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Article

The EU's duty of non-recognition and the territorial scope of trade agreements covering unlawfully acquired territories

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Abstract

Recently, the international legality of the EU's economic activity in unlawfully acquired territories has gained much salience. Claims are increasingly heard that the duty of non-recognition requires the inapplicability of trade agreements to unlawfully acquired territories. In this light, this article attempts a survey of the relevant EU practice by focusing on the case-studies of Palestine and Western Sahara. The main question examined here is whether the EU has acted in breach of its obligation of non-recognition by concluding agreements with third States that extend to unlawfully acquired territories. Overall, this article argues that there is a growing gap between EU identity rhetoric as a promoter of international law and its actual practice on the ground.

Keywords: unlawful territorial situations; duty of non-recognition; the right to self-determination; EU trade agreements

1. Introduction

The EU's identity as a global actor is firmly anchored in a distinct normative and political agenda. As well as an economic power, the Union has consistently portrayed itself as a virtuous, normative power committed to the strict observance and development of international law, both internally and externally.[1] The Treaty of Lisbon further solidified the image of the EU not only as a 'power *in* trade', but also as a 'power *through* trade'.[2] 'Power *through* trade' refers to the shift to the use of trade as a foreign policy instrument; the Union's external action is geared towards using its economic clout to externalise fundamental non-trade values and objectives, including respect for international law.[3]

However, the unlawfulness of some territorial situations may call into question the legality and legitimacy of entertaining economic relations with the parties responsible for the conduct that brought about such situations. Trade relations with parties involved in unlawful territorial situations indirectly call into question respect for fundamental rules of the international legal order, such as respect for the right to self-determination. As will be explained below, under certain circumstances the duty of non-recognition of unlawful territorial situations under general international law limits or even prohibits economic relations with States responsible for these situations.

Recently, the international legality of the EU's economic activity in unlawfully acquired territories has gained much salience. Claims are increasingly heard that the duty of non-recognition requires the inapplicability of trade agreements to unlawfully acquired territories.[4] In this light, the present article attempts a survey of the relevant EU practice by focusing on the case-studies of Palestine and Western Sahara. The main question examined here is whether the EU has acted in breach of its obligation of non-recognition by concluding agreements with third States that extend to unlawfully acquired territories. Overall, this article argues that there is a growing gap between EU identity rhetoric as a promoter of international law and its actual practice on the ground.

The survey of the relevant EU practice is complemented by an analysis of the approach of the Court of Justice of the European Union (CJEU) to questions of interpretation of the territorial scope of trade agreements extending to unlawfully acquired territories to further identify the EU's overall approach to occupied territories. Respect for international law is now expressly a core constitutional norm – something that has been acknowledged by the Court itself.[5] The EU's external projection of itself as an entity firmly committed to the strict observance and development of international law generates the expectation that its courts also espouse something of this internationalist approach.[6] Thus, the way in which the EU courts have treated in their practice the duty of non-recognition is highly relevant in this context. In this light, the following sections will also examine the Court's reliance on international law, and in particular on the duty of non-recognition, in cases involving trade agreements covering unlawfully acquired territories. It will be argued that the Court's tendency to largely ignore the broader international legal framework of the dispute, including the duty of non-recognition, in this line of case-law does not sit well with the image

[1] See Treaty on the European Union (TEU), art 3(5). See also Treaty on the Functioning of the European Union (TFEU), art 21(1); E Cannizzaro, 'The Neo-Monism of the European Legal Order' in E Cannizzaro, P Palchetti and R Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2012) 35, 56–7.

[2] See generally J Larik, 'Good Global Governance through Trade: Constitutional Moorings' in J Wouters, A Marx, D Geraets and B Natens (eds), *Global Governance Through Trade: EU Policies and Approaches* (Edward Elgar 2016) 43–69 (emphasis added).

[3] A Marx, B Natens, D Geraets and J Wouters, 'Global Governance through Trade: An Introduction' in Wouters, Marx, Geraets and Natens (n 2) 1, 4.

[4] See e.g. '"Made in Illegality" – STOP All Economic Relations with Illegal Israeli Settlements' (*European Co-Ordination of Committees and Associations for Palestine*, 28 February 2014) <http://www.eccpalestine.org/made-in-illegality-stop-all-economic-relations-with-illegal-israeli-settlements/> accessed 31 January 2018. See also 'Report: Label and Liability: How the EU Turns a Blind Eye to Falsely Stamped Agricultural Products Made by Morocco in Occupied Western Sahara' (*Western Sahara Resource Watch/EMMAUS Stockholm*, 18 June 2012) < https://docplayer.net/15119744-Label-and-liability-report-how-the-eu-turns-a-blind-eye-to-falsely-stamped-agricultural-products-made-by-morocco-in-occupied-western-sahara.html> accessed 24 January 2019.

[5] Case C-366/10 *Air Transport Association for America v Secretary of State for Energy and Climate Change* EU:C:2011:864, para 101 and Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and Others v Kadi* EU:C:2013:518, para 103.

[6] G De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht JECL 168, 183.

of a court that shares an internationalist outlook – thereby undermining the image of the EU as an entity with a particular fidelity to international law.

2. Unlawful territorial situations and the duty of non-recognition

From the outset, a few general remarks regarding the duty of non-recognition under general international law need to be made in order to provide some context to the discussion of the CJEU's practice. It needs to be noted that when it comes to questions of territorial status (including title to territory; modes of acquisition of territory; and means of modification of territorial status) international law does not reduce itself to merely recording the facts on the ground. In this sense, it is the existence of substantive principles of legality, rather than the factual exercise of effective control over territory, that affects and determines the lawfulness of territorial situations.[7] As Judge Kreca observed:

> Effectiveness in a system with a defined concept of legality may be legally accepted only in cases in which it does not conflict with the norms that serve as criteria for legality. Within the coordinates of the *de jure* order *effectiveness versus legality* is an incorrect approach, because to accept effectiveness as a rule 'would be to apply a hatchet to the very roots of the law of nations and to cover with its spurious authority an infinite series of international wrongs and disregard for international obligations'.[8]

This section discusses the unlawfulness of territorial situations arising from the breach of the obligation to respect the right to self-determination – a right that, as will be explained below, applies both to the Palestinian people and to the Sahrawi people. Although, for present purposes, the analysis is confined to this principle, it is worthwhile noting that a number of other principles and norms (including the *uti possidetis* principle, the principle of territorial integrity, as well as the prohibition of systematic racial discrimination including the prohibition of apartheid) may be relevant in assessing the lawfulness of a given territorial situation.[9]

The right to self-determination is a core tenet of international law; it is clearly accepted and widely recognised as a peremptory norm of international law.[10] By virtue of this principle, peoples are to 'freely determine their political status' and to 'freely pursue their economic, social and cultural development'.[11] The right to self-determination creates a concomitant obligation on States regarding the method by which decisions concerning peoples should be made, that is by taking into account their freely expressed will.[12] The illegality of changes of territorial status when these are based on the denial, and thus the violation, of the right to self-determination finds widespread support in practice. In 1966 the UN General Assembly declared that South Africa had failed to fulfil its obligations in respect of the administration of its mandate in South West Africa (Namibia) through, inter alia, the forcible denial of the right to self-determination, and terminated South Africa's mandate on that basis.[13] The illegality of South Africa's presence in Namibia was confirmed by the Security Council, which then decided to request of the International Court of Justice (ICJ) an Advisory Opinion on the legal consequences for States of the continued presence of South Africa in Namibia.[14] The Court opined that South Africa's failure to submit itself to supervision by the UN and

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[7] See generally S Zappala, 'Can Legality Trump Effectiveness in Today's International Law?' in A Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 105ff; E Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (Martinus Nijhoff 2006) 8.

[8] Dissenting Opinion of Judge Kreca in *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [1996] ICJ Rep 658, 709 (emphasis in the original).

[9] Milano (n 7) 101–29; D Raic, *Statehood and the Law of Self-Determination* (Martinus Nijhoff 2002) 89–167; J Dugard, *Recognition and the United Nations* (Grotius Publications Limited 1987) 154–70.

[10] ILC, 'Commentary to Art. 26 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, With Commentaries' (adopted by the International Law Commission at its 53rd session) (2001) II Yrbk of the ILC 85, para 5.

[11] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 1; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), art 1.

[12] A Cassese, *International Law* (2nd edn, OUP 2005) 62; *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, paras 58–9.

[13] UNGA Res 2145 (XXI) of 27 October 1966, UN Doc A/RES/2145 (XXI).

[14] UNSC Res 264 of 20 March 1969, UN Doc S/RES/264; UNSC Res 269 of 12 August 1969, UN Doc S/RES/269; UNSC Res 276 of 30 January 1970, UN Doc S/RES/276.

its disrespect for the right to self-determination amounted to a breach of the mandatory agreement.[15] That breach enabled the UN General Assembly to unilaterally revoke the mandate, thus terminating South Africa's right to govern the territory.[16] Another instance where the denial of the right to self-determination affected the legality of a territorial situation was Southern Rhodesia.[17] A few days before the unilateral declaration of independence by the Smith racist regime was issued, the UN General Assembly adopted a resolution appealing to all States 'not to recognize any government in Southern Rhodesia which is not representative of the majority of the people'.[18] The day after the declaration of independence, the Security Council adopted a resolution calling upon all States 'not to recognize this illegal racist minority regime'.[19] In Resolution 277 (1970), the Security Council toughened its stance by calling upon all Member States to take all appropriate measures 'to ensure that any act performed by officials and institutions of the illegal regime of Southern Rhodesia shall not be accorded any recognition, official or otherwise, including judicial notice, by the competent organs of their State'.[20] In a similar fashion, the General Assembly urged all States 'to refrain from any action which might confer a semblance of legitimacy on the illegal regime'.[21] According to Milano, this practice shows that 'the right to self-determination impacts upon the legality of any claim and/or implementation of effective Statehood which does not take into account a genuine expression of popular will, but is openly discriminatory towards the majority of the population'.[22]

As expressly affirmed by the ICJ in its relevant Advisory Opinions, the right to self-determination applies both to the Palestinian people and to the Sahrawi people and, thus, these peoples are entitled to freely determine their own future political status.[23] According to the ICJ, the annexation of land severely impedes the exercise of the right to self-determination and constitutes, therefore, a breach of the obligation to respect that right.[24] Thus, as long as Israel and Morocco maintain their annexation of the territories in question (by means of settlements or otherwise),[25] that annexation amounts to a breach of their obligation to respect the right to self-determination.

The obligation of non-recognition spells out the consequences for third parties of this unlawful conduct on the part of Israel and Morocco. According to Article 42(2) of the Draft Articles on the Responsibility of International Organizations, in cases of a serious breach of a *jus cogens* norm, international organisations (such as the EU) have duties corresponding to those applying to States under Article 41(2) of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.[26] Thus, States and international organisations alike are under an obligation not to recognise as lawful a situation created by a serious breach of a peremptory norm of international law.

[15] *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 16, 29–32.

[16] Ibid, 45–50.

[17] See generally, V Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law* (Martinus Nijhoff 1990) 423–86.

[18] UNGA Res 2022 (XX) of 5 November 1965, UN Doc A/RES/2022 (XX).

[19] UNSC Res 216 of 12 November 1965, UN Doc S/RES/216.

[20] UNSC Res 277 of 18 March 1970, UN Doc S/RES/277.

[21] UNGA Res 2946 (XXVII) of 7 December 1972, UN Doc A/RES/2946 (XXVII).

[22] Milano (n 7) 123.

[23] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 155–6; *Western Sahara* (n 12) para 162.

[24] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 23) paras 115–22.

[25] For Israel, see UNCHR, 'Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967' (2014) UN Doc A/HRC/25/67, para 16. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 23) para 121. For Morocco, see M Dawidowicz, 'Trading Fish or Human Rights in Western Sahara? Self-Determination, Non-Recognition and the EC-Morocco Fisheries Agreement' in D French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (CUP 2013) 250, 260; UN Human Rights Committee, 'Consideration of Reports submitted by States Parties under Article 40 of the International Covenant on Civil and Political Rights, fifth periodic report submitted by Morocco' (UN Doc CCPR/C/MAR/2004/5 of 11 May 2004) para 39; OHCHR, 'Report of the OHCHR Mission to Western Sahara and the Refugee Camps in Tindauf 15/23 May 2006' (8 September 2006) para 26 <http://www.arso.org/OHCHRrep2006en.htm> accessed 24 January 2019.

[26] ILC, 'Commentary to Art. 42 of the Draft articles on the Responsibility of International Organizations, with commentaries' (adopted by the International Law Commission at its 63rd session) (2011) II Yrbk of the ILC 66, para 1.

The principle that legal rights cannot derive from an illegal act (*ex injuria jus non oritur*) provides the rationale underpinning the obligation of non-recognition.[27] In the literature, non-recognition is considered as a precondition for an international legal order to exist.[28] According to Lauterpacht: 'to admit that an unlawful act, or its consequences or immediate manifestations, can become a source of legal rights for the violator of the law is to introduce into the legal system a contradiction which can only be resolved by the negation of its legal character'.[29] The obligation serves as a mechanism to ensure that a fait accompli on the ground resulting from an illegal act does not 'crystallize over time into situations recognized by the international legal order'.[30] While it may be questioned whether customary international law knows of a general duty of non-recognition of *all* situations created by a serious breach of a peremptory norm,[31] there is settled practice with regard to the obligation of non-recognition of territorial situations created by a breach of the right to self-determination.[32] Articles 41 and 42 of the Draft Articles on the Responsibility of International Organizations, which mirror Articles 40 and 41 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, foresee an aggravated regime of responsibility, providing that the duty of non-recognition arises in cases of a *serious* breach of a peremptory norm of international law. A serious breach of a peremptory norm is defined in Article 41 of the Draft Articles on the Responsibility of International Organizations as a 'gross or systematic failure' to fulfil an obligation arising under a *jus cogens* norm. According to the International Law Commission (ILC) and to relevant practice, the denial of the right to self-determination qualifies as a serious breach of a peremptory norm giving rise to the duty of non-recognition.[33]

According to the ILC the obligation of non-recognition not only covers formal acts of recognition, but also 'prohibits acts which would imply such recognition'.[34] In the *Namibia* case,[35] the ICJ elaborated on the scope and content of the obligation of non-recognition. The duty of non-recognition entails, inter alia, that States are under an obligation to abstain: (a) from entering into treaty relations with the non-recognised regime in respect of the unlawfully acquired territory; and (b) from entering into economic and other forms of relationship concerning the unlawfully acquired territory which might entrench the non-recognised regime's authority over the territory.[36]

The ICJ reaffirmed the duty of non-recognition in its *Wall* Advisory Opinion.[37] In resolution ES-10/15 the UN General Assembly acknowledged the Opinion and called upon all Member States 'to comply with their *legal obligations* as mentioned in the advisory opinion'.[38] This formulation is important since it shows that States voting in favour of the resolution (including all EU Member States) have themselves characterised the obligations set out in the Opinion as 'legal obligations'. In the present context, it is also important to note that the EU has expressly acknowledged that it is bound by the

[27] J Crawford, 'Legal Opinion: Third Party Obligations with Respect to Israeli Settlements in the Occupied Palestinian Territories' (TUC, 24 January 2012) para 46 <https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf> accessed 24 January 2019.

[28] M Kohen, *Possession contestée et souveraineté territorial* (Presses Universitaires de France 1997) 157.

[29] H Lauterpacht, 'Régles générales du droit de la paix' (1937) 62 RdC 95, 291, as quoted in A Lagerwall, 'The Non-recognition of Jerusalem as Israel's Capital: A Condition for International Law to Remain Valid?' (2018) 50 QIL, Zoom-in 33, 34.

[30] 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) 677, 678.

[31] Separate Opinion of Judge Kooijmans in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 23) 219, paras 43–4.

[32] See the practice mentioned in S Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?' in C Tomuschat and J-M Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Erga Omnes Obligations* (Martinus Nijhoff 2005) 99, 103; Dawidowicz (n 30) 679–82.

[33] ILC, 'Commentary to Art. 41 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (adopted by the International Law Commission at its 53rd session) (2001) II Yrbk of the ILC 115, para 8.

[34] Ibid, 114, para 5.

[35] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (n 15) 16.

[36] Ibid, paras 122, 124.

[37] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 23) para 159.

[38] UNGA Res ES-10/15 of 2 August 2004, UN Doc A/RES/ES-10/15, para 3 (emphasis added).

international law duty of non-recognition in its 2013 Guidelines on the eligibility of Israeli entities working within Israeli settlements in Palestine for EU funding.[39]

Despite the fact that the duty of non-recognition is well entrenched both in theory and in practice, the exact contours of the duty's content remain unclear.[40] As seen above, the *Namibia* opinion made it clear that the ambit of the prohibition includes the conclusion of treaties extending to unlawfully acquired territories since this would imply recognition of sovereignty over that territory. In international law the capacity of States to enter into agreements that apply within their territory is 'an attribute of State sovereignty'.[41] Thus, any claim by a non-recognised regime to treaty-making capacity in relation to territory under its control needs to be construed as a legal claim to sovereignty – which third parties are under an obligation not to recognise according to international law.[42] In this sense, extending the territorial scope of an agreement to an unlawfully acquired territory would certainly amount to a breach of a third party's (*in casu* the EU's) obligation of non-recognition.

However, although this particular aspect of the duty of non-recognition is fairly uncontested, the same does not hold true for others. As Crawford observes: '[W]hile some elements of the obligation of non-recognition are clear, such as the prohibition on diplomatic relations and conclusion of treaties, or invocation of treaties which recognise the unlawful regime as sovereign, beyond this, it is difficult to delineate any operative content to the obligation.'[43] In particular, it is open to question whether other types of cooperation with an unlawful regime, including the importation of products from settlements, would imply recognition of the unlawful regime's authority over the territory – thereby amounting to a violation of the duty of non-recognition.[44] According to Moerenhout, the exportation of products from a settlement represents a claim of the non-recognised regime on the unlawfully acquired territory and, conversely, 'the act of importation remains a legal act, which requires the stamp of approval from the importing state, which holds a sovereign power over its trade policy'.[45] Thus, according to this line of argumentation, the importation of products into a third county's territory may be considered as implicit recognition of the unlawful regime's claim over the territory.[46] However, this view is far from uncontroversial. Some scholars consider the importation of products from settlements as falling outside the ambit of the duty of non-recognition altogether,[47] whereas others see importation as falling within the scope of the related but separate duty of not rendering aid or assistance in maintaining an illegal situation created by a serious breach of a *jus cogens* norm.[48]

Given the uncertainty surrounding the types of conduct to which the duty of non-recognition may attach, the article will focus exclusively on the question of the territorial scope of the agreements concluded between the EU on the one hand and Israel and Morocco on the other – since, as seen above, the prohibition of entering into an agreement with the occupant in respect of unlawfully acquired territory is generally accepted as falling within the ambit of the duty of non-recognition.

[39]Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards [2013] OJ C 205/05, para 1.

[40]Talmon (n 32) 104.

[41]*Case of the S.S. 'Wimbledon' (Britain et al. v Germany)* PCIJ Series A No 1, 14, 25.

[42]Dawidowicz (n 25) 218.

[43]Crawford (n 27) para 51. A number of judges disagreed with the majority opinion in *Namibia* exactly on the point of the precise content of the duty of non-recognition. For a detailed discussion see J Crawford, *The Creation of States in International Law* (2nd edn, Clarendon Press 2006) 165–7.

[44]C Ryngaert and R Fransen, 'EU Extraterritorial Obligations with Respect to Trade with Occupied Territories: Reflections After the Case of *Front Polisario* Before EU Courts' (2018) 2 EWLR 1, 16.

[45]T Moerenhout, 'The Consequence of the UN Resolution on Israeli Settlements for the EU: Stop Trade with Settlements' (*EJIL:Talk!*, 4 April 2017) <https://www.ejiltalk.org/author/tommoerenhout/> accessed 24 January 2019.

[46]Ibid.

[47]See generally E Kontorovich, 'Economic Dealings with Occupied Territories' (2015) 53 Colum J Transnat'l L 584.

[48]ILC (n 33) para 12. F Dubuisson, 'The International Obligations of the European Union and its Member States with Regard to Economic Relations with the Israeli Settlements' (*Made in Illegality*, February 2014) 41 <http://www.madeinillegality.org/IMG/pdf/etude_def_ang.pdf> accessed 24 January 2019. Crawford takes a middle position arguing that economic and commercial dealings between an unlawful regime and a third State 'may be considered as either a breach of the obligation of non-recognition ... or they might be considered to amount to aid or assistance in the commission of an internationally wrongful act, contrary to articles 16 and 41(2) of the ILC Draft articles' Crawford, *The Creation of States in International Law* (n 27) para 84.

For the sake of completeness, it is worth mentioning as a final note that the Court in the *Namibia* case introduced an element of flexibility in the doctrine of non-recognition, the so-called '*Namibia* exception'.[49] According to the Court, while acts that are undertaken in pursuance of the illegal administration are to be considered null and void since they purport to enhance unlawful territorial claims, minor administrative acts, such as 'the registration of births, deaths and marriages' and acts of benefit to the local population, are valid[50] as they are considered 'untainted by the illegality of the administration'.[51] Whether particular conduct is beneficial to the local population and as such falls outside the scope of application of the obligation of non-recognition is difficult to answer *in abstracto*; as Crawford notes: 'Ultimately, the question of whether a particular act falls within the *Namibia* exception . . . is highly fact-dependent.'[52]

3. The territorial scope of the EU-Israel Association Agreement and the EU's obligation of non-recognition

The EU-Israel Association Agreement constitutes the legal basis for EU trade relations with Israel. The core aim of the Agreement is to reinforce the free trade area between the EU and Israel.[53] Goods exported from Israel to the EU and *vice versa* benefit from preferential tariffs and customs duties.[54] However, according to Article 7 of the Agreement, this preferential treatment applies only to products 'originating in Israel'.

It is important to note that the territorial clause inserted in the Agreement fails to provide a definition of the Agreement's precise territorial scope; Article 83 of the EU-Israel Association Agreement merely refers to the 'territory of Israel'. Another relevant agreement is the EU-PLO Association Agreement, which aims to promote the economic and social development of the West Bank and the Gaza Strip and to encourage regional cooperation with a view to consolidating peaceful coexistence and economic and political stability.[55] Article 73 of the EU-PLO Association Agreement states that it applies to the 'territory of the West Bank and the Gaza Strip'. It is noteworthy that the EU-PLO Agreement applies to the whole of the West Bank and the Gaza Strip – although the PLO only has partial control of these territories.[56]

The ensuing lack of clarity has created serious problems in practice.[57] According to Israel, goods produced in the occupied Palestinian territory are produced in Israel's customs territory and, thus, they should be entitled to preferential treatment under the Association Agreement.[58] In light of the EU's duty of non-recognition, the territorial scope of the EU-Israel Association Agreement is of utmost importance.

The European Court of Justice (ECJ) was confronted with the question of the territorial scope of the EU-Israel Association Agreement in the context of the *Brita* case. The case concerned the import to Germany of goods from an Israeli company located in the West Bank.[59] The German authorities withdrew

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[49] E Milano, 'The Doctrine(s) of Non-Recognition: Theoretical Underpinnings and Policy Implications in Dealing with *De Facto* Regimes' (Paper presented at the ESIL Research Forum, Budapest, 28–30 September 2007) 2 < https://esil-sedi.eu/wp-content/uploads/2018/04/Agora-3-Milano.pdf> accessed 24 January 2019.

[50] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (n 15) para 125.

[51] Crawford (n 43) 167. The European Court of Human Rights has further delineated the scope of the 'Namibia exception' in its jurisprudence. See *Loizidou v Turkey* App No 15318/89 (ECtHR, 18 December 1996) para 45; *Cyprus v Turkey* App No 25781/94 (ECtHR, 10 May 2001) para 96; *Demopoulos v Turkey* App No 46113/99 (ECtHR, 1 March 2010) paras 93–129.

[52] Crawford (n 27) para 91.

[53] Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part [2000] OJ L 147/3 (EU-Israel Association Agreement), art 6.

[54] Ibid, arts 9–20.

[55] Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part [1997] OJ L 187/3, art 1(2).

[56] C Hauswald, 'Problems under the EC-Israel Association Agreement: The Export of Goods Produced in the West Bank and the Gaza Strip under the EC-Israel Association Agreement' (2003) 14 EJIL 591, 595.

[57] Opinion of Advocate General Bot in Case C-386/08 *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECR I-1289, para 26.

[58] Ibid, para 32. See also G Harpaz, 'The Dispute Over the Treatment of Products Exported to the European Union from the Golan Heights, East Jerusalem, the West Bank and the Gaza Strip – The Limits of Power and the Limits of the Law' (2004) 38 J World Trade L 1049, 1051.

[59] Case C-386/08 (n 57) para 30.

the benefit of preferential treatment on the ground that it could not be conclusively established that the imported goods fell within the scope of the EU-Israel Association Agreement.[60] Brita, the company that imports the products in question, brought the issue before the German courts, which then submitted a preliminary question to the ECJ.[61]

Despite an express invitation by the Advocate General to analyse the legal status of Israel's presence in the West Bank for the purpose of establishing the territorial scope of the Association Agreement,[62] the Court decided the matter solely with reference to the 'politically-detached' principle of *pacta tertiis*.[63] The ECJ argued that the EU-PLO Association Agreement implicitly restricted the territorial scope of the EU-Israel Association Agreement.[64] According to the Court, construing the territorial clause of the EU-Israel Agreement

> as meaning that Israeli customs authorities enjoy competence in respect of products originating from the West Bank would be tantamount to imposing on the Palestinian customs authorities an obligation to refrain from exercising the competence conferred upon them by virtue of the . . . provisions of the EC-PLO Protocol. Such an interpretation, the effect of which would be to create an obligation for a third party without its consent, would thus be contrary to the principle of general international law, '*pacta tertiis nec nocent nec prosunt*'.[65]

The judgment clarified that the scope of the EU-Israel Association Agreement does not extend to the occupied Palestinian territories, thereby making it abundantly clear that the EU has not implicitly recognised Israel's treaty-making capacity over these territories. At the same time, the Court's exclusive reliance on the *pacta tertiis* rule is formalistic and, more importantly, difficult to reconcile with the image of a court that shares an internationalist approach.[66] The failure to take into account the broader international legal framework of the dispute and, more importantly, the EU's duty of non-recognition, in interpreting the territorial scope of the EU-Israel Association Agreement leaves much to be desired.[67] In this light, it is difficult to escape the conclusion that, by focusing exclusively on the *pacta tertiis* rule, the Court sought to achieve conformity with EU law while avoiding being drawn into political storms.[68] However, this judicial strategy severely undermines the image of the EU as an internationally engaged polity.

4. EU–Morocco trade relations

4.1. The territorial scope of the trade agreements concluded between the EU and Morocco and the EU's obligation of non-recognition

The EU is Morocco's largest trading partner, accounting for 55.7 per cent of its trade in 2015, while 61 per cent of Morocco's annual exports go to the EU.[69] The EU-Morocco Association Agreement, which came into force in 2000, is the legal basis governing the relations between the two parties and its principal aim is to establish a free trade zone between the EU and Morocco.[70] In this light, the Agreement provides for reduced or no tariffs for certain products[71] and for the gradual implementation of measures for the

[60] Ibid, para 33.
[61] Ibid, paras 35–6.
[62] Opinion of Advocate General Bot (n 57) paras 109–12.
[63] G Harpaz and E Rubinson, 'The Interface between Trade, Law and Politics and the Erosion of Normative Power Europe: Comment on Brita' (2010) 35 E L Rev 551, 566.
[64] Case C-386/08 (n 57) paras 50–3.
[65] Ibid, para 52.
[66] Harpaz and Rubinson (n 63) 565–6.
[67] R Holdgaard and O Spiermann, 'Case C-386/08 *Brita GmbH v Hauptzollamt Hamburg-Hafen*, Judgment of the Court of Justice (Fourth Chamber) of 25 February 2010, nyr' (2011) 48 CML Rev 1667, 1680–2.
[68] Harpaz and Rubinson (n 63) 566.
[69] See European Commission, 'Countries and Regions: Morocco' <http://ec.europa.eu/trade/policy/countries-and-regions/countries/morocco/> accessed 24 January 2019.
[70] 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 [2000] OJ L 70/2 (EU-Morocco Association Agreement) art 6.
[71] Ibid, arts 7–30.

greater liberalisation of reciprocal trade in agricultural and fishery products.[72] In 2008 Morocco became the first country in the Southern Mediterranean region to be granted ‘advanced status’ – thereby marking a new phase of privileged relations.[73] Against this background, an Agreement concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products was concluded between the EU and Morocco in 2010 and came into force in 2012.[74]

Neither the Association Agreement, nor the Liberalisation Agreement clarify whether their territorial scope extends to Western Sahara. The Liberalisation Agreement does not include a territorial clause, while Article 94 of the Association Agreement merely refers to the ‘territory of the Kingdom of Morocco’. However, both Agreements have been interpreted in practice as including Western Sahara. There is much evidence to support this proposition. The Commission’s Food and Veterinary Office has paid visits to Moroccan exporters located in Western Sahara to check compliance with EU health standards under the Association Agreement.[75] Furthermore, the Commission has included 140 Moroccan exporters located in Western Sahara in the list of approved exporters under the Association Agreement.[76] The then High Representative of the Union for Foreign Affairs and Security Policy, Catherine Ashton, expressly confirmed that the Liberalisation Agreement allows Morocco to ‘register as geographical indications products originating in Western Sahara’.[77] Finally, in the context of the *Front Polisario* case, both the Council and the Commission expressly acknowledged that the Liberalisation Agreement has been de facto applied to the territory of Western Sahara.[78] Thus, it is safe to assume that, under these Agreements, ‘Saharan territory was included *sub silentio*’.[79]

The question of Western Sahara gained considerable attention in the negotiations over the 2006 EU-Morocco Fisheries Partnership Agreement (FPA)[80] and the 2013 EU-Morocco Fisheries Protocol.[81] In 2006 the EU and Morocco concluded an FPA allowing access for EU vessels to Morocco’s fisheries for an initial period of four years.[82] In exchange, the EU paid Morocco a financial contribution of 144.4 million euros for the relevant period.[83] The FPA’s reference to ‘waters falling within the sovereignty or *jurisdiction* of Morocco’[84] has been widely interpreted as including the waters off the coast of Western Sahara.[85] This interpretation is reinforced by the fact that the 2006 FPA replaced earlier fisheries agreements which

[72] Ibid, art 16.

[73] Council of the EU, *Joint Statement: European Union-Morocco Summit* (Press Release, 7 March 2010) 7220/10 (Presse 54) 6.

[74] Agreement in the form of an Exchange of Letters between the European Community and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 of and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2012] OJ L 241/4 (Liberalisation Agreement).

[75] Case T-512/12 *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v Council of the European Union* [2015] ECLI:EU:T:2015:953, paras 79, 99, 103.

[76] Ibid, paras 80, 99, 103. See also European Commission, ‘Morocco: Live bivalve molluscs’ (13 February 2017) <https://webgate.ec.europa.eu/sanco/traces/output/MA/LBM_MA_en.pdf> accessed 24 January 2019; European Commission, ‘Morocco: Fishery products’ (19 December 2017) <https://webgate.ec.europa.eu/sanco/traces/output/MA/FFP_MA_en.pdf> accessed 31 January 2018; European Commission, ‘Morocco: Processing plants’ (3 August 2017) <https://webgate.ec.europa.eu/sanco/traces/output/MA/ABP-FSB_MA_en.pdf> accessed 24 January 2019.

[77] Joint Answer given by High Representative/Vice-President Ashton on behalf of the Commission, Written Questions E-0001004/11, P-001023/11, E-002315/11 (14 June 2011) <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2011-001023&language=DE> accessed 24 January 2019.

[78] Case T-512/12 (n 75) para 99.

[79] Kontorovich (n 47) 604.

[80] Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco [2006] OJ L 141/4.

[81] Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and the financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco [2013] OJ L 328/2 (2013 Fisheries Protocol).

[82] Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco [2006] OJ L 141 (FPA) arts 1, 12.

[83] Protocol setting out the fishing opportunities and financial contribution provided for in the Fisheries partnership Agreement between the European Community and the Kingdom of Morocco [2006] OJ L 141/9, art 2.

[84] FPA, art 2(a) (emphasis added).

[85] V Chapaux, ‘The Question of the European Community-Morocco Fisheries Agreement’ in K Arts and PP Leite (eds), *International Law and the Question of Western Sahara* (International Platform of Jurists for East Timor 2009) 217, 218; E

were similar in geographical scope and under which EU vessels were authorised by Morocco to operate in Western Sahara waters.[86] Furthermore, while the southernmost geographical limit of the FPA is not clearly defined, thereby creating doubt as to whether it extends beyond the internationally recognised maritime boundaries of Morocco,[87] the practice of the parties has settled the matter and the Commission itself has acknowledged that fishing by EU vessels has taken place in the waters off Western Sahara.[88] Upon its expiry, the FPA was not automatically renewed – partly because of doubts regarding its compatibility with international law.[89]

Against this background a new Fisheries Protocol was negotiated and signed in 2013. The 2013 Protocol was modelled after its predecessor; it applies to 'waters falling within the sovereignty or *jurisdiction* of Morocco'[90] and, according to its provisions, the EU, again, pays a financial contribution to Morocco for access to its waters[91] – including the waters off the coast of Western Sahara. The Commission has clarified that 'the Western Sahara waters are included in the new Protocol'.[92] It is noteworthy that several Member States raised serious concerns over the inclusion of Western Sahara in the new Protocol. Denmark and Sweden voted against the adoption of the Protocol, raising doubt as to whether any economic gains resulting from its implementation would actually benefit the people of Western Sahara.[93] Finland, the Netherlands and the UK abstained from voting, citing similar concerns.[94]

Despite some initial hesitation, the Parliament approved the new Protocol in 2013, acting on the advice of its legal service.[95] According to the Opinion rendered by the Parliament's legal service, Morocco, as a 'de facto administering power', is responsible for the economic development of Western Sahara.[96] The legal service claimed that, under international law, de facto administering powers are not prohibited from undertaking economic activities pertaining to natural resources in non-self-governing territories.[97] The Opinion rendered by the Parliament's legal service was largely based on a 2002 Opinion issued by the

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Cannizzaro, 'A Higher Law for Treaties?' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 425, 430.

[86]Chapaux (n 85) 218; Dawidowicz (n 25) 268.

[87]Legal Service of the European Parliament, 'Legal Opinion: Proposal for a Council Regulation on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco – Compatibility with the principles of international law' (20 February 2006) SJ-0085/06, D(2006)7352, paras 31–5.

[88]Reply from European Commissioner Ferrero-Waldner to Written Question E-4425/08 (12 September 2008) <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2008-4425&language=PL> accessed 24 January 2019. Reply from the European Commission to Oral Question H-0079/09 (12 March 2009) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20090312+ANN-01+DOC+XML+V0//EN#top> accessed 24 January 2019. See also Legal Service of the European Parliament, 'Legal Opinion: Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the fisheries Partnership Agreement in force between the two parties' (04 November 2013) SJ-0665/13, D(2013)50041, para 29 (2013 Legal Opinion).

[89]European Parliament Resolution of 14 December 2011 on the future Protocol setting out the fishing opportunities and financial compensation provided for in the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, 2011/2949 (RSP) para 9.

[90]Council Decision of 15 November 2013 on the signing, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution paid for in the Partnership Agreement between the European Union and the Kingdom of Morocco [2013] OJ L 328/1, point (2).

[91]2013 Fisheries Protocol (n 81) art 3.

[92]Answer given by Ms Damanaki on behalf of the Commission to Written Question E-007185/2013 (17 September 2013) <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-007185&language=EN> accessed 24 January 2019.

[93]Statements by Denmark, Sweden, Proposal for a Council Decision, on the signing on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership agreement in force between the two parties (14 November 2013) 15723/13, ADD 1, 2, 7 <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015723%202013%20ADD%201> accessed 24 January 2019.

[94]Statements by Finland, the Netherlands and the UK, Proposal for a Council Decision, on the signing on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership agreement in force between the two parties (14 November 2013) 15723/13, ADD 1, 5, 7, 8 <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015723%202013%20ADD%201> accessed 24 January 2019.

[95]Kontorovich (n 47) 606.

[96]2013 Legal Opinion (n 88) para 17.

[97]Ibid, para 18.

UN Under-Secretary General for Legal Affairs and Legal Counsel,[98] Hans Corell ('Corell Opinion').[99] The UN Security Council requested Corell to issue an Opinion on the legality, under international law, of certain contracts concluded between Morocco and foreign companies regarding the exploration of mineral resources in Western Sahara.[100] Corell analysed the question from the point of view of the status of Western Sahara as a non-self-governing territory and did not touch upon the status of Morocco as an occupying power. Having analysed the relevant State and judicial practice, he concluded that mineral resources activities in a non-self-governing territory are illegal if conducted in disregard of the needs and interests of the people of that territory.[101] On this basis, the Parliament's legal service concluded that the Protocol between the EU and Morocco is compatible with international law as long as 'a certain amount of the financial contribution [granted by the EU] is allocated by Morocco to the benefit of Western Sahara population'.[102] The conclusion of the 2013 Fisheries Protocol was vociferously denounced by Front Polisario since it would 'give a sign of legitimisation to the Moroccan occupation of the Territory, thus contributing to the prolonging of the suffering of the Sahrawi people'.[103]

The qualification of the legal status of Western Sahara as a territory 'de facto administered' by Morocco is questionable on a number of grounds. First, the concept of 'de facto administrative power' does not correspond to any legal category under international law. In other words, the concept simply does not exist as a matter of positive law.[104] The status of 'administering power' is a legal status granted by the UN and in the absence of such recognition a State cannot proclaim itself to be one.[105] The UN still recognises Spain as the *de jure* administering power of Western Sahara and Spain has relied on this status to extend its international jurisdiction in criminal matters to crimes committed in Western Sahara.[106] Furthermore, the legal service's reliance on the Corell Opinion for the purpose of substantiating the claim that Morocco is the de facto administering power of Western Sahara is not without problems. The Opinion in question made it abundantly clear that Morocco is *not* the administering power of Western Sahara and that this designation was only used *by analogy* in order to answer the more general question of whether mineral resource activities in non-self-governing territories by an administering power are illegal.[107] In this context, it bears noting that Corell has expressly distanced himself from any attempts to construe his 2002 Opinion as lending support to the view that, under international law, Morocco is the 'de facto administrative power' of Western Sahara.[108]

In this light, it is difficult to escape the conclusion that by entering into a number of agreements with Morocco that have been de facto applied to the territory of Western Sahara, the EU has acted in breach of its obligation of non-recognition to the extent that it has recognised Morocco's treaty-making capacity with respect to Western Sahara and thus, implicitly, the Moroccan claim to sovereignty over the

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[98] Ibid.

[99] UNSC, 'Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, Hans Corell, addressed to the President of the Security Council' (12 February 2002) UN Doc S/2002/161 (Corell Opinion).

[100] Ibid, para 1.

[101] Ibid, paras 21, 24.

[102] 2013 Legal Opinion (n 88) para 31. It bears noting that this was not the first time that the Corell Opinion was cited as evidence that, under international law, Morocco is allowed to conclude agreements regarding the exploitation of Western Saharan natural resources. In 2006 Commissioner Borg stated: 'Regarding the question whether Morocco can conclude agreements concerning the exploitation of natural resources of the western Sahara, the opinion of the UN legal adviser gives a clear answer . . . [T]he interpretation given by the UN legal adviser implies that Morocco is a "de facto" administrative power of the territory of Western Sahara and consequently has the competence to conclude such a type of agreement'; Answer given by Mr Borg on behalf of the Commission to Written Question E-0560/2006 (15 March 2006) <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2006-0560&language=EN> accessed 24 January 2019.

[103] M Sidati, 'Polisario Front: EU-Morocco Fisheries Agreement Undermines UN Efforts to Find Solution to Western Sahara Conflict (statement)' (*Statement to Europe*, 10 December 2013) <http://www.sadr-emb-au.net/polisario-front-eu-morocco-fisheries-agreement-undermines-un-efforts-to-find-solution-to-western-sahara-conflict-statement/> accessed 24 January 2019.

[104] Chapaux (n 85) 223.

[105] Arts 73 and 74 of the UN Charter. Chapaux (n 85) 222.

[106] See the decision by the Spanish Audiencia Nacional (National High Court): Summario1/2015, 9 April 2015 <http://www.rightsinternationalspain.org/uploads/noticia/37c008565d943d77468c0f275052d37b25ca7bcb.pdf> accessed 24 January 2019.

[107] Corell Opinion (n 99) paras 7–8.

[108] H Corell, 'The Principle of Sovereignty of Natural Resources and Its Consequences' in M Balboni and G Laschi (eds), *The European Union's Approach to Western Sahara* (PIE Peter Lang 2017) 129, 131.

territory.[109] It is instructive that a number of other third-party States have publicly declared that their free trade agreements with Morocco do not extend to Western Sahara *exactly because* Morocco does not exercise internationally recognised sovereignty over the territory. The Norwegian Minister for Foreign Affairs has stated that the free trade agreement between the European Free Trade Association (EFTA) States and Morocco is not applicable to Western Sahara since Western Sahara is not part of Morocco's territory.[110] In a similar vein, the US has interpreted its free trade agreement with Morocco as not covering Western Sahara since 'the United States and many other countries do not recognize Moroccan sovereignty over Western Sahara'.[111] Furthermore, the fact that Morocco is not the administering power of Western Sahara and thus cannot conclude agreements extending to the territory in that capacity, raises questions regarding the legal basis that would justify Morocco's treaty-making capacity over Western Sahara.

Against this background, the next section endeavours to explore how the ECJ treated the question of the territorial scope of the Association and Liberalisation Agreements in the context of the *Front Polisario* case.

4.2. The ECJ and the territorial scope of the EU-Morocco Association and Liberalisation Agreements: the Front Polisario judgment

On 21 December 2016 the ECJ delivered its appeal judgment in the *Front Polisario* case.[112] The Grand Chamber overturned the General Court's judgment and decided that Front Polisario did not have legal standing to bring an action for annulment against the Council Decision adopting the Liberalisation Agreement since, in its view, neither the Liberalisation Agreement nor the EU-Morocco Association Agreement legally extended to the territory of Western Sahara.[113] The ECJ ruled that the General Court erred in interpreting the territorial scope of the Liberalisation Agreement as extending to Western Sahara to the extent that it failed to take into account Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT),[114] pursuant to which the interpretation of a treaty must be carried out in the light of 'any relevant rules of international law applicable in the relations between the parties'.[115] The Court pointed out three relevant rules of applicable international law that the General Court failed to take into account: the right to self-determination; Article 29 VCLT relating to the territorial scope of international agreements; and the principle of the relative effect of treaties (the principle of *pacta tertiis*).[116] By having recourse to the legal context of the dispute, the Court concluded that the territorial scope of the EU-Morocco Agreements did not include Western Sahara.

The ECJ's approach to treaty interpretation in *Front Polisario* has been criticised in the literature mainly because of the ECJ's artificial and selective reliance on international law.[117] According to Odermatt, the judgment is an example of the Court 'instrumentalizing' international law.[118] First, the

[109] Dawidowicz (n 25) 274. S Koury, 'The European Community and Member States' Duty of Non-Recognition under the EC-Morocco Association Agreement: State Responsibility and Customary International Law' in Arts and Leite (n 85) 165, 187–90; Chapaux (n 85) 233–4; Cannizzaro (n 85) 430.

[110] See the reply given by the Norwegian Minister for Foreign Affairs, Mr Jonas Gahr Store, to a parliamentary question: 'Norway: No way for Western Sahara free trade' (*WSRW*, 12 May 2010) <http://www.wsrw.org/a105x1411> accessed 24 January 2019; for the position of Switzerland in relation to the EFTA-Morocco Free Trade Agreement, see the opinion of the Swiss Federal Council: 'Obligation de déclarer les marchandises provenant des territoires du Sahara occidental occupés par le Maroc' (*The Federal Assembly – The Swiss Parliament*, 15 May 2013) <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20133178> accessed 24 January 2019.

[111] See R Zoellick, 'Letter from the U.S. Trade Representative R. Zoellick to Rep. J. Pitts' (22 July 2004) 150 *Cong. Rec.* H667.

[112] Case C-104/16 P *Council of the European Union v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)* ECLI:EU:C:2016:973.

[113] Ibid, paras 92, 123, 132, 133.

[114] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) (VCLT) 1155 UNTS 331.

[115] Case C-104/16 P (n 112) para 86.

[116] Ibid, para 87.

[117] See generally E Kassoti, 'The *Council v. Front Polisario* Case: The Court of Justice's Selective Reliance on Treaty Interpretation' (2017) 2 European Papers 23; J Odermatt, '*Council of the European Union v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro* (Front Polisario). Case C-104/16P' (2017) 111 AJIL 731; P Hilpold, 'Self-determination at the European Courts: The *Front Polisario* Case or the Unintended Awakening of a Giant' (2017) 2 European Papers 907.

[118] Odermatt (n 117) 737.

ECJ approached the question of interpretation of the territorial scope of the Association Agreement and, by extension, that of the Liberalisation Agreement, largely through the lens of Article 31(3)(c) VCLT. However, The Court's excessive reliance on Article 31(3)(c) VCLT and the fact that it paid little to no attention to other elements contained therein go against the interpretative process envisaged thereunder; a process that is predicated on the combined application of *all* means of interpretation set out in Article 31.[119] This not only shows the Court's unfamiliarity with the operation of Article 31 VCLT,[120] but it is also hardly reconcilable with the aim of treaty interpretation in general.[121] Thus, the excessive focus placed on Article 31(3)(c) VCLT transformed the interpretive process from a quest to establish objectively the intention of the parties to a quest for the 'relevant rules of international law applicable in the relations between the parties'. More importantly, the Court's approach calls into question the very outcome of this process.

Secondly, the Court's findings are premised on the assumption that the legal status of non-self-governing territories (as entities separate and distinct from the States administering them) also implies that these entities enjoy some form of territorial sovereignty or title over territory; any other inference would run counter to the overall conclusion of legal inapplicability of the Association Agreement to the territory of Western Sahara. However, the Friendly Relations Declaration's[122] reference to the 'distinct and separate status' of non-self-governing territories is generally understood to mean that these territories enjoy a separate *legal* status, that is, a measure of international legal personality, and not necessarily some form of territorial sovereignty.[123] Overall, neither Chapter XI of the UN Charter (dealing with non-self-governing territories) nor the Friendly Relations Declaration address matters of territorial title as such, as their focus lies with the development of these territories and the people concerned.[124] The question of territorial sovereignty over non-self-governing territories remains a controversial one and there is evidence to suggest that sovereignty remains with the administering State.[125] The ICJ dealt with the question of sovereignty over non-self-governing territories in the *Right of Passage* case and it clearly accepted that the administering power retained sovereignty over the territory in question.[126] Furthermore, in its Advisory Opinion on *Western Sahara*, the Court clarified that the request, pertaining to the future status of the non-self-governing territory in question, did not relate to 'existing territorial rights or sovereignty over the territory'.[127] In the light of the indeterminacy surrounding questions of territorial sovereignty over non-self-governing territories, it is submitted that more by way of evidence should have been furnished by the Court in order to support the proposition that these entities enjoy a separate *territorial* status.

Furthermore, the Court's finding to the effect that Article 29 VCLT creates a presumption against extraterritoriality is questionable and it does not comport with the drafting history of the Article. The ILC, in its commentary on the relevant Article, made it abundantly clear that the matter of extraterritorial application of treaties was too complicated and it decided to leave it aside.[128] Accordingly, it is widely acknowledged that Article 29 VCLT does not create a presumption either in favour of or against the extraterritorial application of a treaty as the matter simply does not fall under the scope of the Article.[129]

[119] ILC, 'Draft Articles on the Law of Treaties with commentaries' (adopted by the ILC at its 18th session' (1966) II Yrbk of the ILC 219, para 8. See also R Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 31–2.

[120] According to Gardiner, in its interpretive practice pertaining to international agreements concluded with non-Member States, the ECJ 'has not overtly progressed beyond the first paragraph of article 31 of the Vienna Convention' Gardiner (n 119) 138.

[121] *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213, para 48.

[122] *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 25/2625 (XXV) of 24 October 1970.

[123] Crawford (n 43) 618–19.

[124] Ibid, 613.

[125] Ibid. See also A Schwed, 'Territorial Claims as a Limitation to the Right of Self-determination in the Context of the Falkland Islands Dispute' (1982) 6 Fordham Int'l LJ 443. Cf I Lukashuk, 'Parties to Treaties – The Right to Participation' (1972) 135 RdC 231, 254–5.

[126] *Case concerning Right of Passage over Indian Territory (Portugal v India)* [1960] ICJ Rep 6, 39.

[127] *Western Sahara* (n 12) para 43.

[128] Draft Articles on the Law of Treaties with commentaries (n 119) 213–14, para 5.

[129] S Karagiannis, 'The Territorial Application of Treaties' in D Hollis (ed), *The Oxford Guide to the Law of Treaties* (OUP 2012) 305, 318; K Odendahl, 'Article 29' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A*

In this light, the Court's conclusion that Article 29 VCLT 'precluded Western Sahara from being regarded as coming within the territorial scope of the Association Agreement'[130] seems unsubstantiated.

The Court's interpretation and application of the *pacta tertiis* principle is also noteworthy. Here, the Court considered the peoples of Western Sahara as a 'third party',[131] thereby extending the *pacta tertiis* rule to non-State actors, as it had done before in *Brita*.[132] However, there are grounds to question the applicability of the principle to non-self-governing territories. The *pacta tertiis* rule expresses 'the fundamental principle that a treaty applies only between the parties to it';[133] and thus, treaties to which a State is not a party are generally considered as *res inter alios acta* – a matter between others. The *raison d'être* of the principle is to ensure that States should not be bound against their will,[134] something that would run counter to two core tenets of international law, namely sovereignty and sovereign equality.[135] Thus, in international law, the principle is viewed as 'a corollary of the principles of sovereignty, equality and independence of States'.[136] Relevant legal literature suggests that the rule's conceptual roots in the notions of State sovereignty and sovereign equality preclude its application to State–non-State actor relationships.[137] State practice also supports the proposition that there are exceptions to the *pacta tertiis* rule vis-à-vis non-State actors. States may create entities with legal personality by means of a treaty and subject them to international obligations. International organisations are a case in point. These actors, while possessing legal personality, are third parties in relation to their constitutive treaties and they may incur obligations (among other things by means of their constitutive treaties) even absent their consent.[138] In this light, the Court's unqualified assertion that the *pacta tertiis* rule applies *in casu* seems to rest on thin evidentiary grounds.[139]

Finally, the overwhelming majority of commentators have found problematic the Court's reluctance to engage extensively with the parties' 'subsequent practice in the application of the treaty' under Article 31(3)(b) VCLT for the purpose of interpreting the territorial scope of the Association and Liberalisation Agreements.[140] The importance attached to the subsequent practice of the parties to a treaty in its interpretation constitutes one of the most distinctive features of the Vienna rules.[141] According to the ILC, 'the importance of such subsequent practice in the application of a treaty, as an element of interpretation, is obvious; for it constitutes *objective evidence* of the understanding of the parties as to the meaning of the treaty'.[142] Treaty terms are given meaning by action and thus, the subsequent practice of the parties is the best evidence of their intention.[143] International adjudicatory bodies routinely have recourse to the subsequent practice of the parties in interpreting treaty terms.[144]

The Court's approach to the element of 'subsequent practice' of the parties in the *Front Polisario* judgment does not reflect the importance attached thereto in international jurisprudence. Here, the Court did not take into account this element in establishing the ordinary meaning of the term 'territory of the

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Commentary (Springer 2012) 489, 502; M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (OUP 2011) 11.

[130] Case C-104/16 P (n 112) para 97.

[131] Ibid, para 106.

[132] Case C-386/08 (n 67) para 52.

[133] J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 384.

[134] *The Case of the SS Lotus (France v Turkey)*, PCIJ Rep Series A No 10, para 44.

[135] A MacNair, *The Law of Treaties* (2nd edn, Clarendon Press 1961) 35.

[136] M Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 467.

[137] D Murray, *Human Rights Obligations of Non-State Actors* (Hart Publishing 2016) 94–105; S Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 ICLQ 319, 377–8.

[138] D Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2014) 20 JCSL 101, 118; C Chinkin, *Third Parties in International Law* (Clarendon Press 1993) 12.

[139] Odermatt (n 117) 736.

[140] E Cannizzaro, 'In Defence of *Front Polisario*: The ECJ as a Global *Jus Cogens* Maker' (2018) 55 CML Rev 569, 578; Kassoti (n 117) 37–40; Odermatt (n 117) 737; Hilpold (n 117) 917.

[141] Gardiner (n 119) 253.

[142] Draft Articles on the Law of Treaties with commentaries (n 119) 221, para 15 (emphasis added).

[143] Gardiner (n 119) 253.

[144] See e.g. *Case concerning Kasikili/Seduku Island (Botswana v Namibia)* [1999] ICJ Rep 1045, para 50; WTO, *Japan: Taxes on Alcoholic Beverages II* (4 October 1996) WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, 12–13.

Kingdom of Morocco', nor did it test the result of its initial textual interpretation against the background of this element in order to confirm its veracity. In a similar vein, the Court's dismissal of subsequent conduct by the EU and Morocco as mere de facto instances of application of the Agreements at hand to the territory of Western Sahara[145] is less than convincing since the Court failed to explain why these instances do not constitute subsequent practice within the meaning of Article 31(3)(b) VCLT.

Overall, the Court's reliance on international law in the context of the *Front Polisario* judgment seems artificial and selective. In an obvious attempt to evade a politically sensitive issue,[146] the Court used selectively international rules on treaty interpretation to limit the legal applicability of the EU-Morocco Agreements to the latter's territory, while stopping short of addressing the de facto application of the Agreements to Western Sahara.[147] The fact that the Court reaffirmed the right of the Sahrawi people to self-determination does not diminish the essentially political nature of the judgment. By circumventing the thorny question of the factual application of the Agreements to Western Sahara, the Court effectively turned a blind eye to the EU's actual practice on the ground. It is quite telling that although the Court mentioned the right of the Sahrawi people to self-determination, it failed to make any reference to the concomitant obligation of non-recognition incumbent upon the EU by virtue of international law. Thus, ultimately, the *Front Polisario* judgment lends evidentiary force to critical voices in the literature that have cast doubt on the image of the EU, as evidenced by the jurisprudence of its principal judicial organ, as an actor maintaining a distinctive commitment to international law.[148]

The Court's line of reasoning in *Front Polisario* is not merely of academic interest but has important practical ramifications for the EU's approach to the territory – especially in the light of the newly adopted Council Decision amending Protocols 1 and 4 to the EU-Morocco Association Agreement.[149] The Decision in question purports to *expressly extend* the territorial scope of the EU-Morocco Association Agreement to Western Sahara.[150] The Court's failure to address the broader international legal framework of the dispute, and more fundamentally, the EU's duty of non-recognition, has (at least to a large degree) allowed the Council and the Commission to claim that the express extension of the Agreement to Western Sahara does not imply recognition of Moroccan 'sovereignty over Western Sahara'.[151] However, as shown above, the duty of non-recognition expressly requires third parties to abstain from entering into treaty relations with the non-recognised regime in respect of the unlawfully acquired territory. Thus, it is difficult to escape the conclusion that by extending the territorial scope of the EU-Morocco Association Agreement

[145] Case C-104/16 P (n 112) para 121.

[146] The political overtones of the judgment were highlighted by the Council and the Commission, which argued that 'the political nature of the questions raised by the present case would lead the Court to make political rather than legal assessments'. Opinion of Advocate General Wathelet in Case C-104/16 P *Council of the European Union v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)* ECLI:EU:C:2016:677, para 141. According to Odermatt: 'the [Western Sahara] cases clearly have political consequences for EU-Morocco relations, as evidenced by the strong response by Morocco to the judgments'; J Odermatt, 'Patterns of Avoidance: Political Questions Before International Courts' (2018) 14 Int JLC 221, 230.

[147] The same argument is made by S Hummelbrunner and A-C Prickarz, 'EU-Morocco Trade Relations Do Not Legally Affect Western Sahara – Case C-104/16 P Council v Front Polisario' (*European Law Blog*, 5 January 2017) <http://europeanlawblog.eu/2017/01/05/eu-morocco-trade-relations-do-not-legally-affect-western-sahara-case-c-10416-p-council-v-front-polisario/> accessed 24 January 2019.

[148] J Klabbers, *The European Union in International Law* (A Pedone 2012) 77. See also generally G de Búrca, 'The European Court of Justice and the International Legal Order After Kadi' (2010) 51 Harvard ILJ 1, 5.

[149] Council Decision regarding the signature, on behalf of the European Union, 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, Council Doc 10591/18, 10 July 2018.

[150] Ibid, 2. See also Annex to the Proposal for a Council Decision regarding the signature, on behalf of the European Union, 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, 11 June 2018, SWD(2018) 346 final, point 1.

[151] Council Decision (n 149) 5, point 10. See also Proposal for a Council Decision regarding the signature, on behalf of the European Union, 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, 11 June 2018, COM/2018/481 final – 2018/0256 (NLE) 5.

to expressly include Western Sahara, the EU falls foul of its international law duty of non-recognition – despite the claim that such extension does not imply the recognition of Moroccan sovereignty over the territory. This illustrates the practical importance of the Court's line of argumentation in *Front Polisario*. Had the Court expressly pronounced on the incompatibility of the application of the Agreement to Western Sahara with the EU's duty of non-recognition, little room would have been left to the political institutions to pursue the express extension of the Agreement to Western Sahara.

4.3. The ECJ and the territorial scope of the EU-Morocco Fisheries Partnership Agreement and the 2013 Fisheries Protocol: the Western Sahara Campaign UK *judgment*

In *Western Sahara Campaign UK*, the Court was faced with the question of the territorial scope of the FPA and the 2013 Fisheries Protocol.[152] The EU's duty of non-recognition featured prominently both in the applicant's submissions and in the Opinion delivered by Advocate General Wathelet. According to the applicant, the inclusion of that territory and of the waters off the coast of Western Sahara within the territorial scope of the relevant EU-Morocco Agreements violates Article 3(5) TEU to the extent that such inclusion is incompatible with a number of international law duties incumbent upon the EU, including the duty of non-recognition.[153] For his part, the Advocate General, having ascertained that the agreements at bar cover Western Sahara,[154] opined that the inclusion of Western Sahara in the territorial scope of the EU-Morocco fisheries agreements constitutes a breach of the EU's duty of non-recognition to the extent that this inclusion constitutes recognition of Morocco's treaty-making capacity – and thus, implicitly, Moroccan sovereignty – over the territory.[155]

However, the Court disagreed with this view and concluded that, as a matter of law, the agreements in question do not apply to the territory of Western Sahara and the waters adjacent thereto.[156] In doing so, the Court closely followed the reasoning applied in *Front Polisario* and relied heavily on the normative context of the dispute (Article 31(3)(c) VCLT) in order to buttress its finding of inapplicability of the agreements to Western Sahara.[157] In a similar vein to *Front Polisario*, the Court's approach to treaty interpretation in this case is open to criticism.[158] In both cases the Court relied selectively on international law rules, thereby managing to seemingly achieve conformity with international law without having to pronounce on the legal repercussions of the EU's policy and practice towards Western Sahara.[159]

One aspect of the judgment which is strongly reminiscent of the approach to treaty interpretation espoused in *Front Polisario* is the Court's exclusive reliance on Article 31(3)(c) VCLT for the purpose of interpreting the term 'waters falling within the jurisdiction' of Morocco.[160] Here, the Court relied exclusively on Articles 55 and 56 UNCLOS[161] in order to interpret the territorial clause of the FPA and did not engage at all with the other means of interpretation listed in Article 31 VCLT. The Court's excessive reliance on Article 31(3)(c) VCLT and the fact that it did not take into account the other means of interpretation contained in the Article significantly depart from the letter and spirit of the Vienna rules, which – as seen above – envisage interpretation as a holistic process.

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[152] Case C-266/16 *The Queen on the application of Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Food and Rural Affairs* EU:C:2018:18.

[153] Ibid, para 32. Opinion of Advocate General Wathelet in Case C-266/16 *The Queen on the application of Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Food and Rural Affairs* EU:C:2018:1, para 26.

[154] Opinion of Advocate General Wathelet (n 153) paras 60–75.

[155] Ibid, paras 187–213.

[156] Case C-266/16 (n 152) para 85.

[157] Ibid, paras 57–85.

[158] For a detailed discussion, see E Kassoti, 'The ECJ and the Art of Treaty Interpretation: Western Sahara Campaign UK' (2019) 56 CML Rev 209; J Odermatt, 'Fishing in Troubled Waters: ECJ 27 February 2018, Case C-266/16 *R (on the application of Western Sahara Campaign UK)* v *Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*' (2018) 14 EuConst 751.

[159] Odermatt (n 117) 737–8.

[160] Case C-266/16 (n 152) paras 65–73.

[161] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) (UNCLOS) 1833 UNTS 397.

Furthermore, as shown above, the majority of commentators have found the Court's reluctance to engage extensively with the parties' subsequent practice according to Article 31(3)(b) VCLT particularly problematic in the context of the *Front Polisario* case. The same reluctance to engage with the parties' subsequent practice for the purpose of interpreting the territorial scope of the FPA and the 2013 Protocol permeates the Court's judgment in *Western Sahara Campaign UK*. More particularly, the Court's failure to address the element of the subsequent practice of the parties – even though both the Council and the Commission expressly acknowledged that the agreements in question are applicable to Western Sahara[162] – severely undermines the outcome of its interpretative process.[163]

Furthermore, as with *Front Polisario*, the judgment has significant practical consequences for the EU's future approach towards the territory – especially in the light of the ongoing negotiations for a new fisheries agreement with Morocco. In particular, the Commission is currently negotiating a Sustainable Fisheries Partnership Agreement with Morocco *which is expressly intended to cover the waters off the coast of Western Sahara*.[164] According to the relevant Commission proposal issued in October 2018, although the Court in the *Western Sahara Campaign UK* case concluded that the current Agreement does not extend to Western Sahara 'in view of the considerations set out in the Court's judgment . . . it was nonetheless possible to include that territory and the waters adjacent thereto in the [Sustainable] Fisheries Partnership [Agreement] . . . '.[165]

The Commission's invocation of the Court's argumentation in *Western Sahara Campaign UK* in order to justify the express inclusion of the territory in the new fisheries agreement with Morocco illustrates the practical importance thereof. Had the Court applied the rules of treaty interpretation as these are understood and applied in international judicial practice, it would have reached the same conclusion as Advocate General Wathelet, namely that the application of the fisheries agreements to Western Sahara violates a number of duties incumbent upon the EU on the basis of international law, including the duty of non-recognition. Thus, the Court's 'instrumentalization' of international law in *Western Sahara Campaign UK* has allowed the institutions to continue their 'realpolitik' approach[166] towards Western Sahara as evidenced by the aforementioned Commission proposal.

5. Conclusion

The article has shown that the EU's trade practice in relation to unlawfully acquired territories does not comport with the image of the EU as an internationally engaged polity committed to the strict observance and development of international law. The case-studies of the occupied Palestinian territories and Western Sahara illustrate that the EU and its courts have systematically ignored the international law duty of non-recognition in carving out the legal relationship between the EU and these territories. The failure to take into account the international legal status of the territories vindicates the view that 'the story of the EU and international law as a happy family, is a seductive story, but it does have a few holes in its plot . . . [C]loser scrutiny reveals that the openness narrative is not supported by practice, in particular the practice of the courts.'[167]

In this respect, the CJEU's selective reliance on international law in the Western Sahara cases is particularly disappointing. In both judgments the Court's unilateral re-interpretation of international law was clearly geared towards shielding the EU from the legal consequences stemming from its policy towards Western Sahara.[168] At the very minimum, this line of case-law should raise a few eyebrows as to

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[162] Opinion of Advocate General Wathelet (n 153) para 144.

[163] Kassoti (n 158) 225–9. Odermatt (n 158) 759–60.

[164] European Commission, Proposal for a Council Decision on the signing, on behalf of the Union, of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and an exchange of letters accompanying the said Agreement, COM (2018) 677 final, 8 October 2018 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0677> accessed 24 January 2019.

[165] Ibid, 2.

[166] Crawford (n 27) para 131.

[167] J Klabbers, 'Völkerrechtsfreundlichkeit? International Law and the EU Legal Order' in P. Koutrakos (ed), *European Foreign Policy* (Edward Elgar Publishing 2011) 95, 97.

[168] Odermatt (n 146) 230

the extent to which the Court performed its judicial function in a proper manner. On the international plane, few disputes have no political ramifications. As the ICJ put it:

> [T]he fact that a legal question also has political aspects, 'as, in the nature of things, is the case with so many questions which arise in international life', does not suffice to deprive it of its character as a 'legal question' and to 'deprive the Court of a competence expressly conferred on it by its Statute . . . ' Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial function . . .[169]

Displaying a cavalier attitude towards international law in politically sensitive cases not only threatens the Court's own legitimacy, but also undermines 'respect for international law' as a core constitutional value of the EU – thereby undermining the image of the EU as a global actor with a particular fidelity to international law.[170]

Declarations and conflict of interests

The author declares no conflicts of interest.

[169] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 23) para 41.

[170] J Klabbers, 'The Reception of International Law in the EU Legal Order' in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law: Volume I: The European Union Legal Order* (OUP 2018) 1208, 1233.