that the EC had concluded an interim trade agreement with the Palestinian authorities is significant because it is premised on the understanding that the PLO effectively controlled the West Bank and Gaza Strip and their respective inhabitants – a fact that enables it to enter into international agreements on behalf of the Palestinian people. In contrast,

⁶⁰ General Court's judgment, Case 512, n 20, [95-98].

⁶¹ CJEU judgment, Case 104, n 3, [103-106].

⁶² *ibid*, [106].

⁶³ J Odermatt, Case C-104/16 P, *EU Council v Front Polisario* (2017) 111 AJIL, 731–738, 736.

⁶⁴ Eg see 'Treaties – Third Party Effect', in Max Planck, Encyclopedia of Public International Law <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1450?rskey=DpbSAD&result=1&prd=MPIL>> accessed 26 January 2020, [4].

⁶⁵ Kassoti, n 59, 143.

pacta tertiis does not fit the circumstances of Western Sahara well. The Polisario largely functions as the government of the Sahrawi Arab Democratic Republic (SADR), which is currently recognised by 42 States, but not by the EU, or any of its member States. Further, it does not exercise effective control, or governmental authority, over the vast majority of Western Sahara's territory, its inhabitants, or its marine natural resources.

Nevertheless, international law has often taken a generous view regarding the international legal personality of National Liberation Movements.⁶⁶ In the circumstances, it may be that Western Sahara's NSGT status, along with the exceptional circumstances prevailing in that Territory, render SADR a *de facto* State, irrespective of the recognition policies of individual States and International Organisations. It would appear that 'proto-State' status is readily consistent with the CJEU's rulings in the *Western Sahara Cases*. On this reading, the positive consent of the Polisario would be required for the purpose of exploiting the natural resources in Western Sahara. Normally, such consent is secured through the conclusion of an international agreement. It might take the form of either an interim treaty between the EU and the Polisario, or a tripartite agreement between the EU, the Polisario and Morocco. However, as things stand, it is inconceivable that Morocco would be a party to an international agreement with the Polisario or that it would tolerate direct treaty relations between the EU and the Polisario concerning Western Sahara.⁶⁷ Moreover, as discussed above, the Polisario's lack of control over Western Sahara and its ambiguous international status are significant problems in this respect. This is not to deny that the Polisario represents the people of Western Sahara on the international stage. First, as noted above, it is well-established that NSGTs have a separate status from those States that administer them. Second, it has been observed that an Administering power loses its legal authority to conclude international agreements on behalf of a NSGT, once a national liberation movement has established itself on the international scene in response to exceptional and/or unconstitutional events.⁶⁸ The Polisario has satisfied these requirements since it first opposed Morocco and

⁶⁶ A Cassese, *International Law* (2nd ed, OUP 2002) 141-142. Nonetheless, it is notable that the Polisario has not enjoyed observer status in the General Assembly in the same way as other NLMs.

⁶⁷ See P Wrange and S Helaoui, 'Report for the European Parliament, 'Occupation/Annexation of a Territory – Respect for International Humanitarian Law and Human Rights and Consistent EU Policy', 25 June 2015.

⁶⁸ See the AG's Opinion 2018, n 32 [233] – relying on the Guinea-Bissau/Senegal Maritime Delimitation Arbitration Award (1989) 20 RIAA, [51 and 52]).

Mauritania's military occupation of Western Sahara. Consequently, the EU's misguided notion of Morocco being the Territory's *de facto* Administering power would not have any effect even if it were valid as a matter of international law. Nonetheless, it is important to appreciate the practical limits on the Polisario's capacity to give its consent (or to withhold it), on behalf of the people of Western Sahara. It is, therefore, arguable that the Polisario does not have the sole capacity to decide the question of whether an EU/Morocco fisheries agreement may be extended to Western Sahara's coastal waters. Instead, it may be that consent can be secured only by the holding of a plebiscite through which the people of Western Sahara could decide this matter directly for themselves. Of course, this possible way forward is not without its problems, as discussed in the next section.

5. The 2018 Sustainable Fisheries Partnership Agreement

In the aftermath of the CJEU's judgment in the *Western Sahara Campaign Case*, the Commission and Council took the view that the FPA should be revised with a view to extending it to cover Western Sahara's coastal waters. The Council instructed the Commission to negotiate a new treaty with Morocco subject to two conditions: (i) that any benefits accruing to the people of Western Sahara needed to be evaluated; and, (ii) this constituency had to be consulted about the extension of such an agreement to Western Sahara and its coastal waters.⁶⁹ However, it is clear that this strategy would call into question the EU's position that it does not recognise Morocco's sovereignty claim to Western Sahara.

5.1. The Duty of Non-Recognition

As noted above, Morocco claims that Western Sahara is an integral part of its national territory, but its sovereignty claim has not been recognised by any third State or International Organisation (including the EU). Its forcible occupation of Western Sahara offends the prohibition on the acquisition of territory by the threat or use of force which now constitutes *jus cogens* and an obligation *erga omnes*.⁷⁰ It is well-established that a serious breach of *jus cogens* triggers the collective duty of non-recognition, as far as aiding and assistance in maintaining illegal situations is

⁶⁹ Negotiating directives, 16 April 2018.

⁷⁰ See the Declaration on Friendly Relations, n 10.

concerned.⁷¹ But even where such a violation has not occurred, States are under a duty not to knowingly assist in the perpetuation of an internationally wrongful act, or they run the risk of being found complicit in such behaviour.⁷²

Typically, in cases involving the breach of a peremptory norm, the Security Council will adopt a resolution calling on all States not to recognise the consequences arising from any resulting unlawful situation while elaborating the content of that duty in those circumstances.⁷³ However, the Council has chosen not to characterise Morocco's actions in Western Sahara as amounting to military occupation, thereby warranting IHL's application.⁷⁴ More surprisingly, as a result of the various positions adopted by certain of its permanent members, the Council has refused to acknowledge that Morocco has committed any violations of international law in relation to Western Sahara at all.⁷⁵ This reluctance to intervene has meant that individual States have had to decide for themselves how best to satisfy the customary obligation of non-recognition.⁷⁶ The ICJ has provided some guidance regarding the kind of conduct which may be sufficient to imply recognition in its *Namibia Advisory Opinion*.⁷⁷ On that occasion, the Court stated that States were under a duty to refrain from entering into economic arrangements, and other relations, with South Africa which may have the effect of entrenching its authority over Namibia.⁷⁸ It also observed that States are under an obligation to abstain from applying existing bilateral treaties concluded with South Africa concerning Namibia.⁷⁹ From this statement, it can be surmised that such a duty would have extended *a fortiori* to the conclusion of any new bilateral treaties

⁷¹ See Arts 40 and 41(2) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA); and Arts 41 and 42(2), Draft Articles on the Responsibility of International Organisations (DARIO).

⁷² See Art 16, ARSIWA and Art 14, DARIO.

⁷³ See M Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation', in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010).

⁷⁴ See Dawidowicz n 12. Art 42, The Hague Regulations, provides that military occupation depends on whether a power effectively controls a territory without having sovereignty authority over it. Art 49 Geneva Convention (IV)(1949) prohibits the individual or mass forcible transfers from an occupied territory to any other territory. The ICJ as observed that these fundamental customary rules are to be observed by all States: *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, (1996) ICJ Rep 226, [79].

⁷⁵ T Ruys, 'The Role of State Immunity and Act of State in the NM Cherry Blossom Case and the Western Sahara Dispute' (2019) 68 ICLQ 67, 85.

⁷⁶ Milano, n 55, 24-25.

1. ⁷⁷ See J Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006), 183.

⁷⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 31 [124]. While the Court's observation referred to UNSC Res 276, the source of this obligation can also be found in the collective duty of non-recognition which is engaged in cases where a peremptory norm has been contravened. See Crawford, *ibid*, 160

⁷⁹ *Namibia Opinion*, *ibid*, [122].

with this illegal regime. Against this background, it is notable that, in his 2016 Opinion in *Council v Polisario*, the Advocate-General thought it was impossible to reconcile the application of the EU/Morocco trade agreements to Western Sahara without arriving at the conclusion that the EU had impliedly recognised Morocco's sovereignty claim to that Territory.⁸⁰

Despite the above, individual assessments about the parameters of the obligation of non-recognition involve evaluations about whether the acts of a third State, or an International Organisation, have contributed to the maintenance of an unlawful situation. In this vein, the ICJ conceded that third States may not be in breach of the duty of non-recognition if they have accepted certain acts of public administration conducted by the unrecognised regime, which are beneficial to the Territory's inhabitants.⁸¹ The argument that the EU/Morocco trade and fisheries agreements could fall within the scope of the Namibia 'exception' was rejected by the Advocate-General in his Opinion, in the *Western Sahara Campaign Case*. He took the view that the exception did not encompass the conclusion of international agreements with an illegal regime.⁸² It has been suggested that, in the absence of specific guidance contained in a targeted Security Council resolution, the duty of non-recognition could be satisfied by a formal statement stipulating that a third State (or International Organisation) does not recognise the lawfulness of the delinquent State's actions in a contested situation.⁸³ Further, it may be countered, in response to a claim that recognition has been implied through the conduct of a third State or International Organisation, that evidence cannot be adduced for this purpose where such an actor has expressly declared that it does not recognise the unlawful behaviour of an offending State, or entity. This standpoint follows from the view that recognition may only be implied where it can be shown that a given entity intends to recognise a concrete situation as being lawful without expressly so doing.⁸⁴ Such a formalistic approach would, however, appear to confuse situations where a decision is made to

⁸⁰ AG's Opinion in Case 104, n 58, [84-86].

⁸¹ Crawford points out that the 'Namibia exception' applies to acts untainted by the illegal character of the administration which has performed them: n 77, 164. In the *Namibia Opinion*, the Court also observed that States were still under an obligation to observe the terms of multilateral treaties of a humanitarian character notwithstanding the illegal nature of the regime in question: [122].

⁸² AG's Opinion, Case 266, n 32, [288-292].

⁸³ The UK has expressed the view that the duty of non-recognition may amount to a 'barren' obligation: Dawidowicz, n 73, 679.

⁸⁴ TD Grant, 'How to Recognise a State (and Not)' in C Chinkin and F Baetend (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (CUP 2013), 198-199.

withhold recognition on political grounds and the legal obligation of non-recognition.⁸⁵ It has been observed that the operation of the collective duty does not seek to deny political reality in a given context, instead, it endeavours to prevent an unlawful factual situation from giving rise to law-creating consequences.⁸⁶ As a result, it is not a duty that can be satisfied by formal statements alone. Nevertheless, it has also been suggested that a tension exists between the principles of *ex injuria jus non oritur* and *ex factis jus oritur* where the unlawful activity in question has persisted for such a period of time that the situation becomes normalized, from the perspective of the international community.⁸⁷ The Western Sahara Question appears to exemplify these countervailing pressures.

5.2. Recognition and the SFPA

In an Exchange of Letters which accompanied the SFPA,⁸⁸ the EU and Morocco set out their respective 'without prejudice' positions concerning the status of Western Sahara.⁸⁹ As far as the EU was concerned, any references in the treaty to Moroccan laws and regulations did not affect Western Sahara's NSGT status; 'its' right to self-determination;⁹⁰ or the EU's view that the Territory's waters constitute part of the material fishing zone. Morocco, in contrast, maintained that it exercises full sovereignty over 'the Sahara region'.⁹¹ From the parties' respective positions, it is hard to discern a common intention regarding the ownership of the marine resources found in the waters off Western Sahara. By implication, Morocco's view must be that these resources belong to the Moroccan people as a whole whereas it follows from the EU's standpoint that such resources belong to the people of Western Sahara. Despite these radically diverging views, the EU Council has denied that there is anything in the SFPA, which would imply that the EU recognises Morocco's sovereignty claim to

⁸⁵ See Crawford, n 77, 157-158.

⁸⁶ H Lauterpacht, *Recognition in International Law* (CUP 2013 Reissue), 430 and Dawidowicz, n 12, 264-65

⁸⁷ *ibid.* See J Smith, 'The Taking of the Sahara: The Role of Natural Resources in the Continuing Occupation of Western Sahara', (2015) 27 *Global Change, Peace & Security*, 263-284 (section II).

⁸⁸ The Exchange of Letters forms an integral part of the SFPA, according to Arts 1(c) and 16.

⁸⁹ *ibid.*, [2].

⁹⁰ The right to self-determination inheres in the people of a NSGT, rather than belonging to the Territory itself.

⁹¹ Exchange of Letters, [2].

Western Sahara, and its adjacent waters, (or to exercise any sovereign rights therein).⁹²

The new Treaty's preamble alludes to the 'the close working relationship between the Union and Morocco [...] and their mutual desire to intensify that relationship' before reiterating the parties' commitment, 'to strict compliance with international law and fundamental human rights while ensuring mutual benefits for the Parties concerned'. Moreover, in its 2019 Decision to adopt the SFPA, the EU Council declared that the Treaty's main objective is:

'to enable the Union and the Kingdom of Morocco to work together more closely on promoting a sustainable fisheries policy and sound exploitation of fishery resources in the fishing zone defined in the Fisheries Agreement and supporting the Kingdom of Morocco's efforts to develop the fisheries sector and a blue economy.'⁹³

However, it is unclear how this aim takes Western Sahara's NSGT status into account or how the EU could satisfy its obligation arising out of the *erga omnes* character of the right to self-determination in this context.

The Commission and the Council have also sought to resurrect the idea that Morocco is the Territory's *de facto* Administering power for the purpose of concluding the SFPA. In keeping with its established position, the Commission maintains that not only does Morocco administer the largest part of Western Sahara, as well as controlling its adjacent waters, it is the only entity with which the EU can conclude an international agreement concerning the exploitation of fisheries in this marine area.⁹⁴ To this end, the Council reiterated the view that Western Sahara is 'administered principally by the Kingdom of Morocco'.⁹⁵ This reliance on real-politick factors has influenced the Treaty's content more broadly. In particular, the SFPA defines the material fishing zone by reference to the geographical co-ordinates which identify Morocco's Atlantic waters *and* the waters adjacent to Western Sahara, rather than by reference to the concepts of sovereignty and jurisdiction, which are typically found in international agreements and were used in the 2006 FPA. Specifically, Article 1(h) of the new Treaty provides that:

⁹² Council Decision 2019/441, n 1, [12].

⁹³ *ibid*, [7].

⁹⁴ Commission, Proposal for a Council Decision, COM 677 (2018), 8 October 2018.

⁹⁵ Decision 2019/441, [4].

“fishing zone” means the waters of the Eastern Atlantic Ocean between the parallels 35° 47’ 18” north and 20° 46’ 13” north, including the adjacent waters of Western Sahara, [an accompanying footnote adds that: ‘The Sahara region according to the Moroccan position’], covering all the management area ...’

The reason for this approach is obvious, as the CJEU ruled in the *Western Sahara Campaign Case*, Morocco does not exercise sovereignty or jurisdiction over the waters off Western Sahara. Nevertheless, the parties’ decision to forgo the legal concepts of sovereignty and jurisdiction for the purpose of establishing the scope of the fishing zone in question is startling. Article 6(1) identifies the applicable regulatory framework as, ‘the Moroccan laws and regulations governing fishing activities in that zone...’ Further, according to Article 14, the SFPA’s area of application is: ‘the territories subject, on the one hand, to the treaty establishing the European Union and, on the other hand, to the laws and regulations referred to in Article 6(1)’. Accordingly, the parties have sought to invoke Moroccan municipal law directly as the *sole* legal basis for the EU’s fishing activities in this marine area.⁹⁶

Both the Commission and the Council insist that the SFPA does not prejudice the outcome of the UN-sponsored peace process.⁹⁷ The claim that the exploitation of natural resources is separable from the question of Western Sahara’s final status is surprising. Clearly, Morocco’s ability to extract valuable natural resources from the Territory, and its associated waters, provides the means, at least in part, by which its control can be sustained thereby frustrating the exercise of the right to self-determination in this setting.⁹⁸ In this respect, it is worth recalling the concern, expressed by the General Court, in its 2015 judgment in *Polisario v Council*, that the EU was contributing to the human rights violations being perpetrated by Morocco ‘by encouraging and profiting’ from the exploitation of Western Sahara.⁹⁹ In the light of the above, the argument that the EU has impliedly recognised Morocco’s sovereignty over Western Sahara, and its concomitant marine areas, is a compelling one. Nevertheless, such a conclusion presupposes that the coastal waters adjacent to Western Sahara

⁹⁶ Art 5(4) FPA contained a similar formulation but Art 2 also invoked Morocco’s sovereignty and jurisdiction as a matter of international law.

⁹⁷ COM 677 (2018), n 94, 3; Council Decision 2019/441, n 1, [4].

⁹⁸ For a detailed assessment of the relationship between the exploitation of natural resources and the perpetuation of Morocco’s occupation of Western Sahara see Smith (2015), n 87.

⁹⁹ Case T-512, n 20, [231].

are attributable to this NSGT but whether such an assumption is correct requires further investigation.

5.3. The Status of the Waters Adjacent to Western Sahara

5.3.1. An Extension of Morocco's Territorial Sea and EEZ?

Although the notion of the Territorial Sea is well-established in CIL, Spain did not declare any maritime zones in relation to Western Sahara while it administered the Territory.¹⁰⁰ Moreover, as the CJEU confirmed, in the *Western Sahara Campaign Case*, Morocco does not exercise sovereign authority in this marine area.¹⁰¹ In addition, Morocco controls those waters which would correspond to a putative 200 nm EEZ off the coast of Western Sahara even though the CJEU concluded that it does not exercise jurisdiction in this area as a matter of international law. The exploitation of marine resources in such an area has proved to be significant for the EU fleet's fishing activities, the Advocate-General noted, between 2014 and 2018, 91.5% of its total catches came from pelagic fishing conducted in the waters located over 15 nm from the coast of Western Sahara.¹⁰²

Dahir No.2-75-311 (1975), provided, *inter alia*, the geographical co-ordinates for the baselines upon which Morocco's territorial waters were established.¹⁰³ Further, Dahir No.1-81-179 (1981), enacted Law No.1-81 (1980) which established an EEZ extending 200 nm off Morocco's coast. It has been observed that the geographical co-ordinates which provide the basis for these maritime zones conform to Morocco's internationally recognised boundaries.¹⁰⁴ Morocco ratified the LOSC in 2007;¹⁰⁵ however, it has not deposited geographical co-ordinates relating to its maritime zones with the UN Secretary-General.¹⁰⁶ In any event, Morocco has not formally claimed *de*

¹⁰⁰ See generally J Smith, 'International Law and Western Sahara's Maritime Area' (2019) 50 *Ocean Development & International Law* 117-140.

¹⁰¹ In principle, Morocco could exercise lawful control over Western Sahara's territorial waters, if it qualifies as the Territory's occupying power. However, not only has it rejected this role neither the Security Council nor the EU have applied this status to Morocco vis-à-vis Western Sahara.

¹⁰² See the AG's Opinion in Case 266, n 32, [272].

¹⁰³ 21 July 1975, Bulletin Officiel du Royaume du Maroc, No. 3276, 996. A Dahir is a decree made by the King of Morocco.

¹⁰⁴ Dahir No 1-81-179 (8 April 1981), enacted Law No 1-81 (18 December 1980) Bulletin Officiel du Royaume du Maroc, No 3575, 232. Also see Legal Service of the European Parliament, Opinion on 2013 Protocol to the EU/Morocco FPA, SJ-0665/13, 4 November 2013, [9].

¹⁰⁵ 31 May, 2007: see

<https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 26 January 2020.

¹⁰⁶ In line with the requirements contained in Art 75, LOSC.

jure authority, by reference to international law, in respect of Western Sahara's territorial waters or a putative EEZ covering the adjacent marine area.¹⁰⁷ The lack of such a claim is not surprising given the way in which Articles 2 and 56 of the LOSC have been interpreted but it is remarkable that Morocco has not claimed these maritime zones under its own municipal law either.

In 2017, the Moroccan government sought to revise its maritime claims. Draft Law 37-17 sought to amend Moroccan law, as far as Morocco's Territorial Sea claim is concerned.¹⁰⁸ Further, draft Law 38-17 sought to amend the 1981 Law, ostensibly, to enable Moroccan law to be consistent with the LOSC's terms regarding its EEZ claim with a view to formulating Morocco's continental shelf claims. The Moroccan government also saw an opportunity to extend its Territorial Sea and EEZ claims to encompass Western Sahara's coastal waters and to provide the basis for the formulation of a continental shelf claim in this marine area.¹⁰⁹ However, as part of this exercise, Morocco would have to fix the geographical co-ordinates for the baselines that would underpin any such claims. Consequently, draft Dahir No. 2-17-349 sought to revise and extend the geographical co-ordinates set out in the 1975 Dahir for that purpose. The draft decree did not provide the co-ordinates for the baselines which would form the basis of Morocco's (extended) Territorial Sea and EEZ claims, instead, it sought to authorise a process through which these co-ordinates could be fixed, particularly in relation to waters off Morocco's 'Southern region' (i.e. Western Sahara).¹¹⁰ The two draft Laws and the draft Dahir were adopted by the Moroccan Council of Ministers on 6 July 2017; however, it does not appear that they have been enacted since this time.¹¹¹ Accordingly, as things stand, Morocco has not made any *de jure* claims to Western Sahara's coastal waters. In his 2018 Opinion, in the *Western*

¹⁰⁷ 2013 Opinion, n 104, [10-11].

¹⁰⁸ Dahir No 1-73-211 (2 March 1973) established the geographical scope of Morocco's territorial waters.

¹⁰⁹ The Explanatory Note accompanying this piece of draft legislation anticipates the negotiation of maritime delimitation agreements with neighbouring States as a result of the introduction of such reforms.

<http://www.sgg.gov.ma/Portals/0/lois/Projet_Loi_38.17_Fr.pdf?ver=2017-07-10-173311-267> and <http://www.sgg.gov.ma/Portals/0/conseil_gouvernement/CR/2017/CR_CG_06.07.2017_fr.pdf?ver=2017-07-12-104131-583> accessed 26 January 2020.

¹¹⁰ Art 3(a), draft Dahir No 2-17-349,

<http://www.sgg.gov.ma/Portals/0/lois/Projet_decret_2.17.349_Fr.pdf?ver=2017-07-10-170541-993> accessed 26 January 2020.

¹¹¹ The reasons for Morocco's failure to promulgate these pieces of draft legislation are not clear. However, political tensions with Spain regarding the question of maritime delimitation in the area adjacent to the Canary Islands may have delayed their enactment.

Sahara Campaign Case, the Advocate-General surmised that, in the absence of a positive claim EEZ claim in respect of the waters adjacent to Western Sahara, these waters must form part of the High Seas by default.¹¹² However, there are reasons to question the veracity of this argument.

5.3.2. SADR's Maritime Claims

Despite Morocco's lack of legal authority over the coastal waters adjacent to Western Sahara, and the contention that they constitute part of the High Seas, it does not necessarily follow that this is the default position as far as a putative Western Saharan EEZ, or its Territorial Sea, are concerned. Resolution III, which is annexed to Final Act of the Third Conference of the Law of the Sea refers to the NSGT concept, as elaborated in Article 73 of the UN Charter, before declaring that:

'In the case of a territory whose people have not attained full independence or other self-governing status recognized by the United Nations, or a territory under colonial domination, provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development.'¹¹³

In the ordinary course of things, an Administering power would take the necessary steps to declare maritime zones relating to those Territories for which it bears international responsibility and they would acquire international legal validity under the terms of the LOSC as a result. However, the problem with the potential application of Resolution III to Western Sahara stems from the fact that the people of Western Sahara cannot rely on an engaged Administering power. Nevertheless, given the Polisario's representative role, it is arguable that the actions and claims of the Polisario and/ or SADR may generate legal effects, as far as this NSGT is concerned.

In the circumstances, it is worthwhile examining the claims made by Polisario/SADR regarding Western Sahara's marine space. Through Law No 3/2009, SADR declared a full range of maritime zones – including claims to a Territorial Sea and a 200nm EEZ in connection with the exploration, exploitation, conservation and

¹¹² AG's Opinion, Case 266, n 32, (especially footnote 183). This was also the view taken by the EU Parliament's Legal Service in the 2013 Opinion, n 104, [13-14]. The same would also seem to follow as far as a Western Sahara's Territorial Sea but neither the Advocate-General nor the Parliament's Legal Service addressed the status of Western Sahara's territorial waters.

¹¹³ Resolution III, Final Act of the Third Conference of the Law of the Sea (1982).

management of natural resources in this area and it invoked the provisions set out in Resolution III in this regard.¹¹⁴ In a letter addressed to UN Permanent Missions, SADR drew attention to the activities being undertaken in the waters off Western Sahara by the EU fleet under cover of the 2006 EU/Morocco FPA, without its authorisation.¹¹⁵ SADR's claims triggered a good deal of consternation in the EU Parliament.¹¹⁶ As a result, the potential legal effects of these claims were assessed in a 2009 Legal Opinion.¹¹⁷ It advised that SADR's maritime claims did not have international legal significance because, in its view, SADR could not satisfy the requirements for a valid claim to statehood due to its lack of control over Western Sahara and it concluded that SADR was ineligible to be a signatory to the 1982 Convention.¹¹⁸ Nevertheless, the Opinion concluded that if the FPA was not being applied in conformity with international law, the Community should prevent its vessels from fishing in the waters off Western Sahara.¹¹⁹

The various responses to the question of the status of the waters adjacent to Western Sahara has led to a curious state of affairs. The EU's political institutions have consistently maintained that Morocco is the Territory's *de facto* Administering power in order to provide legal cover for the EU fleet's fishing activities in its coastal waters. In addition, this strategy seems to have been pursued to ensure that the concomitant legal obligations relating to the exploitation of the natural resources belonging to this Territory rest with Morocco, rather than the EU. However, the absence of an active Administering power and the Polisario's established representative status, along with SADR's maritime claims combine to generate somewhat ambiguous legal and political effects. In this regard, it is notable that none of the parties to the *Western Sahara Campaign Case* argued that either Western Sahara's notional maritime zones were actually part of the High Seas or that the people of Western Sahara had no entitlements in relation to the Territory's coastal waters. The existence of a distinct

¹¹⁴ Law No 3/2009, 'Establishing the Maritime Zones of the SADR', 21 January 2009: see <<https://archive.org/details/327943-documents-268462-sahrawi-arab-democratic>> accessed 26 January 2020.

¹¹⁵ 22 January 2009, *ibid*.

¹¹⁶ See J Smith, 'Fishing for Self-Determination: European Fisheries and Western Sahara – The Case of Ocean Resources in Africa's Last Colony' (2013) 27 *Ocean Yearbook* 267, 281-284.

¹¹⁷ Legal Service of the European Parliament, Opinion on SADR's Maritime Zones Declaration and the FPA: SJ-0269/09, 13 July 2009. This Opinion was quoted extensively in the 2013 Opinion, n 104.

¹¹⁸ 2009 Opinion, quoted in the 2013 Opinion, *ibid* [4(a)]. However, NLMs can become parties to the LOSC (via Art 305).

¹¹⁹ *ibid*, [4(i)].

zones conforming to a Western Sahara Territorial Sea and an EEZ, may, therefore, have been presumed by all those involved in the litigation.

5.4. Sustainable Fishing and the SFPA

The Commission's 2018 Evaluation Report sought to assess the benefits flowing from the SFPA for the people concerned and to establish whether they have consented to its extension to Western Sahara.¹²⁰ As part of this exercise, the Report sought to determine the contribution that the EU/Morocco fisheries agreements have made to the responsible management of fisheries in the waters off Western Sahara. Specifically, it claimed that the fisheries partnership has sought to guard against the over-exploitation of marine living resources in the waters adjacent to Western Sahara pending the resolution of the Territory's final status.¹²¹ The Report went on to contend that Morocco is well-placed to perform this protective role because it possesses the necessary scientific capabilities to monitor and regulate the sustainable use of fish stocks in these waters.¹²²

The 2006 FPA did manifest a commitment to the sustainable management of fisheries resources. One of its declared purposes was to promote: 'economic, financial, technical and scientific cooperation in the fisheries sector with a view to introducing responsible fishing in Moroccan fishing zones to guarantee the conservation and sustainable exploitation of fisheries resources [...]'¹²³ To this end, the parties undertook, 'to promote responsible fishing in the Moroccan fishing zones'.¹²⁴ The FPA's approach was, ostensibly, consistent with the LOSC's provisions regarding a coastal State's right to exploit, conserve and manage living natural resources in the EEZ.¹²⁵ In particular, Article 61 of the 1982 Convention provides that:

(2) The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that

¹²⁰ See the Assessment Report on Benefits for the Western Sahara Population of the EU/Morocco SFPA and on the Consultation of this Population, Commission Staff Working Document (SWD) 433 (8 October 2018) which accompanied COM 677 (2018), n 94.

¹²¹ *ibid*, 2.

¹²² *ibid*, 24-25.

¹²³ Art 1, FPA.

¹²⁴ Art 3(1), FPA and its preamble.

¹²⁵ Art 56(1)(a), LOSC. A coastal State is under no duty to make provision for the sustainable use of fisheries resources in its Territorial Sea. However, it has been observed that many conservation duties extend landwards from the EEZ in practice: D Rothwell and T Stephens, *The International Law the Sea* (2nd edn, Hart 2016) 321.

the maintenance of the living resources in the [EEZ] is not endangered by over-exploitation [...];

(3) Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors including the [...] taking into account fishing patterns, the interdependence of stocks [...].'

In addition, as far as the utilization of living resources in the EEZ is concerned, the FPA's terms seem to be in line with LOSC's provisions regarding a coastal State's management of any surplus allowable catch.¹²⁶ Further, the FPA and, particularly its 2013 Protocol, reflect a number of the 'conservation measures' envisaged in Article 62(4) of the LOSC.¹²⁷

The SFPA maintains its predecessor's commitment to the sustainable management of fisheries resources and its preamble pledges the parties to 'establishing and strengthening sustainable fisheries and contributing to improved ocean governance'; it also alludes to their willingness to take into account the available scientific advice, as per the LOSC's exhortation in Article 62(2), for this purpose. In similar terms to the FPA, the new Treaty focuses on 'scientific and technical cooperation with a view to ensuring the sustainable exploitation of fisheries resources in the fishing zone and developing the fisheries sector'.¹²⁸ Likewise, one of its objectives is the promotion of sustainable fishing,¹²⁹ as judged 'from an ecological, economic and social perspective'.¹³⁰ The connections between sustainable use, scientific expertise and the extent of the EU's fishing activities in the material fishing zone are expressed in Article 3(4), which provides that:

'The Parties agree that Union fishing vessels are only to catch the allowable catch surplus referred to in Article 62(2) and (3) of the UNCLOS, as identified, in a clear and transparent manner, on the basis of available and relevant scientific advice and relevant information exchanged between the Parties on the total fishing effort exerted on the affected stocks by all fleets operating in the fishing zone.'

¹²⁶ Art 62(2) and (3), LOSC.

¹²⁷ In particular, those provisions relating to licensing requirements, the setting of quotas, the payment of adequate compensation, training opportunities on EU vessels and the compulsory landing of part of the EU fleet's catch in 'Moroccan ports'. See the 2013 Protocol (Annex I).

¹²⁸ Art 2(d), SFPA.

¹²⁹ Art 3(1), SFPA.

¹³⁰ Art 10, SFPA. These aspirations would appear to be in the spirit of Art 61, LOSC.

Notwithstanding the extensive technical and regulatory measures contained in the SFPA, the new Treaty's provisions do not add significantly to the environmental goals contained in the 2006 Agreement. However, this has not stopped the Commission and Council from using the cause of sustainable fishing in order to strengthen the EU's justification for dealing with Morocco as far as the natural resources belonging to Western Sahara are concerned.

In its proposal for a Council decision regarding the SFPA, the Commission asserted that only Morocco has the technological and scientific capabilities to ensure the sustainable use of the natural resources found in this marine area.¹³¹ The Council endorsed this view, by stating in its subsequent Decision, that the Commission's Report showed the SFPA:

'[...] represents the best guarantee for the sustainable exploitation of the natural resources of the waters adjacent to Western Sahara, since the fishing activities comply with the best scientific advice and recommendations in that area and are subject to appropriate monitoring and control measures'.¹³²

Morocco's control over Western Sahara's coastal waters regulates the use of marine living resources in this area but it does so in Morocco's favour and to the advantage of those third States/Organisations, such as the EU and Russia, which have entered into agreements with Morocco regarding the exploitation of such resources. It may be argued that, from an ecological perspective, the level of regulation of sustainable fishing established through the EU/Morocco fisheries partnership is preferable to the regulatory mechanisms that would apply if the coastal waters adjacent to Western Sahara form part of the High Seas. However, such a contention overlooks the requirements of international legality in this situation. The LOSC's provisions regarding the exploitation, conservation and management of living natural resources in the EEZ assume that the regulating State is the coastal State. The CJEU's approach, in its *Western Sahara Campaign* judgment, makes it clear that Morocco is not the coastal State as far as the waters off Western Sahara are concerned. The claim that the EU/Morocco fisheries partnership is, fundamentally, about safeguarding the marine living resources found in waters under Morocco's control for people of Western Sahara is, therefore, a dubious one, given that Morocco has no legal authority to regulate the

¹³¹ COM 677 (2018), n 94, [3].

¹³² Decision 2019/441, n 1, [10].

waters in question. In the circumstances, it is hard to disprove the charge that the EU/Morocco fisheries partnership's commitment to sustainable fishing is a means to ensure that the fish stocks in the material zone are maintained as a viable resource for the purpose of their exploitation by the parties.

5.5. The Benefits and Wishes of the People of Western Sahara

As discussed, in the *Western Sahara Campaign Case*, the Court was prepared to accept, in principle, Morocco's control of the Territory and the EU's exploitation of its natural resources if it could be established that the people of Western Sahara have given their consent to the extension of the EU/Morocco fisheries agreement to the waters off Western Sahara. As noted above, the Council instructed the Commission to consult this constituency to ascertain their views and to evaluate any benefits which would be derived from this process of extension for the people concerned.

5.5.1. The Benefits

The Commission's Report addressed the issue of the benefits expected from the SFPA by first examining those that had been derived from the 2006 FPA during the lifetime of the 2013 Protocol. The Advocate-General had assessed the benefits which purportedly flowed from these agreements in his Opinion in the *Western Sahara Campaign Case*.¹³³ He noted that the vast majority of the EU fleet's fishing activities took place in the waters off Western Sahara;¹³⁴ this led him to suggest that any accrued benefits should be enjoyed by the people of Western Sahara on a pro rata basis.¹³⁵ Nevertheless, the Advocate-General observed that, under Article 3 of the 2013 Protocol, out of a total financial contribution of €40m p.a. only €14m (35%) had been designated to support Morocco's fishing policy with only a general monitoring requirement regarding the socio-economic consequences of the Agreement and their geographical distribution.¹³⁶ He added that although the Commission's claim that, between 2014 and 2018, the FPA's Joint Committee would monitor a total spend of

¹³³ AG's Opinion, in Case 266, n 32, [272-285].

¹³⁴ *ibid*, [272].

¹³⁵ *ibid*, [273].

¹³⁶ *ibid*, [274-275, 280].

€54m on development projects, about 80% of which were located in Western Sahara,¹³⁷ it did not follow that these projects would necessarily receive a proportionate amount of the available funding.¹³⁸

Perhaps in response to the Advocate-General's concerns, the Report reiterated the Commission's claim and, in support, it stated that the Dakhla and Laayoune regions of Western Sahara alone received €25.3m and €10.6m respectively in sectoral support under the 2013 Protocol.¹³⁹ The Report went on to provide information about regional infrastructure projects, and development opportunities, including the construction and operation of markets and the enhancing of the fish processing industry in Western Sahara, arising from the compulsory landing of catches provided for in the 2013 Protocol.¹⁴⁰ In sum, it claimed that the FPA and its 2013 Protocol had created – directly and indirectly – several thousands of jobs and it warned that these socio-economic gains would be 'jeopardised' if a new EU/Morocco fisheries agreement extending to the waters off Western Sahara was not adopted.¹⁴¹

Like its predecessor, the SFPA's financial contribution to Morocco is divided into three distinct components. Article 12 provides for: (a) a direct financial payment for access; (b) fees paid by the owners of EU vessels; and (c) sectoral support for Morocco's sustainable fisheries policy.¹⁴² However, in contrast to the FPA, the SFPA addresses the distribution of the benefits flowing from the Agreement in greater detail. Article 12(4) provides that:

'The Parties shall seek a fair geographical and social distribution of the socio-economic benefits arising from this Agreement, in particular in terms of infrastructure, basic social services, the setting-up of businesses, vocational training and programmes aimed at developing and modernising the fisheries sector, to ensure that this distribution benefits the relevant populations in a way that is proportionate to the fishing activities.'

¹³⁷ *ibid*, [278].

¹³⁸ *ibid*, [282].

¹³⁹ 47% and 19% of the amount available during this period: SWD 433 (2018), n 120.

¹⁴⁰ 2013 Protocol (Annex I).

¹⁴¹ SWD 433 (2018), n 120, 35-6.

¹⁴² Under the 2013 Protocol, the overall financial contribution was set at €30 million with €14 million allocated for sectoral support. The EU fleet's total quota was fixed at 80,000 tonnes p.a. Art 3 of the 2018 Protocol identifies the total financial contribution as €48 million p.a. (Year 1) with €18 million set aside for sectoral support. Over the lifetime of the new Protocol the EU's fishing quota ranges from 85,000 to 100,000 tonnes.

This provision goes some way to addressing the Advocate-General's worry that only the benefits falling within the FPA's sectoral support element would qualify for sharing with the people concerned by extending this approach to all three components of the financial contribution, thereby facilitating an equitable distribution of the benefits derived from the new Treaty. The Protocol specifies the extent of the EU's financial contribution and deals with the allocation of sectoral support for Morocco's current national development policy.¹⁴³ Article 13 of the SFPA confers considerable supervisory responsibilities on the Joint Committee, including a range of specific duties in relation to the setting of targets, the establishing of programmes and a substantial role in evaluating outcomes.¹⁴⁴ Further, if the parties are found not to be acting in conformity with the Treaty's objectives, the Joint Committee has the power to reduce the financial contribution payable to Morocco and to suspend it.¹⁴⁵

The Commission's Report argued that, based on the FPA's operation during the lifetime of its last Protocol and an analysis of the SFPA's provisions, there is 'sufficient evidence' to conclude that the economic activity generated by the EU/Morocco fisheries partnership benefits the populations/people concerned.¹⁴⁶ In its 2018 proposal for a Council Decision, the Commission claimed that 'the socio-economic impacts of the Fisheries Agreement will greatly benefit the populations concerned'.¹⁴⁷ The Council subsequently endorsed the Commission's overall assessment of the advantages flowing from the EU/Morocco fisheries agreements for the people concerned.¹⁴⁸ Nevertheless, the fundamental problem with this evaluation is that it is not clear *who* has received these benefits, or who might receive them in the future. The charge levelled against successive EU/Morocco fisheries agreements is that such benefits are largely enjoyed by Moroccan settlers, and businesses, rather than by members of the Sahrawi community. This issue is further explored below.

¹⁴³ Arts 4 and 7 respectively.

¹⁴⁴ Arts 7 and 13(2), Protocol.

¹⁴⁵ Art 12(6) and Art 13(3), SFPA. Arts 20 and 21 address the SFPA's suspension and termination.

¹⁴⁶ SWD 433 (2018), n 120, 5-6. The 'people' rather than a 'population' are the subject of the right to self-determination. However, the use of these terms is not necessarily decisive in all situations. The Commission's Report noted that, in the French language the word 'population' corresponds to 'people' in English. COM 677 (2018), n 94, used the term 'populations' while Decision 2019/441 used the term 'people'. See also SWD Report 'Report on Benefits for the People of Western Sahara and Public Consultation on Extending Tariff Preferences to Products from Western Sahara', (2018) 346 (15 June 2018), 9, discussed below. The present author believes that these terms should be understood to be interchangeable for the present purpose.

¹⁴⁷ COM 677, *ibid*, 5.

¹⁴⁸ Decision 2019/441, n 1, [5 and 9].

5.5.2. Consultations

The Commission's Report identified the difficulty in satisfying the Council's consultation requirements given the opposing views of Morocco and the Polisario regarding the issue of who qualifies as 'the people concerned'. It observed that Morocco views this group as including all of the Territory's inhabitants while the Polisario equates the people of Western Sahara with the ethnic Sahrawi community.¹⁴⁹ The Report acknowledged Western Sahara's NSGT status but it pointed to three problems with the Polisario's interpretation of Western Saharan 'people-hood'. First, it noted that many Sahrawis now live outside Western Sahara.¹⁵⁰ By implication, it seems to be suggesting that the use of an ethnic criterion for the purpose of establishing the contours of Western Saharan people-hood is not feasible. Second, the Report observed that the Sahrawi community was, traditionally, nomadic in character. The assumption here being that, in this context, territoriality is not a key indicator of societal identity and territorial entitlements are somehow weakened as a consequence. Finally, the Report alluded to MINURSO's lack of success, between 1991 and 2004, in confirming the franchise for the purpose of holding a final status referendum. The supposition being the Polisario's preferred conception of Western Saharan people-hood is not workable in practice.¹⁵¹ The Report concludes that the lack of a reliable definition of 'the people concerned' meant that the Commission's evaluation had to be conducted on the premise that Morocco's contention is correct – the current inhabitants of Western Sahara qualify as the Territory's people. The significance of this problematic conclusion is considered in the article's final section.

The Report admitted that the EU had no competence or practical means to investigate the situation in Western Sahara for itself,¹⁵² but this limitation did not stop its authors from claiming that there was 'strong support' for the waters off Western Sahara to be included in a new EU/Morocco fisheries agreement.¹⁵³ The Report conceded that a number of stakeholders, including the Polisario, had chosen not to

¹⁴⁹ SWD 433 (2018), n 120, 11. Also see SWD 346, n 146.

¹⁵⁰ SWD 433, *ibid.*

¹⁵¹ *ibid.*

¹⁵² Commission officials only carried out a short field trip to Rabat and Dhakla between 30 July to 3 August 2018 for the consultations, *ibid.*, 12.

¹⁵³ *ibid.*, 34. It indicated that a 'large majority' of the consultees who participated in this process – including elected representatives, regional governmental agencies and fisheries organisations – identified themselves as Sahrawi (31).

engage with its evaluation process.¹⁵⁴ The Polisario's position may be gauged from comments it made in the broad context of an earlier consultation exercise, carried out by the Commission, pursuant to the proposed amendment to the tariff preferences contained in the EU/Morocco trade agreements in response prompted by the CJEU's judgment in *Council v Polisario*.¹⁵⁵ First, the Polisario would claim the extension of the fisheries agreement to Western Sahara is an attempt to circumvent the CJEU's decision in the *Western Sahara Campaign Case*. Second, by exploiting natural resources in Western Sahara's coastal waters, the EU is complicit in Morocco's unlawful activities in the Territory. Finally, the Polisario would argue that the consultation exercise was procedurally flawed because the SFPAs had already been initialled by the parties before the consultation process began.¹⁵⁶ This last point is evidently a salient factor in determining whether the people of Western Sahara could have given their genuine consent to the SFPAs as consent invariably requires prior consultation.¹⁵⁷

In its proposal for a Council Decision, the Commission claimed that those consultees who responded to its invitation to participate were 'clearly in favour' of concluding a fisheries agreement that would encompass Western Sahara's coastal waters.¹⁵⁸ The Council subsequently endorsed this view and it added that the Commission and EEAS had taken, 'all reasonable and feasible measures in the current context to properly involve the people concerned in order to ascertain their consent'.¹⁵⁹ However, this approach falls far below the standard set out in the Corell Opinion, a standard that had informed the Commission's own evaluation process. In the circumstances, it is instructive to refer to a 2018 Legal Opinion, produced by the EU Parliament's Legal Service, in connection with the Commission's proposal for a Council Decision regarding amendments to Protocol 1 and 4 to the EU/Moroccan Association Agreement given the CJEU's *Council v Polisario* judgment.¹⁶⁰ One of the

¹⁵⁴ *ibid*, 33-34, COM 677 (2018), n 94, 5; and Decision 2019/441, n 1, [11].

¹⁵⁵ SWD 346 (2018), n 146, 31.

¹⁵⁶ It was initialled by the parties on 14 July 2018.

¹⁵⁷ The doctrine of Free, Prior and Informed Consent (FPIC) has gained significance in IHRL in recent years. See M Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead' (2012) 16 *The International Journal of Human Rights*, 1.

¹⁵⁸ See COM 677 (2018), n 94, 5; Decision 2019/441, n 1, [11].

¹⁵⁹ Decision 2019/441, *ibid*.

¹⁶⁰ Commission Proposal for a Council Decision regarding the signing of an Agreement the amendment of Protocols 1 and 4 to the EU/Morocco Association Agreement: COM/2018/481 (15 Jun. 2018). See

questions asked was whether the consultations with the people concerned satisfied the consent requirements set out in that decision.¹⁶¹ Accordingly, the 2018 Opinion has considerable resonance for any evaluation of whether the SFPA is capable of satisfying international law's requirements. After surveying the evidence, the Opinion stated:

'It cannot be established with certainty whether the Union institutions are able in practice to secure the consent of the people of Western Sahara in order to meet the conditions spelled out in the Court's judgment [in *Council v Polisario*].'¹⁶²

It went on to conclude that:

'If, therefore, the Commission seems to have taken any steps that were available to obtain consent and could find that "most of those interviewed by the [...] were in favour of extending the tariff preferences" [...] it seems difficult to confirm with a high degree of certainty whether these steps meet the Court's requirement of a consent by the people of Western Sahara, also taking into consideration that the conclusion of a positive consent is reached in spite of the negative opinion expressed by the Polisario Front.'¹⁶³

In the light of this Opinion, it is arguable that both the Commission's proposal, and the subsequent Council Decision regarding the adoption of the Exchange of Letters concerning the amendments to the Protocols to the 1996 Association Agreement,¹⁶⁴ and the Commission's proposal regarding the SFPA and, thus, the resulting Council Decision, do not meet the CJEU's requirements, as set out in its *Western Sahara Cases*.¹⁶⁵

6. Conclusions: Self-determination and the Notion of 'People-hood'

E. Kassoti, 'The Empire Strikes Back: The Council Decision Amending Protocols 1 and 4 to the EU-Morocco Association Agreement' (2019) 4 European Papers 307-317.

¹⁶¹ The Council instructed the Commission to conclude the amended agreements with Morocco subject to the same pre-conditions that were established for the renegotiation of the FPA.

¹⁶² Opinion of the Legal Service of the European Parliament, 3 September 2018, [25].

¹⁶³ *ibid*, [26].

¹⁶⁴ Council Decision 2018/1893 (16 July 2018) regarding the signing of an Agreement the amendment of Protocols 1 and 4 to the EU/Morocco Association Agreement, OJ L 310/1.

¹⁶⁵ Despite considerable opposition, Parliament consented to the SFPA's conclusion on 12 Feb 2019. The conclusion of this Agreement was ultimately approved via Council Decision 2019/217 (28 January 2019), OJ L 34/2.

The subject of the right to self-determination – ‘the people’ – has always been notoriously elusive. In particular, it has been pointed out that the artificiality of many colonial boundaries has meant the use of ethnography as the principal signifier for the purpose of forging postcolonial States would create an unmanageable risk to international stability.¹⁶⁶ Thus, through the principle of *uti possidetis juris*, the right to self-determination has, invariably, prioritized the territorial integrity of existing colonial units above virtually all other considerations. The difficulty with relying solely on the right to self-determination is that, if it is accepted that its colonial variant is exercisable by recourse to territorial factors, in principle, the people of a NSGT must be co-terminus with all the inhabitants of that Territory. In 1975, the General Assembly welcomed the ICJ’s *Western Sahara Advisory Opinion* and it reaffirmed the people of Western Sahara’s right to self-determination.¹⁶⁷ It also called upon Spain as the Administering power to take, ‘all necessary measures [...] so that all Saharans originating in the Territory may exercise fully and freely, under United Nations supervision, [this] inalienable right [...]’¹⁶⁸ Of course, this referendum never took place but while the standard – territorialized – account of self-determination would clearly have assisted the Sahrawi community back in 1975, the enduring military conflict and the consequent settlement of the Territory by Moroccan nationals coupled with the UN’s inability to establish the franchise for the purpose of holding a referendum have meant that ‘the people of Western Sahara’ has become an increasingly contested concept.

It appears that no solution to the Western Sahara conflict is possible in the absence of establishing Morocco’s legal status vis-à-vis Western Sahara or confirming the parameters of the notion of Western Saharan people-hood not only for the purpose of organising a referendum on the Territory’s final status but also for any significant decisions concerning it – including the exploitation of its natural resources. In the absence of an engaged Administering power and a viable dispute settlement process, third States and International Organisations must abstain from cooperating with Morocco and, in particular, from entering into international agreements with it concerning the exploitation of Western Sahara’s natural resources because such actions help to perpetuate Morocco’s control over the Territory in ways that are not in

¹⁶⁶ See J Trinidad, *Self-determination in Disputed Colonial Territories* (CUP 2018), 69 and 159.

¹⁶⁷ UNGA Res 3458A(XXX) (10 December 1975), [1 and 4].

¹⁶⁸ *ibid*, [7].

conformity with the UN Charter. The Western Sahara Question has been consistently characterized as a self-determination dispute by the UN (and the EU) rather than one involving unlawful military occupation which demands IHL's application.¹⁶⁹ However, there are too many ambiguities regarding the contextual application of the international law relating to self-determination for the Western Saharan situation to be resolved by recourse to this body of law alone. Any re-orientation of this dispute would require the Security Council and the General Assembly to engage more seriously with the conflict than they have done in recent years.¹⁷⁰

¹⁶⁹ Art 49(6) of Geneva Convention (IV) provides that an occupying power 'shall not transfer part of its own civilian population into the territory it occupies'. Art 55, The Hague Regulations permits an occupying power to use the natural resources belonging to an occupied territory for the purpose of providing public goods but they must not be used for that power's benefit. See B Saul, 'The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources' Sydney Law School Legal Studies Research Paper, No 15/81, September 2015; and P Wrangé, 'Self-determination, Occupation and the Authority to Exploit Natural Resources – Trajectories from Four European Judgments on Western Sahara' (2019) 52 *Israel Law Review* 3-29.

¹⁷⁰ See UNSG Report S/2019/282 (1 April 2019).