



INSIGHTS

FRONT POLISARIO: A STEP FORWARD IN JUDICIAL REVIEW OF INTERNATIONAL AGREEMENTS BY THE COURT OF JUSTICE?

AURORA RASI*

ABSTRACT: In *Front Polisario* (judgment of 21 December 2016, case C-104/16 P, *Council of the European Union v. Front Polisario* [GC]), the Court of Justice was called to assess the validity of a decision that had concluded an agreement providing for reciprocal liberalisation measures on agriculture and fishery products between the EU and the Kingdom of Morocco. The agreement had been implemented by the parties as covering also products originating from Western Sahara, a non-self-governing territory militarily occupied by Morocco. In its previous case law, the Court of Justice had mainly limited to procedural aspects the judicial review of acts related to the EU's foreign relations. In *Front Polisario* it took a different view, and assessed the validity of the decision also on the merits. This *Insight* examines the technique used by the Court of Justice, and tries to identify which reasons led it to depart from its traditional standard of judicial review.

KEYWORDS: judicial review of political choices – external action – Council competences – CJEU competences – principle of self-determination – violation by the EU of international peremptory law.

I. PRELIMINARY REMARKS: JUDICIAL REVIEW OF INTERNATIONAL AGREEMENTS BETWEEN SELF-RESTRAINT AND JUDICIAL ACTIVISM

Judicial review of international acts, or of their implementing domestic acts, often proves to be a tough task for domestic courts.

From an inward-looking perspective, there is no reason to depart from the classical view that, insofar as international agreements produce effects – directly or indirectly – within the domestic legal order, they are subject to judicial review, as is the case for purely domestic acts.¹ However, it should be considered that judicial review of interna-

* PhD in International Law and European Union Law, University of Rome “La Sapienza”, aurora.rasi@uniroma1.it.

¹ See the famous dictum in *Kadi*: “[t]he Courts of the European Union must ensure the review, in principle the full review, of the lawfulness of all European Union acts in the light of fundamental rights” (Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission* [GC], para. 326).

tional agreements or of their implementing legislation, unlike that of purely domestic acts, has a significant impact on the sphere of international relations. In other words, by interpreting international acts or by judging their validity, domestic courts may interfere with foreign relations: a field that is normally the competence of the executive.

This explains why domestic courts, when asked to review the validity of an international act, or of its implementing domestic acts, are faced with a dilemma: should they defer to the view of the executive organs, or should they superimpose their view on that of the executive, thus creating international embarrassment and breaching the principle that international actors must speak with one voice in the sphere of international affairs?

There is no well-grounded answer to this dilemma in legal theory and practice. Whereas in certain legal orders courts have traditionally maintained self-restraint, in others they seem to have been inspired by a judicial activism.²

The case law of the CJEU has been constantly inspired by a third approach, which may be called the *procedural approach*.

The CJEU maintained that the acts adopted by the Council, and related to the EU's foreign relations power, are not exempted from judicial scrutiny. However, the CJEU also maintained it has to respect the wide discretion possessed by the Council in shaping EU foreign relations. Therefore, it generally considered itself prevented from evaluating the merit of the acts adopted by the Council in this area. It could not verify, for instance, if those acts represent the only or the best possible measures to deal with an international situation. The judicial scrutiny was thus limited to formal aspects, namely to the evaluation of the correctness of the procedure followed by the Council for the adoption of the relevant acts. For example, the Court assessed whether those acts were manifestly inappropriate, having regard to the objective which the competent institution was seeking to pursue, or whether the Council based its choice on objective criteria, or whether, in exercising its wide discretion, the Council had fully taken into account all the interests involved.³

² For an account of a never ending debate, see J.P. COLE, *The Political Question Doctrine: Justiciability and the Separation of Powers*, Congressional Research Service: Informing the Legislative Debate since 1914, 23 December 2014, fas.org. On the judicial review of international agreements, see E. CANNIZZARO, *Trattati internazionali e giudizio di costituzionalità*, Milano: Giuffrè, 1991; G. GAJA, *Trends in Judicial Activism and Judicial Self-Restraint Relating to Community Agreements*, in E. CANNIZZARO (ed.), *The European Union as an Actor in International Relations*, The Hague: Kluwer Law International, 2002, p. 117 *et seq.*; M. MENDEZ, *Constitutional review of Treaties: Lessons for Comparative Constitutional Design and Practice*, in *International Journal of Constitutional Law*, 2017, p. 95 *et seq.*

³ See Court of Justice, judgment of 8 June 2010, case C-58/08, *Vodafone et al.* [GC], para. 52: "the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue". The manifest inappropriateness standard has been adopted in Court of Justice, judgment of 1 March 2016, case C-440/14, *National Iranian Oil Company v. Council* [GC]: in that case the Court, asked to rule on the validity of two Council Decisions related to the field of the Common Foreign and Security Policy, clarified that: "the Union legislature must

II. THE DECISION OF THE GENERAL COURT IN *FRONT POLISARIO* AND THE PROCEDURAL APPROACH

The procedural approach also inspired the ruling of the General Court in *Front Polisario v. Council of the European Union*.

The General Court was asked to rule on the validity of a Council Decision that had concluded an international agreement between the EU and Morocco, aimed to facilitate the exchange of agricultural and fisheries products originating from the territory of either party (the liberalisation agreement). The applicant asked the General Court to annul the contested decision because it concluded a treaty which violated, among others, the international peremptory principle of self-determination. The applicant, Front Polisario, argued that the agreement had been indeed implemented by the parties as covering also products originating from Western Sahara, a non-self-governing territory unlawfully occupied by Morocco and entitled to self-determination.⁴

The General Court remarked that the Council possessed “wide discretion” in deciding “whether it is appropriate to conclude an agreement with a non-member State”. Thus, the “judicial review must necessarily be limited to the question whether [...] the Council, by approving the conclusion of an agreement [...], made manifest errors of assessment”.⁵

be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. [...] [T]he legality of a measure adopted in those fields can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue” (para. 77). See also Court of Justice: judgment of 1 February 2007, case C-266/05, *Sison v. Council*, para. 33; judgment of 10 January 2006, case C-344/04, *IATA and ELFAA* [GC], para. 80; judgment of 10 March 1998, case C-122/95, *Germany v. Council*, para. 79; judgment of 28 November 2013, case C-348/12 P, *Council v. Manufacturing Support & Procurement Kala Namf*, para. 120. Among the most recent example of the procedural approach, see Court of Justice, judgment of 17 October 2013, case C-101/12, *Schaible*, paras. 47-50. On the identification of the objective criteria for judicial review, see Court of Justice, judgment of 16 December 2008, case C-127/07, *Arcelor Atlantique et al.* [GC], paras. 57-59.

⁴ Front Polisario is a liberation movement allegedly representative of the Saharawi people, a large part of the population of Western Sahara, an area added in 1963 by the UN to the list of non-self-governing territories and still today occupied by Morocco. Historical surveys of the facts are collected in General Court, judgment of 10 December 2015, case T-512/12, *Front Polisario v. Council of the European Union*, paras. 1-16; Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council of the European Union v. Front Polisario* [GC], paras. 21-37; Opinion of AG Wathelet delivered on 13 September 2016, case C-104/16 P, *Council of the European Union v. Front Polisario*, paras. 5-20.

⁵ Expressly, the General Court relied on the procedural approach in the precedent of *Odigitria v. Council and Commission* (judgment of 6 July 1995, case T-572/93, par. 38). In a question concerning the judicial review of two fishing agreements concluded by the EU with two States (Senegal and Guinea Bissau), the General Court, upholding a self-restraint approach, clarified that the Council possessed “a wide discretion in the field of the Community’s external economic relations”. In that case, the applicant asked the Court to assess whether the Council overlapped its discretion by not taking into account all interests involved in the circumstances, and in particular by disregarding the dispute between Senegal and Guinea Bissau for the delimitation of their maritime zones. The General Court, however, did not enter on the

The General Court found that, in the specific case, the Council was required to evaluate “carefully and impartially, all the relevant facts in order to ensure that the production of goods for export [was] not conducted to the detriment of the population of the territory concerned, or entails infringements of fundamental rights”. The General Court concluded that the Council had not taken into consideration those elements and, thus, since it “failed to fulfil its obligation to examine all the elements of the case before the adoption” of an act, the contested decision was to be annulled.⁶

It is worth noting that the adoption of the procedural approach by the General Court in that particular case did not turn out to uphold the course taken by the EU political institutions.

Indeed, the General Court annulled the contested decision and, by so doing, it interfered with the conduct of the foreign relations powers of these Institutions. However, for the reasons that will be expounded in the subsequent sections, the interference was quite limited. The annulment was pronounced only because the Council failed to examine “carefully and impartially all the relevant facts of the individual case, facts which support the conclusions reached”.⁷ In particular, the Council “should have satisfied itself that there was no evidence of an exploitation of the natural resources of the territory of

merits of the Council evaluation of the interests involved in the case, nor did it examine whether the Council would have had to pay attention to the dispute between the two States. On the contrary, the General Court limited itself to reiterate Council's argumentations on the matter.

⁶ *Front Polisario v. Council of the European Union*, cit., paras. 223-225, 241, 247. That the General Court did not evaluate Council's action on the merits, but it was only because of procedural errors that it declared the illegitimacy of the contested decision, is confirmed by Opinion of AG Wathelet, *Council of the European Union v. Front Polisario*, cit., paras. 234-236. It is worth noting that the judgment of the General Court complied with the previous case law of the Court of Justice not only because it upheld the procedural approach, but also for another aspect. In determining the territorial scope of the agreement between the EU and Morocco, the General Court relied on the customary international rules transposed in Art. 31, para. 3, let. b) of the 1969 Vienna Convention on the Law of Treaties (VCLT). It thus took into account the practice of the parties of the treaty following its adoption and found that the EU, while fully aware of the application of the treaty by Morocco to Western Sahara, did not protest. This lack of contestation was considered, by the General Court, as an implicit acceptance of the inclusion of Western Sahara in the territorial scope of the agreement (cf. *Front Polisario v. Council of the European Union*, cit., paras. 94, 98-103; *Council of the European Union v. Front Polisario* [GC], cit., par. 119). At a closer look, this reasoning does not seem alien to the case law of the Court of Justice. Only few months before the General Court issued its judgement in *Front Polisario v. Council of the European Union* the Court of Justice, in *Oberto and O'Leary*, applied Art. 31, para. 3, let. b) VCLT. In that case the Court of Justice stated that “the subsequent practice followed in the application of a treaty may override the clear terms of that treaty if that practice reflects the parties' agreement”. Then, it found that a practice, which has never “been the subject of challenge by the parties to that convention [...] must be regarded as reflecting their tacit agreement to such a practice” (Court of Justice, judgment of 11 March 2015, joined cases C-464/13 and C-465/13, *Oberto and O'Leary*, paras. 38, 60-66).

⁷ *Front Polisario v. Council of the European Union*, cit., para. 225.

Western Sahara under Moroccan control likely to be to the detriment of its inhabitants and to infringe their fundamental rights".⁸

In consequence of this finding, the Council could have re-issued the contested decision stating the reasons requested by the General Court or, possibly, re-open the negotiations in order to conclude the liberalisation agreement anew by including a process of verification that the implementation of the agreement to the territory of Western Sahara was not made to the detriment of the population and of their fundamental rights.

III. THE SUBSTANTIVE APPROACH IN THE DECISION OF THE COURT OF JUSTICE IN *FRONT POLISARIO*

Ruling on appeals, the Court of Justice has abandoned the procedural approach. The Court of Justice found that the General Court's decision was based on a number of errors of law and, therefore, it annulled it.⁹

For the purposes of the current *Insight*, it is worth noting that the Court of Justice conducted a careful assessment on the merits. In particular, the Court of Justice found that the provision, that determined the territorial scope of the agreement, ought to be construed in accordance with the international peremptory principle of self-determination, even if this interpretation was at odds with the practice followed by the parties in implementing the agreement.

In the view of the Court, such practice did not establish the existence of an agreement between the parties regarding its interpretation, under Art. 31, par. 3, let. b), VCLT and, therefore, should be discarded. On that basis, the Court easily concluded that products originating from Western Sahara did not fall within the territorial scope of the agreement and that the provision that determined the territorial scope of the agreement ought to be construed in a way that contradicted the practice followed by the parties, in order to be compatible with the international peremptory principle of self-determination.¹⁰

⁸ *Ibidem*, para. 241.

⁹ Cf. *Council of the European Union v. Front Polisario* [GC], cit., paras. 86, 89, 93, 99, 103, 108, 115-116, 122, 125, 127. It is worth noting that the Court of Justice did not examine the argument, upheld by the Council in its appeal, related to an alleged misconstruction of "the extent to which [the General Court] was able judicially to review [Council's] discretion" in the field of EU's "external economic relations". (see paras. 72 and 126).

¹⁰ An analogous issue has dealt with by the Court of Justice in *Brita* (judgment of 25 February 2010, case C-386/10). The Court was asked to interpret the territorial scope of the association agreement between the EU and Israel, in order to assess whether it was applicable to the West Bank. The Court of Justice read the statutory provision of the association agreement in light of other international norms: the customary principle *pacta tertiis nec nocent nec prosunt* and Art. 73 of the association agreement between the EU and the PLO, which states that the agreement applied to the "territories of the West Bank and the Gaza Strip" (paras. 43-47). It concluded that the territorial scope of the association agreement between the EU and Israel "must be interpreted as meaning that [...] the West Bank do[es] not fall within

The consequence of these findings is that the EU is bound to interpret the liberalisation agreement as excluding from its scope products originating from Western Sahara. By so doing, the Court imposed thus a radically different course in the conduct of the EU foreign relations relations with Morocco.

This conclusion leads one to investigate the reasons which prompted the methodological shift from the procedural approach traditionally followed in the case law of the Court of Justice to a substantive approach, and whether these reasons may reveal the development of a new standard of judicial review.¹¹

IV. THE DECISION OF THE COURT OF JUSTICE BETWEEN SELF-RESTRAINT AND ACTIVISM

The shift in the case law of the Court of Justice has occurred almost inadvertently.

From a superficial glance, the Court of Justice in *Front Polisario* has upheld all the request by the appellant: it annulled the decision of the General Court; it adopted the interpretation of the territorial scope of the liberalisation agreement suggested by the Council; it rejected the idea that the practice, followed by the EU political Institutions, did create acquiescence to the interpretation of the agreement suggested by Morocco, comprehending Western Sahara in its territorial scope.¹² Yet, if one looks under the veneer, the deference towards the position of the EU political Institutions appears to be

the territorial scope of that agreement" (para. 53). Still, while the assessment demanded of the Court of Justice in *Brita* may appear similar to the one asked in *Front Polisario* insofar as the interpretation of the territorial scope of an agreement is concerned, the differences between the two cases should be highlighted. In the first place, in *Brita* the Court was required to issue a preliminary ruling on the interpretation of a statutory provision, and not a ruling on the validity of an act as in *Front Polisario*. Therein lies the main discrepancy with *Front Polisario*, as well as the reason why *Brita* does not seem relevant in examining the criteria applied by the Court for the judicial review of political acts of the Council: it is not a case of judicial review at all. The second key difference between *Brita* and *Front Polisario* is that *Brita* arose because the EU refused to apply the association agreement with Israel to an area not pertaining to Israel's territory. In *Front Polisario*, as seen, the case was instead prompted because the EU accepted the application of the liberalisation agreement with Morocco to an area not pertaining to Morocco's territory.

¹¹ For more comprehensive analysis of the judgment, see E. KASSOTI: *The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part)*, in *European Papers*, 2017, Vol. 2, No 1, p. 339 *et seq.*, www.europeanpapers.eu; *The Council v. Front Polisario Case: The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation (Second Part)*, in *European Papers*, 2017, Vol. 2, No 1, p. 23 *et seq.*, www.europeanpapers.eu; V. KUBE, *The Polisario case: Do EU fundamental rights matter for EU trade policies?*, in *EJIL: Talk!*, 3 February 2017, www.ejiltalk.org; C. RYNGAERT, *The Polisario Front Judgment of the EU Court of Justice: a Reset of EU-Morocco Trade Relations in the Offing*, in *Renforce Blog*, 15 January 2017, blog.renforce.eu; MARKUS W. GEHRING, *EU/Morocco relations and the Western Sahara: the ECJ and international law*, in *EU Law Analysis*, 23 December 2016, eulawanalysis.blogspot.it; S. HUMMELBRUNNER, A.-C. PRICKARTZ, *EU-Morocco Trade Relations Do Not Legally Affect Western Sahara – Case C-104/16 P Council v Front Polisario*, in *European Law Blog*, 5 January 2017, europeanlawblog.eu.

¹² Cf. *Council of the European Union v. Front Polisario* [GC], cit., paras. 92, 96, 114, 126-127 and 134.

more formal than real, and the effects prompted by the Court of Justice's ruling prove to be dramatically diverging from those wished by the Council and by the Commission. To explain what clearly appears to be an iron fist in a velvet glove, it seems indispensable to enter into some more detail in the factual and legal context, and in the line of reasoning followed by the Court.

The territorial scope of the liberalisation agreement is determined by Art. 94 of the 1996 association agreement between the EU and Morocco, which the liberalisation agreement legally refers to. The provision states that the association agreement applies "to the territory of the Kingdom of Morocco". In order to determine the territorial scope of the liberalisation agreement it was thus necessary to ascertain the meaning of the expression "the territory of the Kingdom of Morocco".

As remarked by AG Wathelet, both the Council and the Commission asked the Court of Justice to interpret the agreement as not applying to the territory of Western Sahara. Both, however, seemed to maintain that, beyond the formal interpretation of the agreement, Morocco could continue to apply *de facto* the agreement to the products of Western Sahara.¹³ Strangely enough, neither the Commission nor the Council seemed to be aware of the fact that a discrepancy between the legal reality and the factual reality cannot but amount to a breach of the law.

Beyond the hypocrisy of this claim, there is a revealing passage in the chain of assumptions of the Council that may explain it. The Council, although "put[ting] forward different and even contradictory views", and although never formally accepting that Western Sahara was part of the territory of Morocco, nonetheless added that the EU and Morocco "have a mutual understanding", whereby "the European Union accepts the application of the agreement to the territory of Western Sahara" and Morocco will "not use this as an argument in support of its claim to sovereignty".¹⁴

The possibility for the agreement to be *de facto* applied to Western Sahara was indeed embraced in its core spirit, as "Morocco would never have accepted the agreement if" the EU "had included in it a clause explicitly excluding its application to Western Sahara".¹⁵ It thus seems that the Council conceived of the principle of self-determination as not obliging the EU to ask that Morocco, in implementing the agreement, gives faithful compliance with the right of self-determination of Saharawi people.¹⁶

¹³ Cf. Opinion of AG Wathelet, *Council of the European Union v. Front Polisario*, cit., paras. 64-67, 83.

¹⁴ *Ibidem*, paras. 65-67.

¹⁵ *Ibidem*, para. 300.

¹⁶ Cf. *Council of the European Union v. Front Polisario* [GC], cit., para. 123. Similar considerations may be expressed with regard to the interpretation of the principle of self-determination upheld by the Commission, which intervened in the case in support of the Council. Indeed the Commission admitted it was aware that the application of the liberalisation agreement to Western Sahara may have been regarded as a violation of peremptory norms of international law (Opinion of AG Wathelet, *Council of the European Union v. Front Polisario*, cit., para. 182). Once it is excluded that the Commission intended to breach international peremptory rules, the only remaining option is to conclude that the Commission interpreted

It is precisely on this point that the Court of Justice took a different course, and a very radical one indeed.

The Court read the principle of self-determination as preventing the EU from tolerating the conduct, performed by Morocco, of applying the liberalisation agreement to Western Sahara. Indeed, the Court specified that all States, under this principle, were required to recognise a separate and distinct status, from that of any State, to all non-self-governing territories. Not only it would have been unacceptable to interpret Art. 94 as including Western Sahara in the territorial scope of the agreements between the EU and Morocco. More broadly, the Court of Justice drew, from the principle of self-determination, the full “inapplicability of the [association and liberalisation agreements] to that territory”.

In the Court’s reasoning, the EU was thus undoubtedly barred from considering the liberalisation agreement as applicable, *de facto* or *de jure*, to Western Sahara. This consideration would have indeed entailed, for the EU, “to implement [the agreement] in a manner incompatible with the principle of self-determination”.¹⁷

There was, then, a huge discrepancy between the Council and the Court of Justice’s identification of the conducts forbidden by the principle of self-determination. While the Council upheld a narrow interpretation of the principle of self-determination,¹⁸ the Court of Justice read it as having a much wider scope.

The Court of Justice clearly conceives of this principle as an all-embracing guarantee for peoples living in a non-self-governing territory. They are fully protected against the possibility of a State applying a treaty to which it is a party to their territory. Thus, while for the Council the principle of self-determination would have precluded international actors only from *explicitly* violating or accepting a violation of the principle itself, for the Court it would have also banned all conduct resulting in an *implicit* acceptance of an infringement of the right to self-determination.

Regardless of its merits, the Court of Justice’s reading of the principle of self-determination inescapably affected the position of the Council with regard to the implementation, by Morocco, of the liberalisation agreement. Albeit not explicitly, the Court of Justice affected the course of foreign policy determined by the Council at the

the principle of self-determination as not precluding for the EU the acceptance of a *de facto* application of the liberalisation agreement by Morocco to Western Sahara.

¹⁷ *Council of the European Union v. Front Polisario* [GC], cit., paras. 88-93, 105, 123.

¹⁸ It does not seem unreasonable to recognise, in the Council’s interpretation of the principle of self-determination, a formalistic approach. This principle seems to have been observed almost exclusively as a criterion for the interpretation of statutory provisions. The principle of self-determination would have indeed forbidden the interpretation of Art. 94 as entailing a violation of the right to self-determination, but the same principle would have not barred States from implicitly accepting its infringement when committed *de facto*.

international level and, thus, strongly interfered with the Council competence in shaping EU foreign relations.

Consequently, the practice followed by the EU, i.e. that of accepting the *de facto* application by Morocco to Western Sahara of the liberalisation agreement, has to be fully abandoned. Moreover, the ruling of the Court prevents the EU from acceding to whatever understanding, tacit or implicit, directly or indirectly related to a breach of the principle of self-determination. The Council is compelled to modify its position about the implementation of the liberalisation agreement, and not to tolerate any longer the application of the agreement to Western Sahara.

V. CONCLUDING REMARKS

In the light of the above, it would be quite arduous to maintain that, in *Front Polisario*, the Court of Justice upheld the procedural approach and did not appraise, on the merits, the conduct of the Council in the EU external action field. On the contrary, it is evident that, in *Front Polisario*, the Court of Justice adopted a very activist approach in performing the judicial review of Council acts related to the area of EU foreign relations.

Such a radical shift appears to have been prompted by the peremptory status of the international rules involved. From the reasoning of the Court, it emerges that it has considered, albeit implicitly, the risk of the EU aiding or abetting a breach of the principle of self-determination by Morocco. Since this indirect complicity of the EU flowed from the Council's misconstruction of the principle of self-determination, a mere procedural review of the contested decision would not have prevented the Council from continuing to read this principle as not forbidding conducts which were, as far as the Court was concerned, entirely prohibited by customary international law.

It thus seems reasonable to conclude that, in *Front Polisario*, the Court of Justice resorted to a new standard for the judicial review of acts related to the foreign affairs area, because of the interests involved in the specific case. The interest in protecting the prerogatives of the Council in dealing with EU foreign relations would be recessive, in particular, when the interest to fulfil international peremptory law comes at stake. In turn, the interest of the EU to not infringe fundamental rights through its international conduct would also allow the Court of Justice to interfere with the Council in shaping EU foreign relations.

All in all, the Court of Justice in *Front Polisario* seems to have developed a sort of *subsidiary approach*. When the Council is not able to develop EU foreign relations in a way that proves to be compatible with customary international law and with the protection of fundamental rights, the Court of Justice will step in, in order to protect the EU's main objectives on the international plane.

