

**Security Council**

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Letter dated 24 November 2021 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council

I would like to transmit to you herewith a letter dated 24 November 2021 from the Ambassador and Representative of the Frente Popular para la Liberación de Saguía el-Hamra y de Río de Oro (Frente POLISARIO) at the United Nations, Sidi Omar, addressed to the Secretary-General of the United Nations concerning the judgment delivered on 29 September 2021 by the General Court of the European Union whereby it annulled the European Union Council decisions on agreements between the European Union and Morocco involving the Territory of Western Sahara because the agreements have been found to be contrary to European Union law (see annex).

I should be grateful if you would have the present letter and its annex issued as a document of the Security Council.

(Signed) Mathu Joyini
Ambassador
Permanent Representative



Annex to the letter dated 24 November 2021 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council

Upon the instructions of my Authorities, I am transmitting to you herewith the press release issued on 29 September 2021 by the General Court of the European Union concerning its judgment on the appeals lodged in 2019 by the Frente POLISARIO, in its capacity as the internationally recognized representative of the people of Western Sahara, against the decisions of the Council of the European Union involving the Territory of Western Sahara (see enclosure).

In its momentous judgment of 29 September 2021, the General Court of the European Union annulled the European Union Council decisions concerning, first, the agreement between the European Union and Morocco amending the tariff preferences granted by the European Union to products of Moroccan origin, and, second, the sustainable fisheries partnership agreement.

By annulling the above-mentioned European Union Council decisions, the General Court of the European Union upheld the position of the Frente POLISARIO that, by approving agreements involving Western Sahara without the consent of the Sahrawi people, the European Union Council had infringed the European Union obligations in the context of its relations with Morocco under European Union and international law by, inter alia, assisting in the unlawful exploitation of the natural resources of the Territory and encouraging the illegal occupation and annexation of the Territory by the occupying state of Morocco.

The latest judgment of the General Court of the European Union reaffirms and consolidates the facts already established in the judgment delivered by the Court of Justice of the European Union on 21 December 2016.

First, there is the fact that the Frente POLISARIO is the representative of the people of Western Sahara and that it therefore has the capacity to bring actions before European Union Courts to defend the sovereign rights of the Sahrawi people over their national territory and natural resources.

Second, there is the fact that, by virtue of the right to self-determination and independence, Western Sahara has a “separate and distinct” status vis-à-vis the Kingdom of Morocco, which reaffirms that the occupying state of Morocco has no sovereignty over the Territory of Western Sahara as already established by the International Court of Justice in its advisory opinion of 1975, among others.

Third, there is the fact that the people of Western Sahara, represented by the Frente POLISARIO, must be regarded as a third party to European Union-Morocco relations and therefore any international agreement applicable to Western Sahara must receive the consent of the Sahrawi people, irrespective of any alleged “benefits”.

In particular, the Court notes that, the validity of the consent itself depends on its being free and genuine, which is the fundamental criterion for exercising the right to self-determination and independence in accordance with United Nations resolutions on decolonization.

It is also very important that the Court, in view of the legal definitions of “people” and “consent” in international law, has emphatically rejected the alleged consent of the people of Western Sahara based on “consultations” conducted by the European Union institutions with “local authorities” established by the occupying state of Morocco and “local” elected officials and economic operators in the occupied Western Sahara who only represent themselves and not the Sahrawi people, as noted by the Court itself.

In addition, by reaffirming the already established fact in relation to the status of the Frente POLISARIO as the sole, legitimate and internationally recognized representative of the people of Western Sahara, the judgment of the General Court of the European Union also deals a heavy blow to the attempts by the occupying state of Morocco to undermine the legal status of the Frente POLISARIO.

The essence of the Court's view in this regard is unequivocally clear: the so-called "local" entities that are created and sponsored by the occupying state of Morocco in the occupied Western Sahara purportedly to "represent" the Sahrawi people are merely "puppets" of the occupying state and, therefore, they do not represent, in any way or form, the Sahrawi people and cannot speak on their behalf.

The European Union has repeatedly and regrettably failed to comply with the unequivocal judgments of the judicial institutions of the European Union, thus damaging its reputation for upholding the rule of law and undermining its publicly stated position of supporting a peaceful, just and lasting solution to the question of Western Sahara, which provides for the self-determination of the Sahrawi people.

In this regard, the Frente POLISARIO and the Authorities of the Sahrawi Republic call upon the European Union and all other stakeholders to comply fully with the provisions of the judgment of the General Court of the European Union of 29 September 2021. The Frente POLISARIO and the Authorities of the Sahrawi Republic reiterate their readiness to enter into partnerships with States as well as public and private companies regarding the investment and resource exploitation in Western Sahara, based on full respect for the permanent sovereignty of the Sahrawi people over their land and wealth and their prior consent expressed through their internationally recognized representatives, the Frente POLISARIO and the Authorities of the Sahrawi Republic.

I should be grateful if you would bring the present letter to the attention of the members of the Security Council.

(Signed) Sidi M. **Omar**
Ambassador
Representative of the Frente POLISARIO at the United Nations
Coordinator with MINURSO

Enclosure

The General Court annuls the Council decisions concerning, first, the agreement between the European Union and Morocco amending the tariff preferences granted by the European Union to products of Moroccan origin and, second, the Sustainable Fisheries Partnership Agreement

However, the effects of those decisions are maintained over a certain period in order to preserve the European Union's external action and legal certainty over its international commitments

The present cases concern actions for annulment brought by the Front populaire pour la libération de la Saguia el-Hamra et du Rio de oro (Front Polisario) ('the applicant') against two Council decisions approving the conclusion of agreements between the European Union and the Kingdom of Morocco.¹

The agreements approved by the contested decisions ('the agreements at issue') are the result of negotiations conducted on behalf of the European Union with Morocco to amend previous agreements in the light of two judgments delivered by the Court of Justice.² Firstly, the negotiations concerned the conclusion of an agreement amending the protocols of the Euro-Mediterranean Association Agreement³ on the arrangements applying to imports into the European Union of agricultural products originating in Morocco and the arrangements concerning the definition of originating products in order to extend to products originating in Western Sahara, which are subject to export controls by the customs authorities of the Kingdom of Morocco, the tariff preferences granted to products originating in Morocco and exported to the European Union. Second, the aim was to amend the fisheries agreement between the European Community and Morocco⁴ and, in particular, to include the waters adjacent to the territory of Western Sahara within its scope.

By applications lodged in 2019, the applicant requested annulment of the contested decisions. Claiming to act 'on behalf of the Sahrawi people', the applicant argues, inter alia, that by approving the agreements at issue through the contested decisions without the consent of the people of Western Sahara, the Council infringed the European Union's obligations in the context of its relations with Morocco under EU and international law. According to the applicant, those agreements apply to

¹ Council Decision (EU) 2019/217 of 28 January 2019 on the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (OJ 2019 L 34, p. 1), and Council Decision (EU) 2019/441 of 4 March 2019 on the conclusion of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the Exchange of Letters accompanying the Agreement (OJ 2019 L 77, p. 4); 'the contested decisions'.

² Judgments of 21 December 2016, *Council v Front Polisario* (C-104/16 P; see Press Release No 146/16) and of 27 February 2018, *Western Sahara Campaign UK* (C-266/16; see Press Release No 21/18). In those judgments, the Court stated that the Association Agreement is applicable only to the territory of Morocco and not to Western Sahara, and that neither the Fisheries Agreement nor the Protocol thereto are applicable to the waters adjacent to the territory of Western Sahara.

³ Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (OJ L 70, 2000, p. 2).

⁴ Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco (OJ L 141, 2006, p. 4).

Western Sahara, provide for the exploitation of its natural resources and encourage the policy of annexation of that territory by Morocco. In addition, the Sustainable Fisheries Partnership Agreement applies to the waters adjacent to that territory. In particular, the applicant claims that the agreements are in breach of the Court of Justice's judgments in *Council v Front Polisario* (C-104/16 P) and *Western Sahara Campaign UK* (C-266/16), which exclude such territorial scope.

By its judgments in Case T-279/19 and the Joined Cases T-344/19 and T-356/19, **the General Court annuls the contested decisions but decides that the effects of those decisions be maintained over a certain period,⁵ since annulling them with immediate effect could have serious consequences on the European Union's external action and call into doubt legal certainty in respect of the international commitments to which it has agreed. On the contrary, the Court dismisses as inadmissible the applicant's action in Case T-356/19 against the regulation on the allocation of fishing opportunities under the Sustainable Fisheries Partnership Agreement, due to a lack of direct concern.⁶**

Findings of the Court

Admissibility of the actions

In the first place, **the Court determines whether the applicant has the legal capacity to bring proceedings before the EU Courts.** According to the Council and the interveners, the applicant does not possess legal personality under the national law of any Member State, is not a subject of international law and does not satisfy the criteria laid down by the Courts of the European Union to allow an entity deprived of legal personality to be recognised as having the capacity to bring proceedings before the courts. In their view, the applicant is therefore not a legal person within the meaning of the fourth paragraph of Article 263 TFEU.

Referring to its previous decisions, the Court states that they do not preclude an entity, irrespective of its legal personality under national law, from being recognised as having capacity to bring proceedings before the EU Courts, in particular where such recognition is necessary to meet the requirements of effective judicial protection, since a restrictive interpretation of the concept of legal person must be ruled out. In examining whether the applicant has legal personality under public international law, **the Court finds that the applicant's role and representativeness are capable of conferring upon it *locus standi* before the EU Courts.**

In that regard, the Court determines that **the applicant is recognised internationally as a representative of the people of Western Sahara**, even if that recognition is confined to the self-determination process of that territory. Furthermore, its participation in that process implies that it has the necessary **autonomy and competencies** to act within that context. **Ultimately, effective judicial protection requires that the applicant be regarded as having the capacity to bring an action before the Court to defend the right of the people of Western Sahara to self-determination.** The Court therefore concludes that **the applicant is a legal person** within the meaning of the fourth paragraph of Article 263 TFEU and rejects the Council's plea of inadmissibility.

In the second place, **the Court examines the Council's plea of inadmissibility alleging that the applicant does not have a legal interest in bringing proceedings.**

⁵ Namely, a period not exceeding the two-month period for lodging an appeal or the date of delivery of the judgment of the Court ruling on any such appeal.

⁶ Council Regulation (EU) 2019/440 of 29 November 2018 on the allocation of fishing opportunities under the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco and the Implementation Protocol thereto (OJ 2019, L 77, p 1).

As to whether the applicant is directly concerned by the contested decisions, the Court notes that a decision on the conclusion, on behalf of the European Union, of an international agreement forms an integral part of that agreement and that, accordingly, the effects of the implementation of that agreement on the legal position of a third party are relevant to the assessment of whether that third party is directly concerned by the decision at issue. In the present case, in order to defend the rights that the people of Western Sahara derive from the rules of international law which are binding on the European Union, the applicant must be able to rely on the effects of the agreements at issue on those rights to establish that it is directly concerned. **The Court takes the view that, in so far as the agreements at issue apply expressly to Western Sahara and, as regards the decision concerning the Sustainable Fisheries Partnership Agreement, to the waters adjacent to that territory, they concern the people of that territory and require the consent of its people. Consequently, the Court concludes that the contested decisions directly concern the legal situation of the applicant as a representative of the people of Western Sahara and as one of the parties to the self-determination process of that territory. Finally, the Court notes that the implementation of the agreements at issue, as regards their territorial application, is purely automatic and leaves no degree of discretion to the addressees of those agreements.**

As to **whether the applicant is individually concerned**, the Court finds that, having regard to the circumstances which resulted in the conclusion that it was directly concerned, in particular its legal position as a representative of the people of Western Sahara and a party to the self-determination process of that territory, **the applicant must be regarded as concerned by the contested decisions by reason of certain special characteristics that differentiate it in a way similar to that of an addressee of those decisions.**

The merits of the actions

As regards substance and, more specifically, the question of whether the Council has infringed the obligation to comply with the case-law of the Court of Justice concerning the rules of international law applicable to the agreements at issue, the General Court finds that, in the judgment in *Council v Front Polisario*, **the Court of Justice inferred from the principle of self-determination and the principle of the relative effect of treaties clear, precise and unconditional obligations towards Western Sahara in the context of its relations with Morocco, namely both to respect its separate and distinct status and to secure the consent of its people in the event of the implementation of the Association Agreement in that territory.** Therefore, the applicant must be able to invoke the violation of those obligations against the contested decisions in so far as that violation may concern the people of Western Sahara, as a third party to the agreement concluded between the European Union and Morocco. In that respect, the Court rejects the argument put forward by the applicant that it would be impossible for the European Union and Morocco to conclude an agreement which applies to Western Sahara, since that possibility is not precluded by international law as interpreted by the Court.

On the contrary, **the Court upholds the applicant's argument that the requirement relating to the consent of the people of Western Sahara, as a third party to the agreements at issue, for the purposes of the principle of the relative effect of treaties, has not been respected.**

In that regard, the Court considers that the rule of international law, according to which the consent of a third party to an international agreement may be presumed where the parties to that agreement intended to confer rights on it, is not applicable in the present case, since **the agreements at issue are not intended to confer rights on the people of Western Sahara, but to impose obligations on them.**

Moreover, the Court notes that, where a rule of international law requires the consent of a party or a third party, the expression of that consent is a precondition for the validity of the act for which it is required, the validity of that consent itself depends on its being free and genuine, and the act must be enforceable against the party or third party having validly consented to it. **However, the steps taken by the EU authorities before the conclusion of the agreements at issue cannot be regarded as having secured the consent of the people of Western Sahara to those agreements in accordance with the principle of the relative effect of treaties, as interpreted by the Court of Justice.** The General Court states, in that regard, that the institutions' discretion in external relations did not allow them, in this case, to decide whether they could meet that requirement.

In particular, the Court finds, first, that **in view of the legal definitions of 'people' and 'consent' in international law, the 'consultations' conducted by the institutions with the 'people concerned' did not amount to an expression of the consent of the people of Western Sahara.** That approach made it possible, at most, to obtain the opinion of the parties concerned, although that opinion did not determine the validity of the agreements at issue or bind those parties in such a way that those agreements could be enforced against them. Next, the Court considers that **the various factors relating to the specific situation in Western Sahara, relied on by the Council, do not show that it would be impossible, in practice, to secure the consent of the people of Western Sahara to the agreements at issue, as a third party to those agreements.** Lastly, the Court notes that **the institutions cannot validly rely on the letter of 29 January 2002 from the UN Legal Counsel to substitute the criterion of the benefits of the agreements at issue for the populations concerned for the requirement of the expression of such consent.** The Court concludes that **the Council did not sufficiently take into account all the relevant factors relating to the situation in Western Sahara and wrongly considered that it had a degree of discretion in deciding whether to comply with that requirement.**
