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

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Submission date: 20 July 2018; Acceptance date: 4 June 2019; Publication date: 26 June 2019

Peer review:
This article has been peer reviewed through the journal’s standard double blind peer-review, where both the reviewers and authors are anonymised during review.

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Open access:
Europe and the World: A law review is a peer-reviewed open access journal.

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

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3A Marx, B Natens, D Geraets and J Wouters, ‘Global Governance through Trade: An Introduction’ in Wouters, Marx, Geraets and Natens (n 2) 1, 4.
5Case 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.
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. 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’.

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.

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. By virtue of this principle, peoples are to ‘freely determine their political status’ and to ‘freely pursue their economic, social and cultural development’. 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. 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. 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.

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

its disrespect for the right to self-determination amounted to a breach of the mandatory agreement.\textsuperscript{15} That breach enabled the UN General Assembly to unilaterally revoke the mandate, thus terminating South Africa’s right to govern the territory.\textsuperscript{16} Another instance where the denial of the right to self-determination affected the legality of a territorial situation was Southern Rhodesia.\textsuperscript{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’.\textsuperscript{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’.\textsuperscript{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’.\textsuperscript{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’\textsuperscript{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’.\textsuperscript{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.\textsuperscript{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.\textsuperscript{24} Thus, as long as Israel and Morocco maintain their annexation of the territories in question (by means of settlements or otherwise),\textsuperscript{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 \textit{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.\textsuperscript{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.

\textsuperscript{16}\textit{Ibid, 45–50.}
\textsuperscript{17}\textit{See generally, V Gowlland-Debbas, \textit{Collective Responses to Illegal Acts in International Law} (Martinus Nijhoff 1990) 423–86.}
\textsuperscript{18}\textit{UNGA Res 2022 (XX) of 5 November 1965, UN Doc A/RES/2022 (XX).}
\textsuperscript{19}\textit{UNSC Res 216 of 12 November 1965, UN Doc S/RES/216.}
\textsuperscript{20}\textit{UNSC Res 277 of 18 March 1970, UN Doc S/RES/277.}
\textsuperscript{21}\textit{UNGA Res 2946 (XXVII) of 7 December 1972, UN Doc A/RES/2946 (XXVII).}
\textsuperscript{22}\textit{Milano (n 7) 123.}
\textsuperscript{23}\textit{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.}
\textsuperscript{24}\textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (n 23) paras 115–22.}
\textsuperscript{26}\textit{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. In the literature, non-recognition is considered as a precondition for an international legal order to exist. 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’. 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’. 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, 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. 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 fulfill 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.

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’. In the Namibia case, 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.

The ICJ reaffirmed the duty of non-recognition in its Wall Advisory Opinion. 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’. 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

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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.  
34 Ibid, 114, para 5.  
36 Ibid, paras 122, 124.  
37 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (n 23) para 159.  
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 country’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.

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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 Rynagert 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.
46 Ibid.
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 valid50 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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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.


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).


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

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\(^{60}\)Ibid, para 33.

\(^{61}\)Ibid, paras 35–6.

\(^{62}\)Opinion of Advocate General Bot (n 57) paras 109–12.


\(^{64}\)Case C-386/08 (n 57) paras 50–3.

\(^{65}\)Ibid, para 52.

\(^{66}\)Harpaz and Rubinson (n 63) 565–6.


\(^{68}\)Ibid and Rubinson (n 63) 566.


\(^{70}\)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. 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. 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.

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. Furthermore, the Commission has included 140 Moroccan exporters located in Western Sahara in the list of approved exporters under the Association Agreement. 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’. 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. Thus, it is safe to assume that, under these Agreements, ‘Saharan territory was included sub silentio’.

The question of Western Sahara gained considerable attention in the negotiations over the 2006 EU-Morocco Fisheries Partnership Agreement (FPA) and the 2013 EU-Morocco Fisheries Protocol. 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. In exchange, the EU paid Morocco a financial contribution of 144.4 million euros for the relevant period. The FPA’s reference to ‘waters falling within the sovereignty or jurisdiction of Morocco’ has been widely interpreted as including the waters off the coast of Western Sahara. This interpretation is reinforced by the fact that the 2006 FPA replaced earlier fisheries agreements which...
were similar in geographical scope and under which EU vessels were authorised by Morocco to operate in Western Sahara waters.\(^\text{86}\) 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,\(^\text{87}\) 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.\(^\text{88}\) Upon its expiry, the FPA was not automatically renewed – partly because of doubts regarding its compatibility with international law.\(^\text{89}\)

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’\(^\text{90}\) and, according to its provisions, the EU, again, pays a financial contribution to Morocco for access to its waters\(^\text{91}\) – including the waters off the coast of Western Sahara. The Commission has clarified that ‘the Western Sahara waters are included in the new Protocol’.\(^\text{92}\) 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.\(^\text{93}\) Finland, the Netherlands and the UK abstained from voting, citing similar concerns.\(^\text{94}\)

Despite some initial hesitation, the Parliament approved the new Protocol in 2013, acting on the advice of its legal service.\(^\text{95}\) 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.\(^\text{96}\) 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.\(^\text{97}\) The Opinion rendered by the Parliament’s legal service was largely based on a 2002 Opinion issued by the European Commission to Oral Question H-0079/09 (12 March 2009) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+PLIER+20090312+ANN-01+DOC+XML+V0/EN#top> accessed 24 January 2019. See also 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.

992013 Fisheries Protocol (n 81) art 3.
102Statements 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.
103Kontorovich (n 47) 606.
1042013 Legal Opinion (n 88) para 17.
105Ibid, 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

98 Ibid.
100 Ibid, para 1.
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, 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.
104 Chapaux (n 85) 223.
105 Arts 73 and 74 of the UN Charter. Chapaux (n 85) 222.
107 Corell Opinion (n 99) paras 7–8.

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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. 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’. 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. 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. 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), 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’. 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 sunt servanda*). 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. According to Odermatt, the judgment is an example of the Court ‘instrumentalizing’ international law. First, the
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.\textsuperscript{119} This not only shows the Court’s unfamiliarity with the operation of Article 31 VCLT,\textsuperscript{120} but it is also hardly reconcilable with the aim of treaty interpretation in general.\textsuperscript{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\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{125} The ICJ dealt with the question of sovereignty over non-self-governing territories in the \textit{Right of Passage} case and it clearly accepted that the administering power retained sovereignty over the territory in question.\textsuperscript{126} Furthermore, in its Advisory Opinion on \textit{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’.\textsuperscript{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.\textsuperscript{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.\textsuperscript{129}

\textsuperscript{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.
\textsuperscript{123}Crawford (n 43) 618–19.
\textsuperscript{124}Ibid, 613. 
\textsuperscript{126}\textit{Case concerning Right of Passage over Indian Territory} (Portugal v India) [1960] ICJ Rep 6, 39.
\textsuperscript{127}\textit{Western Sahara} (n 12) para 43.
\textsuperscript{128}Draft Articles on the Law of Treaties with commentaries (n 119) 213–14, para 5.
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’ seems unsubstantiated.

The Court’s interpretation and application of the *pacta tertii* principle is also noteworthy. Here, the Court considered the peoples of Western Sahara as a ‘third party’, thereby extending the *pacta tertii* rule to non-State actors, as it had done before in *Brira*. However, there are grounds to question the applicability of the principle to non-self-governing territories. The *pacta tertii* rule expresses ‘the fundamental principle that a treaty applies only between the parties to it’; and thus, treaties to which a State is not a party are generally considered as *res inter alias acta* — a matter between others. The *raison d’être* of the principle is to ensure that States should not be bound against their will, something that would run counter to two core tenets of international law, namely sovereignty and sovereign equality. Thus, in international law, the principle is viewed as ‘a corollary of the principles of sovereignty, equality and independence of States’. 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. State practice also supports the proposition that there are exceptions to the *pacta tertii* 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.

In this light, the Court’s unqualified assertion that the *pacta tertii* rule applies in *casu* seems to rest on thin evidentiary grounds.

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. 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. 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’. Treaty terms are given meaning by action and thus, the subsequent practice of the parties is the best evidence of their intention. International adjudicatory bodies routinely have recourse to the subsequent practice of the parties in interpreting treaty terms.

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
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 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, 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. 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.

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. The Decision in question purports to expressly extend the territorial scope of the EU-Morocco Association Agreement to Western Sahara. 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’. 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

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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 sahauel-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.
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. 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. For his part, the Advocate General, having ascertained that the agreements at
bar cover Western Sahara, 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.

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. 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. In a similar vein to *Front Polisario*, the Court’s approach to treaty
interpretation in this case is open to criticism. 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.

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. Here, the Court relied
exclusively on Articles 55 and 56 UNCLOS 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.
156 Case C-266/16 (n 152) para 85.
157 Ibid, paras 57–85.
159 Odermatt (n 117) 737–8.
160 Case C-266/16 (n 152) paras 65–73.
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 – severely undermines the outcome of its interpretative process.

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. 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] . . . ’.

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 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.’

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. At the very minimum, this line of case-law should raise a few eyebrows as to

162 Opinion of Advocate General Wathelet (n 153) para 144.
165 Ibid, 2.
166 Crawford (n 27) para 131.
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.