The Groningen Journal of European Law Vol. 1
 DOI: 10.21827/gjel.1.18-37

THE EU COURT'S USE OF INTERNATIONAL LAW IN THE ENGAGEMENT WITH DISPUTED TERRITORIES: A CONSISTENT APPROACH?

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I. INTRODUCTION

The EU could currently be described as one of the largest international legal entities with, previously unprecedented, legal competences originating from public international law (PIL).[2] Both the European and international legal landscapes have changed and evolved in terms of nature, as well as their national and international competences in relation to each other.[3] The relationship between these two legal systems has therefore also received increasing attention in recent years, most likely due to their unique interaction. In terms of the EU's global influence, it undoubtedly played a role in reshaping the idea of international organizations,[4] but were they influential towards each other in other ways? The aim of the present article is to assess to what extent and how the Court of Justice of the European Union's (CJEU) takes international law into account when ruling on questions regarding international agreements with third countries concerning disputed territories.

The CJEU judgments provide great insight into the role that the EU awards PIL.[5] Although theoretically it is clear that certain rules of international law are binding on the EU, in practice this is debatable, as the CJEU has been known to adopt quite a 'creative approach' to applying international law.[6] The Court is known to borrow but also refuse general international law principles when it prefers 'other principles that it deems fit for its own legal order'.[7] This inconsistent approach of picking and choosing of the international laws can quite understandably be problematic.

[1] The author would like to thank Prof. Ramses Wessel for his valuable comments on an earlier version of this article.

[2] John F McMahon, 'The Court of the European Communities: Judicial Interpretation and International Organisation' (1961) 37 British Yearbook of International Law 320, 329.

[3] Ramses Wessel and Joris Larik, 'The European Union as a Global Legal Actor' in Ramses Wessel and Joris Larik (eds) *EU External Relations* (Hart Publishing 2020) 1, 2; Christina Eckes and Ramses Wessel, 'The European Union from an International Perspective: Sovereignty, Statehood, and Special Treatment' in Takis Tridimas and Robert Schütze (eds) *The Oxford Principles of European Union Law - Volume 1: The European Union Legal Order Oxford* (Oxford University Press 2018), 103; Violeta Moreno-Lax and Paul Gragl, 'The Quest for a (Fully-fledged) Theoretical Framework: Co-implication, Embeddedness, and Interdependency between Public International Law and EU Law' (2016) 35/1 Yearbook of European Law 455, 462.

[4] Katja Ziegler, 'The Relationship between EU Law and International Law' in Dennis Patterson and Anna Södersten (eds) *A Companion to European Union Law and International Law* (Wiley-Blackwell 2016) 42, 43; Sionaidh Douglas-Scott, *Constitutional Law of the European Union* (Longman 2002), 260.

[5] Ricardo Da Silva Passos, 'The Interaction between Public International Law and EU Law: The Role Played by the Court of Justice' in Inge Govaere and Sacha Garben (eds) *The Interface between International and EU Law* (Oxford Hart Publishers 2018), 298; Jed Odermatt, 'The Court of Justice of the European Union: International or domestic court?', (2014) 3 Cambridge Journal of International and Comparative Law 696, 718.

[6] Emanuel Castellarin, 'General Principles of EU Law and General International Law' in Mads Andenas, Malgosia Fitzmaurice, Attila Tanzi, and Jan Wouters (eds) *General Principles and the Coherence of International Law* (Brill 2019) 131, 134.

[7] ibid, 136.

The phenomenon of claim over territories is one that is known to man all throughout history and constantly shifts over time. There is a wide array of issues that make the disputes at hand so complex; such as access to natural resources,[8] intrinsic grounds such as cultural and religious claims,[9] and involves issues of colonization, conquest and displacement.[10] The marking of territories commenced roughly 9,500 years ago, with territorial claims concepts such as mutual recognition of territorial possessions originating from the Treaty of Westphalia in 1648.[11] The political character of territorial claims mean they often attract and involve international interests, players, and international law. Similarly, international law is in essence about regulation and governance of international territories. Under international law some of these territories are also identified as occupied territories, due to their occupied international status as per Article 42 of the Hague Regulations.[12] For the purpose of this article these territories will be referred to simply as disputed territories, unless explicitly referred to as occupied territories.

Given the delicate political nature of the disputed territories, they often pose an obstacle to the territorial scope of certain agreements, an example being the EU's international agreements questions pertaining to disputed territories can be raised through the conclusion of international agreements with third states involved in territorial disputes. Some instances where this played a role, and that led to jurisprudence will be discussed here. These include the *Anastasiou* saga, Western Sahara cases of *Front Polisario* and *Western Sahara Campaign UK*, and *Brita* and *Psagot*. When concluding international agreements with third countries the EU must pay attention to multiple sources of law,[13] which can cause uncertainty and disagreement as to the application and interpretation of international law rules and principles to disputed territories (DTs) in light of these agreements. This has become evident in the recent case-law of the EU on international agreements involving disputed territories that will be examined.

The cases have led to important legal questions on the application of international law and the approach of the Court of Justice of the European Union (hereafter CJEU or the Court). It explores the Court's often selective and inconsistent use of international law principles in the cases at hand, such as the principle of self-determination, obligation of non-recognition,[14] and the principle of relative effect of treaties.[15] This perception of the Court's ignorance of the greater international legal framework at play leads to many interesting observations regarding the EU eschewing political considerations. Similarly, its argued instrumentalization of international law in the cases at hand, to give the principles its own meaning, leads to speculation of the EU contributing to the development of international law in order to push its vision of the EU as a self-contained legal order. The identifiable trends over time also reflect a potential shift towards a more EU centric approach. Lastly, seeing how politics can influence the outcome of these cases provides an interesting insight into how the Court deals with the internationally politically sensitive issues arising from trade in disputed territories and its balance between this and its regard to the applicable international legal rules.

In order to tackle to what extent and how the CJEU takes international law into account in the situations described above, Section 2 to 4 will conduct an analysis of the Court's approach and argumentation in three concrete cases: Northern Cyprus (Section 2), Western Sahara (Section 3), and

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[8] Emmanuel Brunet-Jailly, *Border disputes: A Global Encyclopedia* (Volume 1, ABC-CLIO 2015), 17.

[9] Yang‐Ming Chang, Joel Potter and Shane Sanders, 'The Fate of Disputed Territories: An Economic Analysis' (2009) 18/2 Defense and Peace Economics 183, 183.

[10] Brunet-Jailly (n 7), Gareth Griffiths, 'Afterword: Apprehending 'disputed territories'' in David Trigger, Gareth Griffiths (eds) Disputed Territories (Hong Kong University Press 2003), 305.

[11] Brunet-Jailly (n 7).

[12] Eva Kassoti, 'The Legality Under International Law of the EU's Trade Agreements Covering Occupied Territories: A Comparative Study of Palestine and Western Sahara' (2017) T.M.C. Asser Institute for International & European Law Research Paper Series, 12 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3118936##> accessed 3 June 2020.

[13] Balingene Kahombo, 'The Western Sahara Cases before the Court of Justice of the European Union and International Law' (2019) 18/2 Chinese Journal of International Law 327, 331.

[14] Kassoti (n 11), 18.

[15] Rachel Frid de Vries, 'EU Judicial Review of Trade Agreements involving Disputed Territories: Lessons from the Front Polisario Judgments' (2018) 24/2 Columbia Journal of European Law 496, 511.

Palestine (Section 4). Section 5 will draw several conclusions with a specific focus also on the consistency of the Court's use of international law arguments in these cases.

II. THE EU AND THE DISPUTED TERRITORY OF NORTHERN CYPRUS

The Northern Cyprus conflict started with the bicommunal ethnic divisions in the 1950's, due to the ongoing power struggle between the British colonial power, Greece and Turkey.[16] Although seemingly settled in 1960 when the United Kingdom granted the Republic of Cyprus independence,[17] this instead led to unrest with the Turkish Cypriots.[18] The situation escalated with the Turkish coup in 1974,[19] marking the *de facto* partitioning of southern Greek Cyprus and northern Turkish Cyprus.[20] Following this the Turkish Cypriot community in 1983 declared themselves the Turkish Republic of Northern Cyprus (TRNC).[21] The UN responded with Resolution 541 and 550 calling upon states not to recognise the TRNC.[22] Similarly, the declaration was rejected by European institutions and EU Foreign Ministers.[23] The position of these international players was thereby clear from the outset, as well as their role in influencing the power dynamics at hand.[24]

The EU and Cyprus' trade of citrus fruits and potatoes was governed by the Association Agreement (AA) of 1972 and their protocols.[25] Despite the fact that the AA was concluded with the Greek Cypriot government, it is generally accepted that this Agreement applied to the whole of Cyprus.[26] The other relevant legislation for the import of such products was the Plant Health Directive.[27] Through its declarations the EU made its stance on their relations with Northern Cyprus clear, and following the de facto partitioning the EU therefore attempted to eliminate all possible exports to Northern Cyprus,[28] despite some MSs still accepting movement of citrus fruits and potatoes from Northern Cyprus where the certificates were not labeled as being issued in the TRNC.[29]

In *Anastasiou I* the CJEU was asked for an interpretation of the AA and the Plant Health Directive, and was essentially asked to provide interpretation of 'the provisions "customs authorities of the exporting State" in the Origin Protocol to the Association Agreement and 'authorities empowered for this purpose . . . on the basis of laws or regulations of the [exporting] country' in the Plant Health Directive'.[30] The CJEU ruled that both instruments precluded the acceptance of certificates, when citrus fruit or potatoes were imported from the northern part of Cyprus, issued by authorities different from the competent authorities of the Republic of Cyprus.[31] In effect this meant

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[16] Nikos Skoutaris, 'The European courts as political actors in the Cyprus conflict' in Francis Snyder and Imelda Maher (eds), *The Evolution of the European Courts: Institutional Change and Continuity: Sixth International Workshop for Young Scholars* (Editions juridiques Bruylant 2009), 236.
[17] Patrick Tani, 'The Turkish Republic of Northern Cyprus and International Trade Law' (2012) 12 Asper Review of International Business and Trade Law 115, 116.
[18] Skoutaris (n 15).
[19] ibid, 237.
[20] Stefan Talmon, 'The Cyprus Question before the European Court of Justice' (2001) 22/4 European Journal of International Law 727, 727.
[21] Talmon (n 19).
[22] Skoutaris (n 15), 237.
[23] Talmon (n 19), 728.
[24] Skoutaris (n 15), 235.
[25] Agreement establishing an Association between the European Economic Community and the Republic of Cyprus [1973] OJ L 133.
[26] Talmon (n 19), 730.
[27] ibid, 731; Commission Directive 98/1/EC of 8 January 1998 amending certain Annexes to Council Directive 77/93/EEC on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community [1998] OJ L 15.
[28] Talmon (n 19), 729.
[29] ibid, 731.
[30] ibid, 735.
[31] Case C-432/92 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou* [1994] ECLI:EU:C:1994:277, para 15.

that goods from TRNC could be imported, however were to be treated as from a state not associated with the EC, therefore applying the corresponding custom duties.[32]

In the judgment the Court referred to the principle of subsequent practice (Article 31(3)(b) VCLT), stating the importance of 'the object and purpose of a treaty and any subsequent practice in its application'.[33] It was reluctant to accept its applicability here however,[34] as it ruled that the acceptance of the certificates from the TRNC did not amount to subsequent practice.[35] The relevant subsequent practice argued by the UK and the Commission was ICJ Namibia Advisory Opinion, referencing the principle of non-recognition. They found that accepting these certificates from the TRNC 'is certainly not tantamount to recognition of the TRNC as a State but represents the necessary and justifiable (…)' to account for the interests of population of Cyprus,[36] as in line with the Opinion. The Court dismissed this by making implicit reference to the obligation of non-recognition and stating that 'such cooperation is excluded with the authorities of (such) an entity (…) which is recognized neither by the Community nor by the Member States'.[37] The Court ruled that the Opinion and the case at hand were incomparable and therefore an analogy is impossible.[38] Apart from its implicit reference to the obligation of non-recognition and principle of subsequent practice, it does not go into further detail about their correct application or implications. It issued a similar reasoning regarding the phytosanitary certificates.[39]

Here the CJEU arguably 'ignored the broader international legal framework of the dispute',[40] by failing to engage with the relevant principles of non-recognition and mutual reliance. The import system with movement certificates was 'founded on the principle of mutual reliance and cooperation'.[41] It argued that this cooperation was not possible since TRNC was not recognized. Through this ruling the Court circumvented a conflict with the international law argument, by avoiding the question and ruling in line with the obligation of non-recognition.[42] Although the outcome is in accordance with the international standpoint, the Court failed to actively acknowledge and engage with international law and its obligation of non-recognition.[43] Similarly it ignored the Greek government's argument that the acceptance of the certificates would be tantamount to violating UN Resolutions and thereby condemning the Turkish occupation.[44] It seemingly fulfilled the bare minimum for compliance with international law, while avoiding engagement with other relevant principles at hand, therefore nothing remarkable can be said about the Court's approach to international law.

Following the *Anastasiou I* judgment exporters from Northern Cyprus, previously exporting under phytosanitary certificates issued by the TRNC, concluded an agreement with a Turkish company to retain goods in the Turkish port of Mesin for less than 24 hours,[45] where the goods were inspected and issued the necessary certificates before continuing to the EC. Anastasiou and others questioned

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[32] Skoutaris (n 15), 249.
[33] *Anastasiou I* (n 30), para 43.
[34] Guillaume van der Loo, 'Law and Practice of the EU's Trade Agreements with 'Disputed' Territories: A Consistent Approach?' in Inge Govaere and Sacha Garben (eds) *The Interface between EU and International Law* (Bloomsbury Publishing 2019), 254.
[35] *Anastasiou I* (n 30), 37.
[36] ibid, para 34.
[37] ibid, para 40.
[38] ibid, para 49.
[39] ibid, para 61.
[40] Eva Kassoti, 'Between Sollen and Sein: The CJEU's reliance on international law in the interpretation of economic agreements covering occupied territories' (2020) 33 Leiden Journal of International Law 371, 372.
[41] *Anastasiou I* (n 30), para 38.
[42] Olia Kanevskaia, 'EU Labelling Practices for Products Imported from Disputed Territories' (2019) TILEC Discussion Paper, 16 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3421419#> accessed 29 April 2020.
[43] Kassoti (n 39), 373.
[44] Panos Koutrakos, 'Legal Issues of EC-Cyprus Trade Relations' (2003) 52 The International and Comparative Law Quarterly 489, 492.
[45] Skoutaris (n 15), 249.

whether the Plant Health Directive allowed MSs to import plants originating in a non-member state and where the certificates were issued by a non-Member State.[46]

In its judgment, the Court built on its ruling in *Anastasiou I* and reiterated its stance on the obligation of non-recognition. It went on to rule that under the Directive it was permissible to import plants originating from a non-MS, subject to requirements.[47] Arguably this reasoning was given due to some reluctance to engage in political discussions.[48] Despite its lack of reference to international law rules or principles, the CJEU did take into consideration the international framework by ruling in line with the political-sovereignty approach, similar to the internationalist approach.[49] This approach 'considers the issue of origin from an international political perspective, [underlining] the involved questions of sovereignty and recognition',[50] and therefore corresponds with the view that Northern Cyprus is in fact under the sovereignty of the Republic of Cyprus, the only recognized state under international law.[51]

The last case of the *Anastasiou* saga discussed the Plant Health Directive's modified provisions.[52] The modified provisions now required the phytosanitary certificates to be issued by the country of origin.[53] The standard of certificates set out in the previous two judgments had to be respected, even if they were issued by somewhere other than the plant's place of origin.[54] Against this backdrop the Court thereby ruled that the phytosanitary certificates must be issued by the country of origin or by their competent authorities.[55] This meant the TRNC was incompetent to issue such certificates, as the Republic of Cyprus was the only authority capable of labeling the origin.[56]

Regarding its use of international law, much like in its ruling in *Anastasiou II*, the Court only referred to its implicit statement on the obligation of non-recognition made in *Anastasiou I*.[57] It once again did not expand further on its application to the situation at hand or the implications for the EU.

One of the relevant international law concepts at play in these CJEU judgments is the concept of subsequent practice (Article 31(3)(b) VCLT), stating the Court can consider 'any subsequent practice (…) which establishes the agreement of the parties regarding its interpretation'.[58] The Court did take the principle into consideration in *Anastasiou I,* although not accepting its applicability and providing no further guidance on determining relevant practice when interpreting an international agreement. Here the Commission and the UK agreed on the determined relevant practice, more so than other MSs.[59]

Other international law concepts relevant are non-recognition and mutual reliance. The Court was mindful of the international law perspective in their interpretation and its possible consequences. Much like in *Anastasiou II* and *III*, the CJEU was careful and, despite not actively taking international law into account, ensured to act in line with the 'international political perspective'.[60]

Throughout the Court's judgments the EU is visibly mindful of its place in the realm of international law and the applicable concepts and principles, given the potential complications if it were to mingle in political conflict. Looking at how the Court dealt with international law therefore

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[46] Case C-219/98 *Regina v Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and Others* [2000] ECLI:EU:C:2000:360.
[47] ibid, para 38.
[48] Kanevskaia (n 41).
[49] Guy Harpaz, 'Mandatory labelling of origin of products from territories occupied by Israel and the weight of public international law: Psagot' (2020) 57 Common Market Law Review 1585, 1593.
[50] Tani (n 16), 123.
[51] ibid, 123.
[52] Case C-140/02 *Regina on the application of S.P. Anastasiou (Pissouri) Ltd and Others v Minister of Agriculture, Fisheries and Food* [2003] ECLI:EU:C:2003:520.
[53] ibid, paras 23-26.
[54] ibid, paras 46-49.
[55] ibid, para 75.
[56] Skoutaris (n 15), 250.
[57] *Anastasiou II* (n 45), para 28.
[58] Jed Odermatt, 'The Use of International Treaty Law by the Court of Justice of the European Union' (2015) 17 Cambridge Yearbook of European Legal Studies 121, 138.
[59] ibid, 139.
[60] Tani (n 16).

nothing remarkable can be found; it engaged minimally with the relevant rules, was sometimes even implicit in its references, and did not use its tool of interpretation of international law to give special meaning to its rules in the EU legal order, as it has done in the past.

III. EU AND THE DISPUTED TERRITORY OF WESTERN SAHARA

Since 1884 Western Sahara was a Spanish colony,[61] until Spain officially withdrew in 1976,[62] marking the beginning of an armed conflict between Morocco, the Islamic Republic of Mauritania and Front Polisario (FP), [63] a national liberation movement for Western Sahara founded in 1973 gaining broad support.[64] Despite the peace agreement between Mauritania and FP in 1979,[65] the conflict with Morocco only intensified as the armed annexation of Morocco was characterized as 'occupation' of the territory by the UN.[66] This conflict was resolved in 1988 when Morocco, in principle, accepted the UN Secretary-General's settlement proposal, however it was never actually enforced.[67] Currently, Morocco factually still controls the majority of the Western Sahara territory. The UN however still recognizes Western Sahara (WS) as a non-self-governing territory,[68] and has also repeatedly affirmed the Sahrawi people's right to self-determination.[69]

Since 2000 EU and Moroccan relations are governed by the EU-Morocco AA, aiming to implement 'greater liberalization of reciprocal trade in agricultural and fishery products' (Article 16),[70] making it the legal basis for their relations.[71] Following this, in 2012 the Liberalisation Agreement entered into force between the EU and Morocco on trade in agricultural and fishery products. This Agreement was approved by the Council Decision 2012/497/EU, which later served as the legal basis of the FP's request for annulment.[72]

In 2006 the EU-Morocco Fisheries Partnership Agreement (FPA) was concluded, allowing EU vessels access to Morocco's fisheries.[73] Problems first arose concerning the in- or exclusion of Western Sahara's waters,[74] due to the inclusion of the territory in the earlier fisheries agreements and lack of clarity regarding the southern limit in the FPA.[75] Additionally, in 2013 the EU-Morocco Fisheries Protocol was concluded, which took after its predecessor and applies to Morocco's waters, this time with the Commission's clarification that the Western Sahara's waters were included, despite concerns by MSs.[76] Retrospectively this was perhaps the starting point of international law complications, as the

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[61] Peter Hilpold, '"Self-determination at the European Courts: The Front Polisario Case" or "The Unintended Awakening of a Giant"' (2017) 2/3 European Papers 907, 909.
[62] Frid de Vries (n 14), 500.
[63] ibid.
[64] Hilpold (n 60), 910.
[65] Mauritano-Saharoui Agreement, (Islamic Republic of Mauritania – Frente Polisario) (concluded on 10 August 1979), Annex I of Letter dated 18 August 1979 from the Permanent Representative of Mauritania to the United Nations addressed to the Secretary-General UN Doc A/34/427 – S/13503.
[66] UNGA Res 34/37 (1979) Question of Western Sahara, para 5; UNGA Res 35/19 (1980) Question of Western Sahara, para 3; Kassoti (n 11), 34.
[67] Frid de Vries (n 14), 500.
[68] Kassoti (n 11), 34.
[69] For example in UNSC Res 2285 (2016) UN Doc S/RES/2285; ibid.
[70] Euro-Mediteranean 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.
[71] Kassoti (n 11), 35.
[72] Hilpold (n 60), 913.
[73] Kassoti (n 11), 36.
[74] Vincent Chapaux, 'The Question of the European Community-Morocco Fisheries Agreement' in Karin Arts, Pedro Pinto Leite (eds), *International Law and the Question of Western Sahara* (International Platform of Jurists for East Timor 2007), 218.
[75] Kassoti (n 11), 36.
[76] Answer given by Ms Damanaki on behalf of the Commission to Questions E-007185/2013 [2013] OJ C 81 E; Kassoti (n 11), 37.

Agreements reflect the EU's view that WS was *de facto* a territory of Morocco, conflicting with its international law obligation of non-recognition of Morocco's claim over WS.[77]

This first decision by the General Court concerned FP who filed an action for annulment against the Council Decision 2012/497/EU based on its incompatibility with EU and international law, such as the right to self-determination and principle of permanent sovereignty over natural resources.[78] First the question of *locus standi* was discussed. [79] FP argued its legal personality under international law, which was accepted by the Court stating that an entity not having legal personality may still be regarded as a 'legal person'. When discussing the direct and individual concern to FP, the Court made reference international law, stating that the Agreement was 'concluded by two subjects of public international law',[80] (Article 31 (VCLT)).[81] Despite the divergence between the EU and Morocco's views on Western Sahara's international status,[82] it concluded that the decision applied to Western Sahara,[83] confirming FP's direct and individual concern. This innovative approach reflects an international-law-friendly stance, given its 'expression of deference towards international law', in particular areas such as self-determination.[84]

The Court makes frequent references to international law principles of self-determination and of permanent sovereignty over natural resources, however these are mentioned only in Front Polisario's arguments and were not used in the ruling. Therefore most references are from FP's claims which 'in substance (…) [rely] on the unlawfulness of the contested decision on the ground that it infringes European Union and international law'.[85] The Court proceeded to examine EU's obligations under international law such as Article 3(5) TEU prescribing the EU's obligation of 'strict observance and the development of international law',[86] and Article 216(2) TFEU stating that the validity of European acts 'may be affected by the fact that it is incompatible with such rules of international law'.[87] The Court discusses the eleven pleas put forward, 3 of which rely on 'the infringement of "general international law"' to ensure annulment. The Court rejected all of these. On the overall findings the CJEU rules that nothing supports the argument that 'under EU law or international law, the conclusion of an agreement with a third State which may be applied on a disputed territory is absolutely prohibited'.[88] Finally, the judgment ruled for a partial annulment of the Decision in its application of WS,[89] however this was not based on FP's claims but exclusively on EU fundamental rights.[90]

This judgment caused uproar among scholars given its hesitant application of international law. Despite engaging with the EU's obligations under international law, this has been argued to be an instance where the Court was found to 'abandon the "international law friendly" tone of its earlier judgments'.[91] This arguably left room for the CJEU to correct these errors in its appeal judgment.[92]

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[77] Kassoti (n 11), 38; Martin Dawidowicz, 'Trading Fish or Human Rights in Western Sahara? Self-Determination, Non-Recognition and the EC-Morocco Fisheries Agreement' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013), 274.
[78] Kassoti (n 11), 39
[79] 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, para 115.
[80] ibid, para 90 and 91.
[81] ibid, para 98.
[82] ibid, para 100.
[83] ibid, para 103.
[84] Hilpold (n 60), 914.
[85] *Front Polisario* (n 172), para 171.
[86] ibid, para 180.
[87] ibid, para 182.
[88] ibid, para 215.
[89] ibid, para 247.
[90] Frid de Vries (n 14), 505.
[91] Eva Kassoti, 'The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part)' (2017) 2/1 European Papers 339, 340-341.
[92] Frid de Vries (n 14), 509.

After a Council appeal of the General Court's judgment the Grand Chamber issued its judgment, largely following AG Wathelet's ruling, and overturning the previous decision by ruling that the action was inadmissible.[93] The standing in the previous judgment was based on the applicability of the Agreements to the territory of WS, something that was refuted in this judgment.[94]

The Council's fifth ground of appeal related 'to the misinterpretation and incorrect application of the Charter of Fundamental Rights of the European Union and of certain rules of international law'.[95] When discussing the admissibility the Court once again mentioned the importance of Article 31 VCLT to interpret 'relevant rules of international law applicable in the relations between the parties',[96] after which it listed the relevant principles of 'self-determination (…) and the principle of the relative effect of treaties'.[97] Regarding the right to self-determination it decided that WS has a 'separate and distinct status (…) by virtue of the principle of self-determination',[98] but with reference to 'the customary rule codified in Article 29 VCLT thus also, a priori, precluded WS from being regarded as coming within the territorial scope of the Association Agreement'.[99] After discussing the principle of self-determination and rule on territoriality of agreements, the Court lastly used the principle of *pacta tertiis* for its interpretation, stating 'it is contrary to the principle (…) to take the view that the territory of WS comes within the scope of the Association Agreement'. [100]

After rebutting the General Court's judgment, the CJEU expressed the importance of subsequent practice when applying Article 31(3) (b) VCLT.[101] In this case the Agreements excluded WS, as it would have been in violation of self-determination and *pacta tertiis*,[102] and instead it therefore ruled that the 'General Court also erred' in holding that an interpretation of subsequent practice meant that the Agreements were legally applicable to the territory of Western Sahara.[103] Due to the Court's conclusion that the agreement was not applicable to this territory, FP therefore did not have standing, making the case inadmissible.[104]

One of the most important implications is the Court's handling of the status of international agreements. As mentioned, the EU has been known to exert influence over international law, here the Court when faced with deciding the validity of the international agreement relied on international law such as subsequent practice to exclude WS from the Agreement.[105] This conclusion is criticized for its selectivity, and Kassoti argues it even 'manifests a different, more worrisome judicial strategy, while seemingly anchoring its findings in international law'. [106] Similarly its choice to rule de facto conduct of the parties under Article 31(3)(b) VCLT as insufficient subsequent practice is said to reflect the CJEU's choice to prioritize contextual interpretation over subsequent practice,[107] while failing to further elaborate on its reason for ruling de facto.[108] Furthermore, despite its reference to the principle of subsequent practice the Court remains silent on its application to the agreements at hand.[109] An argument by Cannizzaro for the Court's contextual interpretation is the balancing act between the

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[93] ibid; Hilpold (n 60), 916.
[94] Frid de Vries (n 14), 505.
[95] Case C-104/16 P *Council of the European Union v Front populaire pour la libération dela saguia-el-hamra et du rio de oro* (*Council v Front Polisario*) [2016] ECLI:EU:C:2016:973, para 72.
[96] ibid, para 86.
[97] ibid, para 87.
[98] ibid, para 92.
[99] ibid, para 97.
[100] ibid, para 107.
[101] ibid, para 123.
[102] ibid.
[103] ibid, para 125.
[104] ibid, para 132-134.
[105] Ramses Wessel, 'The EU and International Law' in Ramses Wessel and Joris Larik (eds), *EU External Relations* (Hart Publishing 2020), 155.
[106] Eva Kassoti, 'The Council v. Front Polisario Case: The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation (Second Part)' (2017) 2/1 European Papers 23, 40.
[107] Enzo Cannizzaro, 'In defence of Front Polisario: The ECJ as a global jus cogens maker' (2018) 55 Common Market Law Review 569, 578.
[108] Kassoti (n 11), 45.
[109] ibid, 44.

Agreement and jus cogens, the principle of self-determination in this case.[110] If it were to include WS in the territory it would namely be contrary to rules of PIL at hand.[111] This cautious and selective approach to international law reflects the Court's attempt at avoiding political sensitive issues, given its reliance on self-determination while failing to mention the EU's obligation of non-recognition under international law.[112] Although the Court limited its ruling to addressing the question on territoriality, the judgment has been found to nonetheless include implications that could 'contribute to the development of one of the most controversial doctrines in international law, namely jus cogens'.[113]

These two judgments are important for understanding the EU's interpretation of international agreements under international law and the repercussions this has for third parties.[114] Although both courts in their judgments base their decisions on principles of international law, they reached different conclusions.

The last case concerns Western Sahara Campaign UK who claimed the FPA and its 2013 protocols violated Article 3(5) TEU, in particular self-determination, duty of non-recognition, duty of non-assistance and the principles of permanent sovereignty over natural resources,[115] thereby making the agreements invalid WS's territory.[116] It marked the first time an international treaty was challenged before the CJEU,[117] thereby implying certain ambiguity to the procedural elements.[118]

The Court first references international law when affirming its jurisdiction to assess compatibility of the international agreement with the Treaties and the rules of international law which are binding on the Union.[119] In order to determine a violation the Court examined the agreements' territorial scope and uses international law to define it as 'the geographical area' over which Morocco exercises full powers, and excludes WS.[120] Affirming also that to include WS would be contrary international law principles 'namely the principle of self-determination (…) and the principle of the relative effect of treaties',[121] as per Article 1 of the Charter of the United Nations and Art 34 VCLT respectively. Due to the lack of a territorial clause in the 2013 protocol, the Court found the FPA and the 2013 Protocol excluded the waters adjacent to Western Sahara from its scope, as in accordance with international law'.[122]After excluding WS from the territory the Court found 'there is no need to answer (the) second question',[123] thereby limiting the judgment to the question of territorial application.[124]

The Court made references to the rules of international law throughout the judgment, such as self-determination and relative effect of treaties. The limitation of the territoriality of the agreements by the Court is unsurprising given its previous judgment. What is surprising however is the somewhat far-reaching ruling in accordance with international law. It has raised questions among scholars regarding the place of international law in the EU legal system and the impossible trend it potentially sets requiring the EU to 'never be found in breach of international law simply because this would run counter to its express commitment to upholding international law and irrespective of the actual

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[110] Cannizzaro (n 108), 581.
[111] ibid, 582.
[112] Kassoti (n 11), 45.
[113] Cannizzaro (n 108), 577.
[114] Frid de Vries (n 14), 499.
[115] 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, Food and Rural Affairs (Western Sahara Campaign UK)* [2018] ECLI:EU:C:2018:118, para 26.
[116] ibid, para 32.
[117] Kahombo (n 17), 330.
[118] Anne-Carlijn Prickartz and Sandra Hummelbrunner, 'EU-Morocco Trade Relations, Western Sahara and International Law: The Saga Continues in C-266/16 Western Sahara Campaign UK' *European Law Blog* (28 March 2018) <https://europeanlawblog.eu/2018/03/28/eu-morocco-trade-relations-western-sahara-and-international-law-the-saga-continues-in-c-266-16-western-sahara-campaign-uk/> accessed 5 March 2021.
[119] *Western Sahara Campaign UK* (n 116), para 48.
[120] ibid, para 62.
[121] ibid, para 63.
[122] ibid, para 83.
[123] ibid, para 87.
[124] ibid.

evidence on the ground'.[125] This leads one to question the Court's method of treaty interpretation, and the potentially overpowering weight that international law considerations could have. Others have argued that it should simply be regarded as an element to be taken into account, but not one to 'avail against clear language or clear evidence of intention'.[126] Kassoti and Gourgourinis argued that when using Article 31 (3)(c) VCLT seeking guidance from international law, should be distinguished from application without interpretation.[127] The Court therefore seems to blur the lines between application and interpretation, as visible from its direct application of the international law principles of self-determination and relative effect of treaties to the territories of the agreements, even arguably reversing the 'interpretation-application process'.[128] Kassoti even argues the Court has 'lost sight of the main aim of treaty interpretation'.[129] By relying exclusively on the VCLT the Court focused solely on the normative context of the dispute and failed to consider a more holistic approach to interpretation; it considered why WS should be excluded from the territory, and its violation of international law, as opposed to the intention of the parties to exclude it from the territorial scope.[130] This follows the logic of 'there could not be what must not be',[131] much like in *Front Polisario*.[132]

This normative approach is further reflected in the Court's avoidance of subsequent practice, especially in light of the previous judgments, since it arguably 'undermines the outcome of its interpretative process'.[133] The use of this principle allows for a narrowing of interpretation, and in this case such subsequent practice by for instance the Commission, and the Committee of Development, would all point to inclusion of WS.[134] Given the likelihood of a different conclusion being reached in case the principle was included in the Court's analysis highlights the approach taken by the Court to prioritise international law considerations.

Following the concerns of status of international agreements in *Front Polisario,* the Court here once again had to assess its validity. Using its own method of interpretation it followed in its footsteps, by ruling to exclude the WS territory.[135] The Court arguably subsequently ruled in line with *Front Polisario* in its 'instrumentalization' of international law, enabling them to selectively apply its rules to limit the Agreements 'while ignoring the factual application of these agreements to the territory (…) of Western Sahara'.[136] This selectivity leads to pressing questions on potential repercussions of unsystematic application of PIL rules such as self-determination, legally and politically but also regarding 'economic and humanitarian values'.[137] In the decision's aftermath the EU institutions displayed 'significant lack of internal coherence', regarding the judgment's application, visible from the renegotiation of the fisheries agreement with Morocco, and the European Union's FAC's decision to extend preferential tariffs to WS.[138] This inconsistency exemplifies the long road ahead of the EU to determine the position of international law in its functioning and its external relations, and the importance in settling these inconsistencies through institutional and judicial decisions.[139]

International law rules are unmissable in all three judgments; despite a slow start in the *Front Polisario* saga the recent *Western Sahara Campaign UK* judgment shows clearer application of

[125] Kassoti (n 39), 384.
[126] Wilfred Jenks, 'The Conflict of Law-Making Treaties', (1953) 30 British Yearbook of International Law 401, 403.
[127] Kassoti (n 39), 384; Anastasios Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2 Journal of International Dispute Settlement 31, 51.
[128] ibid, 386.
[129] Eva Kassoti, 'The ECJ and the art of treaty interpretation: Western Sahara Campaign UK' (2019) 56 Common Market Law Review 209, 220.
[130] Kassoti (n 39), 387.
[131] Hilpold (n 60), 916.
[132] Kassoti (n 130).
[133] ibid, 227-228.
[134] Kassoti (n 130), 227-228.
[135] Wessel (n 106), 156.
[136] Kassoti (n 39).
[137] Andrea Mensi, 'The Case Western Sahara Campaign UK and the International and Institutional Coherence of European Union External Action. Opening Pandora's Box?' (2018) 23/4 European Foreign Affairs Review 549, 561.
[138] Mensi (n 138), 562.
[139] ibid, 563.

international law rules. Firstly, it is important to acknowledge the EU's recognition of its obligation under PIL in all jurisprudence. Simultaneously, the Court visibly 'instrumentalizes international law'.[140] Treaty interpretation was one of the Court's focuses to determine the agreements' territorial scope. The Court's emphasis on Article 31(3)(c) VCLT is widely criticized for being contrary to international judicial practice, which require additional elements to be given equal weight.[141] This lack of a more holistic approach leads many scholars to theorize an over-reliance on the said article and a muddled treaty interpretation. On the other hand, this instrumentalization of international law for determining territoriality is not surprising as the Court has been seen exerting influence over concept of territoriality through its interpretation of CIL rules in the other cases. This instrumentalization could therefore also be viewed as an interpretation of this principle. Similar arguments can be made for its interpretation of legal personality, as by instrumentalizing treaty interpretation under Art 34 VCLT, the Court stretched the concept to provide new meaning to it and included FP, showing the Court going beyond simple application of PIL and shaping the concept of legal personality.

Likewise, the Court's application of the *pacta tertiis* has been contested for its application to non-state actors,[142] an application not previously made as Article 34 VCLT specifically refers to 'third states'. However, it could be seen the Court utilising interpretation to provide new meaning to the international law concept of *pacta tertiis*. It is therefore arguably evidence of the Court, through its engagement with *pacta tertiis*, a rule of CIL, aiding in the development of CIL and adding to European argumentation for the principle, as seen in the past. Other criticisms include the Court's regard of the principle of self-determination which has been contested due to judicial practice, which place non-self-governing territories in the sovereignty of the administering power.[143]

A similar argument can be made for principle of subsequent practice, another rule of CIL. As mentioned above many scholars have argued the Court's mistake in failing to extensively engage with this principle in the *Front Polisario* cases and *Western Sahara Campaign UK* case. On the other hand, it can be viewed as evidence for the Court's selective reliance on PIL, especially since it is important in the interpretation of the treaty, as emphasized by the ILC confirmed its considerable authority as means of interpretation.[144] Regarding the Court's contribution to the concept not much can be said however due to its selective and restricted argumentation and lack of interpretation.

Considering new insights found on the role of international law, conclusions are more difficult to make. In the latest case no real light was shone on the use of Article 3(2) TEU as a method to invalidate EU law as was hoped for. By focusing on the text of the agreement it ignored any other questions of international law such as the recognition of WS and the violation of this under international law.[145] The judgment did however exemplify how to 'promote the observance of international law without having to resort to the drastic step of invalidating an EU act'.[146] It can therefore be seen as the Court's insurance of a minimum and modest application of international law rules.

A potential explanation for this is the political nature of the conflict. As seen previously Court has been accused of ignoring international judicial practice to avoid addressing the political issue of WS's place in its agreements.[147] It raises further questions on the Court's approach to politically sensitive disputes, as the Court was able to 'turn a blind eye to what the EU actually did on the

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[140] Jed Odermatt, 'Council of the European Union v. Front Populaire pour la Libération de la Saguia-el-hamra et du rio de oro (Front Polisario)' (2017) 111/3 American Journal of International Law 731, 737.
[141] Eva Kassoti, 'The Compatibility of EU International Agreements Extending to Occupied Territories with International Law: Front Polisario and Western Sahara Campaign UK' (Forthcoming 2021), 7.
[142] ibid, 8.
[143] James Crawford, *The Creation of States in International Law* (OUP Oxford 2006), 613-15.
[144] ILC, Report of the ILC on the work of its 65th session (6 May-7 June and 8 July-9 August 2013) UN Doc A/68/10, 21–2.
[145] Jed 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 European Constitutional Law Review 751, 765-66.
[146] ibid.
[147] Kassoti (n 107), 30-40; Odermatt (n 141), 736-738; and Eva Kassoti, 'The Empire Strikes Back: The Council Decision Amending Protocols 1 and 4 to the EU-Morocco Association Agreement' (2019) 4/1 European Papers 307, 308.

ground'.[148] This explicit avoidance 'undermines the legitimacy' of the Court's judgments, and ultimately their reputation as a global actor.[149] To strengthen this image, consistency must also be ensured in the EU's institutions as well as member and third states, something that is currently lacking.[150] Kassoti described this behavior as stretching its interpretation 'to a breaking point in order to avoid addressing the political disinterest that the EU has demonstrated in relation to the situation in Western Sahara'.[151] Its inconsistent approach seemingly showed its lack of regard to how the principles were applied and understood by international courts and tribunals.[152] The engagement of the CJEU in this jurisprudence with international law is potentially even more problematic than the formalistic approach seen in the past as it shows its willingness to applying it, however in a manner dedicated to avoiding the political character of the questions at hand in order to shield the EU from legal consequences.[153]

The jurisprudence at hand here has given critics a lot of, so called, 'food for thought', given the selective use and application of international law. On the other hand, it provides significant insight into the Court's interpretation of international law, as its used the articles on interpretation to selectively colour in the questions on international law, albeit within the lines of the EU legal order.

IV. EU AND PALESTINE'S DISPUTED TERRITORY

The final case study concerns the Palestinian territory. This conflict dates back to the end of the second World War, when Great Britain was entrusted with the mandate for Palestine.[154] In 1967 Israel then gained control over Palestine.[155] Although both the UN and the EU consider the territory of the West Bank occupied by Israel,[156] Israel argues they are simply disputed territories.[157] Since then numerous agreements have been signed between Israel and the Palestine Liberation Organization (PLO) on the transfer of power to the PLO, however these have been 'partial and incomplete'.[158] The ICJ's Wall Advisory Opinion in 2004 has been crucial in establishing the Palestinian peoples' international right to self-determination and emphasized third parties' obligation of non-recognition.[159] Furthermore, since 2012 Palestine has right of non-member observer in the UN in 2012,[160] and in 2014 the EU adopted a resolution in support of Palestinian Statehood.[161]

In 1995 the EU and Israel concluded an Association Agreement, which formed the basis for trade between the two.[162] The EU first started distinguishing between products from inside or outside the disputed territory of Palestine when it ruled the AA with Israel was not applicable to the DT's, while simultaneously concluding an AA with the PLO.[163] The question of origin was first addressed in

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[148] Kassoti (n 130), 235.
[149] Thomas M Franck, *The Power of Legitimacy Among Nations* (OUP Oxford 1990), 24; and Kassoti (n 240), 236; Kassoti (n 39), 389.
[150] Mensi (n 138), 563.
[151] Kassoti (n 107), 41.
[152] Odermatt (n 141), 737–8.
[153] Kassoti (n 39), 389.
[154] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reps 2004 (13 July 2004), para 70.
[155] ibid, para 73.
[156] As given in UNGA Res 67/19 (2012) UN Doc A/RES/67/19.
[157] Kassoti (n 11).
[158] ICJ Advisory Opinion (n 155), para 77.
[159] ibid, paras 155-156, 159.
[160] UN GA Res. 67/19 (n 157), para 2.
[161] European Parliament Resolution of 17 December 2014 on recognition of Palestine Statehood 2014/2964 (RSP) [2014] OJ C294/9, para 1.
[162] Euro-Mediteranean 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.
[163] Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organisation (PLO) for the benefit of the Palestinian

the EU's Notice to Importers in 2001, where it notified importers of Israel's practice of issuing proofs of origin from occupied territories.[164] In 2005 the EU implemented a rules of origin (ROO)[165] clause to the AA thereby making products produced in Israel's occupied territories subject to a customs duty.[166] This decision was met with uproar among scholars regarding the decision's legal basis,[167] its effect on Europe's normative positions,[168] and its compliance with EU's policies on ROO.[169] A technical arrangement was reached between the two, requiring Israel to specify the production location on its exported products to the EU.[170] Subsequently, another Notice to Importers was sent out by the EU, stating additional specifications for the certificates to ensure verification of the origin and potential preferential treatment.[171] Following this a ROO conflict presumed, constantly escalating and currently stretching over more than three decades.[172] The EU has been criticized for its inconsistent policy and application of trade terms to disputed territories when comparing its practice here to that in WS, where the AA was applicable to the DT.[173]

Despite the efforts described above to facilitate the labelling products' origin, in practice products were still regularly marked as Israel when they were factually products from DTs, much like in *Brita*.[174] Here Brita, a company importing goods from an Israeli company from the West Bank, went before the German courts, who in turn referred the question to the CJEU, to question German authorities' withdrawal of preferential treatment of their goods in question as they were from the West Bank, and therefore excluded from the AA.[175] This was the first time the CJEU ruled on a mixed agreement concerning disputed territory in the Middle East, thereby making it a somewhat monumental case.[176] In 2010 the CJEU ruled that the EU-PLO AA's territorial scope excluded the territory from the EU-Israel AA.[177] The unilateral decision of the Court was said to reflect the practical trend and showed a discriminative approach that it would continue, both towards Israel and in its actions regarding trade and foreign relations.[178]

In ruling on the territoriality the principle of *pacta tertiis* was used almost exclusively as a method of interpretation as it was a relevant rule 'that may be relied on in [this] context (…), according to which treaties do not impose any obligations, or confer any rights'.[179] It uses the principle to conclude that 'Member State may refuse to grant the preferential treatment under the

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Authority of the West Bank and the Gaza Strip [1997] OJ L 187/3; Rachel Frid de Vries, 'Questioning the CJEU's Jurisdiction on Trade with Disputed Territories: Israeli and Public International Law Perspectives' (Forthcoming Special issue: The European Union's External Action: Views from the Outside), 5.

[164] Notice to Importers – Imports from Israel into the Community, OJ [2001] C328/04.

[165] Rules of Origin are 'economic nationality of products', they set out the criteria used to determine a country of origin, as given in Neve Gordon and Sharon Pardo, 'Bordering Disputed Territories: The European Union's Technical Customs Rules and Israel's Occupation' in Raffaella Del Sarto (ed) *Fragmented Borders, Interdependence and External Relations* (Palgrave Macmillan 2015) 86, 88.

[166] Gordon and Pardo (n 166), 86.

[167] ibid; Moshe Hirsch, 'Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip', (2002–2003) 26/3 Fordham International Law Journal 572; Joel Peters and Sharon Pardo, *Uneasy Neighbors: Israel and the European Union* (Lexington Books 2010).

[168] Gordon and Pardo (n 166); Guy Harpaz, 'Mind the Gap: Narrowing the Legitimacy Gap in EU-Israeli Relations' (2008) 31/1 European Foreign Affairs Review 117.

[169] Gordon and Pardo (n 166), 86; Lior Zemer and Sharon Pardo, 'The Qualified Zones in Transition: Navigating the Dynamics of the Euro-Israeli Customs Dispute' (2003) 8/1 European Foreign Affairs Review 51, 75.

[170] Frid de Vries (n 164), 5.

[171] Notice to Importers – Imports from Israel into the Community, OJ [2005] C20/02.

[172] Frid de Vries (n 164), 3.

[173] ibid.

[174] Kassoti (n 11), 28.

[175] Case C-386/08 *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECLI:EU:C:2010:91, paras 33-36.

[176] Frid de Vries (n 164), 6.

[177] *Brita* (n 176), paras 50-53.

[178] Frid de Vries (n 164), 9.

[179] *Brita* (n 176), para 44.

EC-Israel AA where the goods concerned originate in the West Bank',[180] since allowing Israeli custom authorities the power to issue certificates would be 'create an obligation for a third party without its consent, would thus be contrary to the principle of general international law, "pacta tertiis"'.[181] This means that 'products originating in the West Bank do not fall within the territorial scope of that agreement and do not therefore qualify for preferential treatment under that agreement'.[182]

This exclusive reliance on the principle is argued by scholars to be evidence of the formalistic approach of the Court, moving further away from its past internationalist approach, by its lack of regard to the international framework,[183] which would include for instance the right to self-determination and right to non-recognition.[184] This leads to the assumption that the Court's approach was once again largely aimed at avoiding these politically sensitive international questions.[185] Kassoti argued this strategy similarly 'undermines the normative power of European narrative' and is evidence of the EU's '"judicial recalcitrance" towards international law'.[186] In view of the CJEU, this interpretation and use of the principle of *pacta tertiis* the Court can contribute to the development of the concept of territoriality under CIL, and perhaps giving new meaning to it, like was argued in WS cases. It could therefore be seen as its way to contribute to shaping PIL.

In view of the previously discussed case-law similarities are found in the Court's narrow approach to international law. For instance, much like in *Anastasiou*, it also refrained from addressing the political issues at hand by not engaging with the relevant UN resolutions, but still ensuring uniform application of the relevant AA. Hereby it ensured conformity while intervening minimally with ongoing politics.[187] The judgment also resembles *Front Polisario* in its formalistic approach, it shows detachment from factual reality, given the detrimental effect the ruling could have on the DT's population, much like in *Brita* where the Palestinian population were disregarded.[188]

A major criticism was the Court's breach of its international obligation of non-recognition and non-assistance, as established by the UN Resolution 2334 mentioned above. The obligation entails that 'no economic relations can be maintained (…) that would contribute to the development of the settlements in the occupied territories', as determined by the ICJ in the Namibia Advisory Opinion,[189] and build on by scholars such as Crawford who argue that economic dealings can amount to breach of these principles.[190] Allowing import of settlement goods namely worked to the detriment of the Palestinian population and by maintaining the illegal situation the EU facilitated the Israeli settlements in the DT and cooperated in internationally wrongful acts such as breach of the principle of usufruct and right to permanent sovereignty over natural resources, as per Article 14, 16 and 41(2) of the Draft Articles on the Responsibility of International Organisations.[191]

Following the ruling the MSs lacked compliance with the obligation to refuse preferential treatment to occupied territories. In an attempt to emphasize the obligation, the EU issued the Commission's Resolution of 2012 and its Notice to Importers,[192] followed by reports in 2013 and

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[180] ibid, para 58.
[181] ibid, para 52.
[182] ibid, para 53.
[183] Kassoti (n 11), 25.
[184] Kassoti (n 39), 374.
[185] Guy Harpaz and Eyal Rubinson, 'The Interface between Trade, Law and Politics and the Erosion of Normative Power Europe: Comment on Brita' (2010) 35/4 European Law Review 551, 566.
[186] Kassoti (n 39), 374; Frederico Casolari, 'Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation', in Enzo Cannizzaro, Paolo Palchetti and Ramses Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2011), 395.
[187] Kassoti (n 11), 26.
[188] Frid de Vries (n 15), 522.
[189] Kassoti (n 11), 29.
[190] James Crawford, 'Legal Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories' (2012), <https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf> accessed 20 March 2021, page 35.
[191] Kassoti (n 11), 31 and 33; UNGA Res 3005 (1972), UN Doc A/RES/3005, para. 5; UNGA Res 32/161 (1977), UN Doc A/RES/32/161, para 7; UNGA Res 34/136 (1979), UN Doc A/RES/ 34/136, para 5; UNGA Res 35/110 (1980), UN Doc A/RES/35/110, para 5; UNGA Res 36/173 (1981), UN Doc A/RES/36/173, para 6.
[192] Notice to Importers – Imports from Israel into the Community, OJ [2012] C232/03.

2014 on Israeli settlements and human rights situations in the occupied territories respectively.[193] Lastly, a 2015 Notice was issued, to solve the issue of false certification, stating that these falsifications 'would mislead the consumer as to the true origin of the product'.[194]

In 2011, The Organisation Juive Européene and Psagot, a company specializing in exploitation of vineyards from the West Bank, questioned the legality of the Notice on indication of origin of goods originating in occupied territories,[195] before the French Court. The CJEU was then questioned on whether a mandatory indication of Israeli settlement on products from these settlements was required under EU law, in particular under Regulation 1169/2011.[196] The larger question here was whether, under EU consumer law, consumers have a right to know if imported products originate from occupied territory and if so, from an Israeli settlement.[197] In 2019, the CJEU determined that, in line with Articles 9(1)(i) and 26 (2)(a) of the Regulation, consumers must be informed with indication both of the territory as well 'Israeli settlement' as a place of provenance and indications are therefore mandatory.[198] The decision reasoned that the absence of this indication would be contrary to the Regulation's objective, which was to enable consumers to make informed choices based on health, economic, social and ethical considerations and would therefore mislead consumers.[199]

In its judgment the CJEU based its decision on rules of international law. Firstly, when discussing the relevant legislation, it includes the Commission's Interpretive Notice of 2015, which makes reference to EU's obligation to 'ensure the respect of Union positions and commitments in conformity with international law on the non-recognition (…) of Israel's sovereignty over the territories occupied'.[200] On the application of Article 9(1)(i) and 26 (2)(a) of the Regulation it states a country of origin must refer to territory, and by referencing the Western Sahara judgments it includes the geographic spaces, which have a separate and distinct status from that State under international law.[201] These territories are therefore subject to a limited jurisdiction of Israel, as an occupying power',[202] as 'the Palestinian people enjoy the right to self-determination'.[203] Using international law rules and principles the Court concluded that the Israeli labels would deceive customers, and therefore the 'indication of the territory of origin of foodstuffs (…) cannot be omitted'.[204]

The Court went on to examine whether the indication that products come from an 'Israeli settlement' located in the territory is sufficient as an indication of the place of provenance,[205] and found that this gave 'concrete expression to a policy of population transfer by [Israel] outside its territory in violation of the rules of general international humanitarian law'.[206] Using the EU's commitment to PIL under Article 3(5) TEU it ruled an omission of such indication would be misleading.[207] Similarly when studying the non-exhaustive list of considerations, it cited the relevance of international law in this context, as it comes from a settlement in breach of international humanitarian law and therefore influence people's purchasing decision due to ethical

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[193] UN Human Rights Council, 'Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural rights of the Palestinian People throughout the Occupied Palestinian Territory, including East Jerusalem' (7 February 2013) A/HRC/22/63, para 99; and UN Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967' (13 January 2014) A/HRC/25/67, para 46.

[194] Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967 C375/5 [2015], paras 7, 10.

[195] ibid.

[196] Case C-363/18 *Organisation juive européenne and Vignoble Psagot Ltd v Ministre de l'Économie et des Finances* [2019] ECLI:EU:C:2019:954.

[197] Sandra Hummelbrunner, 'Contextualisation of Psagot in Light of Other CJEU Case Law on Occupied Territories' (2019) 4/3 European Papers 779, 780.

[198] *Psagot* (n 197), para 58.

[199] ibid, paras 52-53.

[200] ibid, para 14.

[201] ibid, para 31.

[202] ibid, para 34.

[203] ibid, para 35.

[204] ibid, paras 36, 38.

[205] ibid, para 42.

[206] ibid, para 48.

[207] ibid, para 48, 51.

considerations.[208] This line of reasoning has been criticized for its lack of explanation to the link between ethical considerations and international law.[209] It was therefore quite surprising that despite its reliance on international law, and its emphasis on the EU's obligation of observation of international law under Article 3(5) TFEU, that the CJEU provides no further explanation or reference to the applicable international law principles,[210] and poorly substantiated its reasoning for using international humanitarian law to protect consumers.[211]

Much like in *Brita* the Court here was criticized for refraining from expressing its views on obligations arising from the international right to self-determination and the duty of non-recognition.[212] Instead the Court chose to address international law via a teleological interpretation of the labeling requirements under the Regulation. This is seen by some as a missed opportunity to strengthen the currently weak judgment.[213] The fact that the EU repeatedly emphasized the MSs' obligations of non-recognition in its 2015 Commission Notice simply adds to the confusion regarding the Court's reluctance to shed light on this duty and its effect on the illegality of imported settlement products.[214]

Given the many political considerations arising from disputed territories and self-determination,[215] another parallel can be found the CJEU's refusal to engage with the ongoing politically sensitive discussions in *Brita*, which some argue lead to an overall 'reductive and not well-substantiated' decision.[216] Its once again selective nature in discussing relevant international law rules lead to an arguably discriminatory trade policy towards the occupied territories.[217] Concerning political connotations Frid de Vries furthermore argued that this discriminatory treatment towards occupied territories could 'contribute to the negative connotations of a political bias in the EU's policy on trade with Israel',[218] unsurprising given the judgment's heavily political backdrop. Despite the missed chance to rule on the international law considerations for Israel, perhaps this judgment's implications will lead the EU to reexamine its trade policies towards disputed territories in the future.[219]

On the contrary some have also argued that here the CJEU was, for the first time, outspoken about the illegality of the Israeli settlement and occupation of the territories, something it has failed to do in the past.[220] Harpaz found the Court took the opportunity to rule on Israel's borders and Israel's population transfer and settlement practices, something not seen previously.[221] He recognizes the Court's reservation to address sensitive issues at hand by imposing its MSs with obligations.[222] Therefore the case is arguably quite *völkerrechtsfreundlich*,[223] or 'semi-*volkerrechtsfreundlich*' as held by Hummelbrunner.[224] This optimistic internationalist view was shared by Harpaz, who argued the Court answered the questions at hand in reference to international law.[225] This case is in line with the EU's history of selective use of international law however, given its cautious and apprehensive

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[208] ibid, para 56.
[209] Olia Kanevskaia, 'Misinterpreting Mislabelling: The Psagot Ruling' (2019) 4/3 European Papers 763, 764.
[210] ibid, 770.
[211] ibid, 772.
[212] Hummelbrunner (n 198), 783.
[213] ibid, 788.
[214] Eva Kassoti and Stefano Saluzzo, 'The CJEU's Judgment in Organisation juive européenne and Vignoble Psagot: Some Introductory Remarks' (2019) 4/3 European Papers 753, 760.
[215] Harpaz (n 48), 1598.
[216] Kanevskaia (n 210).
[217] ibid.
[218] Frid de Vries (n 164), 11.
[219] Kanevskaia (n 210), 776.
[220] Hummelbrunner (n 198), 788.
[221] Harpaz (n 48), 1600.
[222] ibid, 1601.
[223] Jan Klabbers, Völkerrechtsfreundlichkeit? International Law and the Union Legal Order' in Panos Koutrakos (ed), *European Foreign Policy* (Edward Elgar Publishing 2011), 95.
[224] Hummelbrunner (n 198), 784.
[225] Harpaz (n 48), 1593-4.

application of its principles and its lack of extensive engagement with its obligations under international law, thereby maintaining 'the autonomy of the EU legal order from international law'.[226]

The role of international law varies a great deal in these two cases at hand, arguably attributable to the time gap and the political escalation in that timeframe making the application and interpretation of PIL more complex. A change is visible however in the Court's engagement with the PIL rules, such as self-determination and non-recognition. *Brita* seemingly only focused on *pacta tertiis,* resulting in a narrow use of international law and using interpretation to circumvent the exact meaning of the rules. Therefore the Court, as opposed to simply applying international law, is seen to give its own meaning to it. In *Psagot* however this trend is not followed; it acknowledges the relevant PIL rules and their application to the territory. Despite the political context of the rulings the Court was able to give special interpretation to certain concepts such as that of territoriality and contributed to its development under CIL. In *Psagot* the Court mostly concerns itself with the correct application of international law and provides no real special meaning to it. The evolving political scene could very well offer an explanation for this trend towards an internationalist approach.

V. CONCLUSION

The aim of this article was to assess the use of international law arguments in dealing with international agreements with third countries concerning disputed territories. The three case studies revealed insights into how the Court contemplated, used and interpreted international law, as summarised in the table at the end of this section.

Given the very specific nature of this question, all the evidence collected and all the arguments made are framed specifically towards finding PIL's contribution to CJEU case-law concerning international agreements pertaining to disputed territories. One of the main conclusions when looking at all the jurisprudence, is the Court's selective approach to international law. It has shown its ability to include relevant international principles in multiple cases. One example of such a principle is the heavy reliance on *pacta tertiis* in *Brita*. This reliance is arguably its method for interpreting the relevant PIL, as this exclusive reliance was part of a more formalistic approach. It served to refrain from engaging with political questions at hand, unfortunately to the detriment of the population. In the judgments concerning the territory of WS, reference to international law was more widely used than in other cases, in particular Articles 31 and 34 VCLT. This could be seen as the Court's use of these customary rules to exclude WS from territory, [227] something the Court has been known to do. The selective nature is also visible here in its avoidance of the relevant principle of self-determination and violating its obligation to prevent an unlawful situation resulting from the breach of obligation of non-recognition.[228] Hummelbrunner, when examining the *Psagot* judgment ironically pointed out the case's consistency with the CJEU's previous judgments on DT in its avoidance of engaging with their international law duties.[229] This therefore shares that view that the CJEU 'instrumentalizes' international law in its judgments, a criticism that was found also in its case law on Western Sahara.

It is unsurprising that one of the frequently recurring comments by scholars in the cases at hand is the CJEU's ignorance of a broader international legal framework. Odermatt argued that in both the cases of *Anastasiou* and *Brita*, who issued similar rulings stating the preferential treatments enshrined of the agreements did not apply to the DTs, a broader question of contested sovereignty was at play.[230] Instead the CJEU focused on protecting the EU's integrity and adopted a more flexible and innovative treatment of the international law principles at hand. In the Western Sahara cases, where the Court was found to adopt a different approach, Odermatt finds that by excluding the DT entirely from the agreement it managed to 'keep the economic agreements intact while appearing to maintain the EU's commitment to international law'.[231] He therefore concludes that the latter approach,

[226] Kanevskaia (n 210), 777.
[227] Kanevskaia (n 210), 767.
[228] Harpaz (n 48), 1600.
[229] Hummelbrunner (n 198).
[230] Odermatt (n 146), 761.
[231] ibid, 761.

although still widely criticized for its lack of extensive engagement with the legal questions at hand, can more easily help assure respect of international law in the EU's future agreements with Morocco and provide WS with sovereignty and power over its territory, as per the right of self-determination.[232]

The different approaches taken in WS and Israel and Northern Cyprus contribute to the image of the EU as an inconsistent applier of international law and weakens its self-proclaimed normative portrayal of its ability to consistently promote its values.[233] Examining these arguments in the view of the EU being *Völkerrechtsfreundlich* thereby also raises its questions. This concept is still widely discussed when examining the case law at hand however the opinions on how the EU complies with it vary. When examining the development of the relationship a shift was detectable towards a more EU centric attitude, as the Court was found to take steps to avoid addressing its obligations under PIL and emphasize its autonomy. Seen as earlier case-law seemed to attach more significance to the observance of PIL, a trend is visible as the current case-law has a more restrictive and selective approach,[234] the Court therefore has considerable influence on their relationship. A case could also be made for the case-law above showing a more internationalist approach as well, seen as the Court takes into account sources and instruments of international law to which it is not legally bound; such as the Vienna Convention on the Law of Treaties.

The EU's reasoning in the cases of Palestine and WS are viewed by Kassoti as being 'slender and incomplete from an international law point of view'.[235] Expanding on this view she once held that the Court in its WS judgments shed its image as an international law supporter, due to its selective use of its rules.[236] In *Anastasiou* the Court completely left out all mention of international law principles. Despite Tani's argument that the judgments were in line with the 'political-sovereign' approach, the consensus in literature seems to be that the Court failed to engage with the broader international law framework. The literature particularly criticized its lack of reference to the obligation of non-recognition, a criticism present also in *Front Polisario*, *Brita* and *Psagot*.

The main reasoning provided for this was the CJEU's attempt to avoid political uproar, a criticism given in all the cases discussed, shared by many scholars including Kanevskaia, Kassoti, Harpaz and Rubinson. This is quite understandable since the cases at hand are politically sensitive just from the fact that they concern disputed territories, who by definition carry political debates. The EU's prevention of its own political suicide led the CJEU to make certain interpretations and applications of international law. This selective approach can follow through to its internal incoherence as even the most politically daring decisions lacked follow-through to other EU institutions and instruments, as was seen in the Western Sahara cases.[237] There is therefore a big correlation between the way these two criticisms come into play. In its later case-law the Court was seen to engage more with international law, although very cautiously. This was viewed by some as potentially worse, as it shows the Court's willingness to use international law, however stretching interpretation to a breaking point 'to avoid pronouncing on the politically sensitive questions'.[238] When the EU is faced with these addressing these questions it has widely been seen to eschew political considerations, therefore a common approach to international law and trade practices with DTs is lacking.[239] A certain shift was evident in *Psagot* ruling however, where it for the first time referred to the territory at hand as occupied, something it refrained from in all its prior rulings.[240] By engaging with contentious political issues Harpaz found that the approach of the Court earlier case-law could be contrasted to *Psagot*.[241] The CJEU finally took the opportunity for political engagement, as careful as it might have been. Whether this sets a precedent for other cases that may arise concerning conflicts with DT in international agreements will have to be awaited.

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[232] ibid.
[233] Kassoti (n 11), 56.
[234] Kanevskaia (n 210), 766.
[235] Kassoti (n 11), 55.
[236] Kassoti (n 107), 23.
[237] Mensi (n 138), 562.
[238] Kassoti (n 39).
[239] Kanevskaia (n 41).
[240] Kassoti and Saluzzo (n 215), 759.
[241] Harpaz (n 48), 1600.

The stretching of interpretation by the Court mentioned above is seen as the CJEU's attempt to balance its PIL obligations and political considerations, Kassoti argues therefore that there is evidence instead of an approach focused more on interpreting international law in a manner reconcilable with the EU's legal system.[242] This argument ties in with the deeper layer of analysis conducted here on the Court's use of interpretation of PIL to give its own meaning and indirectly shape international law. Namely, another reading of the Court's selective approach, its 'instrumentalization', as well as the trend towards a more sovereigntist approach, could be to focus on the Court's use of interpretation of the rules to give its own meaning to these principles, as opposed to simply applying the existing rules. It has been known to contribute to the development of international law, case-law being a large part of this contribution. Therefore, there may very well be some logic in viewing this practice as the Court's unique interpretation of relevant rules of international law, perhaps to continue its trend towards a 'self-contained, self-referential and self-sufficient' legal order.[243] It therefore ultimately also influences the relationship between the two legal orders. Throughout the case law the Court has been seen to consider relevant principles but was criticized for its selectivity. However, this selectivity is potentially the Court's strategy for 'Europeanising' these concepts and giving new special, European, meaning to them. This was viewed in the above case-law mainly for principles of customary law such as territoriality, subsequent practice and also legal personality.

The analysis in this paper underlines that the political nature of the disputed territories play an indisputable role, both in the PIL rules applicable and the Court's active, or minimal, engagement with these. Not one clear distinction can be made in the Court's overall approach, unfortunately the only consistency found by the Court is in its unpredictability. It is interesting to view however how the Court has interacted with these rules to circumvent political connotations, respect its international law obligations and most noteworthy, to in some instances use interpretation to give new meaning.

Case law	References to international law	Application of international law
Anastasiou I	Comparison made to Namibia Advisory Opinion and a potential exception of international principle of non-recognition in this case (para 35 and 49).	Not accepted by the Court, ruled the situations are not comparable therefore the exception is not relevant.
	Authorities in Northern Cyprus are not recognized, implicit reference to international principle of non-recognition (para 40).	No further explanation on the principle of non-recognition or its obligation(s) under international law.
Anastasiou II	Certificate cannot be accepted if from entity that is not recognized, implicit reference to the international principle of non-recognition (para 24).	No further explanation on the principle of non-recognition or its obligation(s) under international law.
Anastasiou III	Reference to *Anastasiou I* para 40 listed above to reiterate non-recognition of the TRNC (para 28).	Not further expanded on the principle of non-recognition or its obligation(s) under international law.
Front Polisario v Council	Principle of self-determination and permanent sovereignty over natural resources: mentioned only to outline FP's arguments.	No further explanation or engagement with the principles in the judgment.

[242] Kassoti (n 39), 389.

[243] Christina Eckes, 'The autonomy of the EU legal order' (2020) 4/1 Europe and the World: A law review < https://www.scienceopen.com/document/read?vid=b3856b34-6219-4068-a12f-d6de0bdf00a5> accessed 14 April 2021, 3.

	International legal personality: used to assess FP's standing in this case.	Proper use and interpretation of international law rules.
	General rule of interpretation Art 31 VCLT: used to take into account the context of the international agreement to include Western Sahara to the territory of the Agreement.	Proper use and interpretation of international law rules.
	Article 3(5) TEU on EU obligation to respect international law: mentioned in FP's argument of infringement of international law, dismissed by the Court.	No further explanation on its potential application or use.
Council v Front Polisario	General rule of interpretation Art 31 VCLT used to include self-determination and *pacta tertiis*: Self-determination applied to exclude Western Sahara from the Agreement, as in accordance with Art 29 VCLT on territorial scope of agreements. *Pacta tertiis* used to affirm this decision.	No further explanation as to the principles used.
	Principle of subsequent practice: used to affirm the exclusion of Western Sahara from the Agreements.	No further explanation to the application of the principle.
Western Sahara Campaign UK	Affirms jurisdiction to assess EU instruments on its compatibility with international law.	In line with its previous caselaw.
	Principle of self-determination and principle of *pacta tertiis*: used to exclude Western Sahara from territory of Agreement, as inclusion would be a violation of these two principles.	No further explanation to the application or the implications of the principles.
Brita	Principle of *pacta tertiis*: used to interpret the AA, Court finds it cannot create obligation on MSs to accept certificates. Therefore, West Bank certificates do not fall within AA and do not qualify for preferential treatment.	The principle of *pacta tertiis* applied properly. Court criticized for limited use of international law rules.
Psagot	Obligation of non-recognition: used to affirm Israel's lack of sovereignty over the territory.	No further explanation on the principle of non-recognition or its implications.
	General international humanitarian law and self-determination: used to rule that Israel has limited jurisdiction and therefore labelling as Israel would mislead consumers.	No further explanation on the principle of self-determination or its implications.
	General international humanitarian law and Article 3(5) TEU on EU obligation to respect international law: used to emphasize EU's obligation to observe international law, and omission of labelling of Israeli settlement would mislead consumers.	Good representation of EU's respect and commitment to international law.