Unrecognized Entities

Perspectives in International, European and Constitutional Law

Edited by

Benedikt C. Harzl and Roman Petrov

Managing Editor

Aistė Mickonytė
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1 Introduction

The European Union (EU) has concluded a number of international agreements with entities that are not recognized as sovereign states. Reference can be made to the Agreement for trade and cooperation with Macau, the Euro-Mediterranean Interim Association Agreement on trade and cooperation with the Palestine Liberalization Organization (PLO) or the agreement with the Government of the Hong Kong Special Administrative Region of the People’s Republic of China on the readmission of persons residing without authorization. The most recent example is the Stabilization and Association Agreement with Kosovo, which explicitly mentions that it does not imply recognition of Kosovo as an independent State by the EU or by the Member States which have not yet taken such a step.

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1 It is noteworthy that in the Psagot judgment, the Grand Chamber of the European Court of Justice defined the notion of a ‘State’ as “a sovereign entity exercising, within its geographical boundaries, the full range of powers recognized by international law.” In the same judgment, it defined the term ‘territories’ as “geographic spaces which, whilst being under the jurisdiction or the international responsibility of a State, nevertheless have a separate or distinct status from that State under international law.” See: ECJ, Case C-363/18, Organisation juive européenne, Vignoble Psagot v. Ministre de l’économie et de finance, EU:C:2019:954, paras. 29–31.


3 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 Palestine Authority of the West Bank and the Gaza Strip, of the other part, OJ (1997) L 187/3.


5 Art. 2 of the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo*, of the other part, OJ (2016) L 71/3. For comments, see: Peter Van Elsuwege, “Legal Creativity in EU External
As clarified in the Commission’s feasibility study, which was published before the start of negotiations with Kosovo, the Union’s capacity to conclude international agreements is not limited to generally recognized independent states. The only crucial prerequisite is that the political and judicial authorities of the third party are capable of ensuring that the terms of the agreement are respected, applied, and implemented. This view was also upheld by the General Court in response to an action brought by Spain against the participation of Kosovo as a ‘third country’ in the Body of European Regulators for Electronic Communications (BEREC). Proceeding from the distinction between ‘countries’ and ‘states’, the General Court explicitly determined that:

The European Union may conclude international agreements with territorial entities, covered by the flexible concept of ‘country’, which have the capacity to conclude treaties under international law but which are not necessarily ‘States’ for the purposes of international law.

In other words, the capacity to ensure full application and implementation of legally binding commitments is a crucial consideration in the EU’s treaty-making practice and is to be distinguished from formal recognition of statehood. This approach not only opened the door to the conclusion of agreements with non-recognized entities but also significantly affects the scope of application of agreements with countries that do not have full control over their territory. For instance, the Association Agreements (AAS) with Moldova and Georgia include a specific territorial application clause indicating that the agreements do not apply in relation to those areas over which the government does not exercise effective control. A decision by the Association Council can extend the scope of application, as happened in relation to Transnistria as far as concerns application of the trade part of the Association Agreement between the EU and Moldova. The Association Agreement with Ukraine is a special case in the sense that the Russian annexation of Crimea and the events in Donetsk

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7 General Court, Case T-370/19, Spain v Commission, EU:T:2020:440, para. 30. An appeal case before the Court of Justice was still pending at the moment of writing; see Case C-632/20 P, Spain v Commission.
8 Art. 462 EU–Moldova AA and Art. 426 EU-Georgia AA.
and Luhansk only happened after the initialing of the agreement. This explains why, in contrast to the AAs with Moldova and Georgia, the territorial application clause of the EU-Ukraine AA provides no specifications as to the areas over which the government does not exercise effective control. However, this issue has been addressed in the Final Act regarding signing the agreement.\textsuperscript{10} Other, mostly older, agreements simply remain silent about the status of non-recognized territories, leading to significant questions in practice and sometimes also legal disputes about their precise territorial scope of application. In this respect, reference can be made to the Euro-Mediterranean Association Agreements (EMAs) with Morocco and Israel, which simply ignored the disputed or occupied territories in both countries (Western Sahara and Palestine).

The aim of this contribution is to analyze the EU’s approach towards non-recognized territories. This is not an easy exercise taking into account the divergent historical, political and legal background of the various disputed territories. For instance, there is a clear difference in the EU’s relations with its eastern and southern neighborhood as far the principle of self-determination is concerned. Both with respect to Palestine and the Western Sahara, the EU explicitly recognized the application of the people’s right to self-determination, as derived from relevant opinions of the International Court of Justice (ICJ).\textsuperscript{11} At the same time, there is also a significant difference between both situations in the sense that the EU never established any formal relations with the Polisario Front, as the representative of the Sahrawi people,\textsuperscript{12} nor with the Sahrawi Arab Democratic Republic (SADR), which was proclaimed by the Polisario Front in February 1976, whereas it has concluded an Interim Association Agreement on Trade and Cooperation with the PLO.\textsuperscript{13} In the eastern neighborhood, the implications of the principle of self-determination are of a totally different nature. Even though the so-called ‘breakaway’ regions in

\begin{footnotesize}
\begin{enumerate}
\item It is noteworthy that the UN General Assembly recognized the Polisario Front as the representative of the people of Western Sahara in November 1979. See: <http://www.un.org/documents/ga/res/34/a34res37.pdf> (last access 15 May 2018).
\item For text, see OJ (1997) L 187.
\end{enumerate}
\end{footnotesize}
several former Soviet republics invoke the right to self-determination as a justification for their actions, this claim has not been accepted at the international level. In this context, the official position of the EU is that the territorial integrity of the respective countries is to be respected even though they do not exercise effective control over their breakaway regions.

Despite these obvious differences in the EU's relations vis-à-vis non-recognized territories, the common challenge concerns determination of the territorial scope of application of international agreements concluded on behalf of the EU (and its Member States in the case of mixed agreements). Without entering into a comprehensive analysis of the EU’s treaty-making practice, this contribution will focus on the relevant case law of the Court of Justice of the EU (CJEU) with respect to three particular case studies (the Northern Republic of Turkish Cyprus; the Palestine territories, and the Western Sahara) in order to draw conclusions regarding its implications for issues such as the principle of self-determination, application of preferential trade regimes, and labelling of products in the EU’s relations with non-recognized territories.

2 The Turkish Republic of Northern Cyprus: Non-recognition and the Requirement of 'Effective Control'

One of the oldest but still most relevant references concerning the EU’s approach towards non-state territories is the Anastasiou judgment of 1994. The key legal question concerned the possible recognition of certificates issued by the authorities of the Turkish Republic of Northern Cyprus (TRNC), which is only recognized by Turkey, for the import of goods in EU Member States. Whereas the UK and the European Commission suggested the de facto

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15 A case in point is UN General Assembly Resolution 68/262 on the territorial integrity of Ukraine. Despite explicit calls by the Russian Representative to the UN, Vitaly Churkin, to regard the Crimean referendum of 16 March 2014 as an expression of the right of self-determination, a large majority of 100 states rejected this view. UN General Assembly, Territorial Integrity of Ukraine, 27 March 2014, A/Res/68/262.


17 ECJ, Case C-432/92, The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others, EU:C:1994:277.
acceptance of certificates issued by the authorities of the TRNC, the European Court of Justice (ECJ) firmly rejected this option. In particular, the Court stressed that the acceptance of import certificates requires "total confidence in the system of checking the origin of products as implemented by the competent authorities of the exporting State." Such confidence obviously did not exist in relation to the authorities of the TRNC, which were not recognized by the European Community or its Member States. Moreover, the Court stressed that the Community could not interfere in the internal affairs of Cyprus and "the problems resulting from the de facto partition of the island must be resolved exclusively by the Republic of Cyprus, which alone is internationally recognized." 

Hence, the Anastasiou I judgment has important implications for the EU’s approach towards non-recognized territories. As long as there are no guarantees that verification, consultation and settlement of disputes in respect of the origin of products or the existence of fraud can be carried out with the cooperation of the authorities of non-recognized entities, the latter cannot benefit from preferential trade regimes. It follows that not so much the existence of formal recognition but rather the possibility of effective cooperation based upon mutual confidence in the established control mechanisms is the crucial criterion to decide whether or not the EU’s preferential trade regimes apply. Of course, there is a close connection between the two in the sense that non-recognition complicates the establishment of effective cooperation mechanisms. However, as can be derived from the example of Kosovo or the EU’s trade relations with Taiwan, granting trade preferences and applying rules of origin is possible without formal recognition. This is in line with the general principles of international law, which do not preclude administrative cooperation with officials of an unrecognized state.

The Anastasiou I judgment is highly relevant for the EU’s approach towards the frozen conflicts in the post-Soviet space. In particular, it explains why the breakaway regions in Ukraine, Moldova and Georgia cannot, in principle, benefit from the preferential trade regime under the Deep and Comprehensive Free Trade Areas (DCFTA s), which are established on the basis of the AAs with these countries. The main reason is not related to the unrecognized status of these territories but rather to lack of effective control in order to ensure full

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18 Ibid., para. 38.
19 Ibid., para. 47.
20 See: Protocol iii to the EU-Kosovo SAA, op.cit. note 5.
implementation and enforcement of mutual commitments. On condition that such guarantees can be offered, non-recognized territories may also benefit from preferential trade rules. The clear example is the case of Transnistria, which is covered under the DCFTA established between the EU and Moldova as a result of Decision 1/15 of the EU-Moldova Association Council.22

The principles derived from the Anastasiou I judgment have far-reaching economic and political consequences in the sense that they significantly complicate the direct import of products originating from non-recognized territories in the EU internal market. In relation to the TRNC, Stefan Talmon even compared the Court’s ruling to the introduction of economic sanctions.23 Therefore, it is not surprising that the question of indirect imports from the TRNC also reached the Court in Luxemburg. In Anastasiou II, the legality of importing citrus fruit from the TRNC via Turkey, and with Turkish certificates, was involved. In particular, the question concerned the compatibility of this practice with the Plant Health Directive and the requirements to satisfy the necessary phytosanitary standards. The ECJ did not exclude the option of indirect imports from the TRNC as long as proper checks can be completed in the country from where the products were exported to the Community (in this case Turkey) and as far as the products were not subject to special requirements that can be satisfied only in their place of origin.24 However, the Court adopted a more stringent approach in its Anastasiou III ruling, after the referring (British) court more explicitly inquired about the requirement under the Plant Health Directive that the packing of imported products must bear an appropriate origin mark. Proceeding from the objective of the directive to ensure a high level of phytosanitary protection, the Court concluded that “the special requirement that an appropriate origin mark be affixed to the plants’ packaging […] can be fulfilled only in the country of origin of the plants concerned.”25

The Anastasiou saga thus reveals the most significant challenges concerning the EU’s approach towards non-state territories. This involves defining the


23 Talmon, op.cit. note 21, 727.

24 ECJ, Case C-219/98, Regina v Minister of Culture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd. and Others, EU:C:2000:360, para. 36.

25 ECJ, Case C-140/02, Regina v Minister of Culture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd. and Others, EU:C:2003:520, para. 75.
precise scope of application of international agreements, which frequently relates to applying a preferential trade regime, and the concomitant issue of determining the origin of products. In addition, the question of adequate labelling and the fulfilment of procedural requirements to ensure the origin of products largely defines the EU’s trade relations with non-recognized territories. It follows from the Anastasiou cases that the ECJ adopts an essentially utilitarian approach to these questions, which focuses on the requirement of effective control in order to ensure compliance with the standards defined under EU law. Arguably, this preoccupation also explains why Protocol No 10 to the Act of Accession of the Republic of Cyprus to the EU provides for suspension of the acquis with respect to those areas where the government of the Republic does not exercise effective control.²⁶ Since its accession on 1 May, 2004, special rules apply with respect to the crossing of goods, services and persons between the Republic of Cyprus and the TRNC as defined in the so-called ‘Green line Regulation’.²⁷ Significantly, suspension of the acquis in the northern part of Cyprus does not affect recognition and enforcement of judgments rendered by a court in the territory under governmental control, even if it concerns land situated in the TRNC.²⁸

3 The Palestine Territories: The Interaction between International Law and EU Law

The EU has never recognized Israel’s sovereignty over the territories it has occupied since June 1967, namely the Golan Heights, Eastern Jerusalem, the West Bank, and the Gaza Strip, nor does the EU consider them to be part of Israel’s territory. However, this position was not explicitly reflected in the 1995 Association Agreement (AA), which in its territorial application clause (Article 83) only refers to “the territory of the State of Israel”

²⁶ Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded – Protocol No 10 on Cyprus, OJ (2003) L 236/955.
without further specification. As a result, both the EU and Israel held completely different views on the interpretation of Article 83 as far as concerns application of the agreement to the occupied territories.\textsuperscript{29} Whereas this approach conveniently allowed the development of EU-Israel relations to proceed notwithstanding fundamentally divergent views on the issue of Palestinian self-determination, the limits of this approach became obvious in the discussion surrounding export to the EU of goods produced in the Israeli settlements. As long ago as 1997, the European Commission informed the Israeli authorities that treating goods manufactured in the occupied territories as “goods made in Israel” violated the Protocol on Rules of Origin attached to the EU-Israel Interim Agreement.\textsuperscript{30} Moreover, the Commission adopted several notices informing importers and economic operators about this position.\textsuperscript{31}

Despite the adoption of a technical arrangement between the EU and Israel in 2004, implying that Israel would specify the geographic location of products in the certificate of origin, the dispute reached the ECJ after a German importer (Brita GmbH) challenged customs duties imposed on imports of drink makers for sparkling water manufactured in an Israeli settlement in the West Bank. The crucial legal question was whether these goods could benefit from preferential treatment on the basis of the EU-Israel Agreement. In its judgment, the ECJ interpreted Article 83 of the EU-Israel Agreement in light of the rules of public international law and, more precisely, the Vienna Convention on the Law of Treaties (VCLT) between states of 1969. Apart from the general rules on interpretation of treaties, laid down in Article 31 VCLT, the principle of \textit{pacta tertia nec nocent nec prosunt}, enshrined in Article 34 VCLT, played a crucial role in the Court’s reasoning. The latter implies that a treaty cannot impose obligations or confer rights on a third State without its consent. Taking into account that the European Communities concluded two agreements, one with Israel and one with the PLO, pursuing identical objectives, the Court derived from the \textit{pacta tertia} rule that the Israeli customs authorities have no competence...
in relation to products originating in the West Bank.\textsuperscript{32} In other words, products originating in the occupied territories do not fall within the territorial scope of the EU-Israel AA.

Whereas most commentators agree that the outcome of the judgment is logical\textsuperscript{33} the Court has been criticized for adopting a rather selective approach to the application of public international law.\textsuperscript{34} By focusing exclusively on the \textit{pacta tertiis} rule, while ignoring relevant UN resolutions pertaining to Israel’s borders\textsuperscript{35} and the advisory opinion of the ICJ, the Court of Justice avoided more contentious but nevertheless crucial issues such as the right to self-determination of the Palestinian people and its legal implications for the EU.

In the wake of its \textit{Brita} judgment, in November 2015 the European Commission adopted a new interpretative notice on the indication of goods from occupied territories confirming the position that such goods cannot be labelled as “products from Israel”, irrespective of their legal status under domestic Israeli law. The notice essentially aimed to bring clarity for consumers, economic operators, and national authorities about the EU (consumer) law requirements on information about the origin of products and to ensure respect for the EU’s policy of non-recognition of Israel’s sovereignty over the occupied territories.\textsuperscript{36} On this basis, the French Minister for the Economy and Finance adopted a ministerial notice in November 2016, indicating that the labelling of food products from the Golan Heights and the West Bank, including East Jerusalem, must accurately indicate the exact origin of the products. This implies that the term “Israeli settlement” or equivalent terms must be added to the label, in addition to the reference “product originating in the Golan Heights

\textsuperscript{32} ECJ, Case C-386/08 \textit{Brita GmbH v Hauptszollamt Hamburg-Hafen}, EU:C:2010:91, paras. 45–52.


\textsuperscript{35} In contrast to the opinion of Advocate General Bot in this case. See Opinion of AG Bot in Case C-386/08 \textit{Brita GmbH v Hauptszollamt Hamburg-Hafen}, EU:C:2010:91, paras. 109–111.

[or West Bank].”37 Two applicants, Organisation juive européenne and Vignoble Psagot, contested the validity of this Ministerial Notice in France, leading to a preliminary reference from the Conseil d’état (Council of State) to the ECJ about the interpretation of Regulation No 1169/2011 on the provision on food information to consumers.

In its Grand Chamber ruling, the ECJ noted that Regulation No 1169/2011 requires that consumers must be able to make informed choices with particular regard to health, economic, environmental, social, and ethical considerations. Taking into account that this list is of a non-exhaustive nature, other types of consideration, such as those relating to the observance of international law, are also relevant. In particular, the information that foodstuffs come from settlements established in breach of the rules of international humanitarian law may influence consumer purchasing decisions.38 It follows that foodstuffs originating in the territories occupied by Israel must appropriately reflect their true origin, implying that an explicit reference to the term “Israeli settlement” is required for products from the Golan Heights or the West Bank.39

In comparison to its previous case law, it is noteworthy that the Court unequivocally characterized Israel’s presence in the Palestinian authorities as “occupation” and condemned its settlement policy as inconsistent with fundamental rules of international law.40 This may be seen as an important development, away from the Court’s traditional reluctance to pronounce explicitly on the international legal status of the territories concerned.41 At the same time, however, the Court’s ruling also ignores some fundamental issues, such as the duty not to recognize illegal situations.42 This can largely be explained by the nature of the preliminary procedure in Psagot, which in essence concerned the interpretation of EU consumer protection legislation. Hence, the ECJ did

38 Ibid., paras. 54–56.
39 Ibid., paras. 57–58.
40 Ibid., paras. 48, 56.
42 At most, the ECJ’s reference to the EU’s duty to observe international law under Art. 3 (5) TEU and the citation of the ICJ Advisory Opinion in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory in para. 48 of the judgment may be interpreted as an implicit link with the duty of non-recognition (see, in this respect, Kassoti and Saluzzo, op.cit. note 41, 760–761). However, as observed by Cedric Ryngaert, this cannot be regarded as a genuine duty of non-recognition for states and international organizations. See: Cedric Ryngaert, “Indications of Settlement Provenance and the Duty of Non-Recognition under International Law,” 4(3) European Papers (2019), 793–794.
not have to express a position on more contentious issues such as the question whether trade in settlement products is, in itself, a violation of international law in the sense that it may amount to an implicit recognition of Israeli settlement policy in the occupied territories.\textsuperscript{43}

In the absence of a consensus about the precise scope of the duty of non-recognition with respect to trade in settlement products,\textsuperscript{44} the EU legal practice is that “the importation of settlements’ products is not prohibited as such, yet subjected to many hurdles, ranging from obtaining customs documentation from Palestinian authorities to affixing labels indicating that products were ‘made in Israeli settlements’.”\textsuperscript{45} In any event, it appears that the requirement of adequate labelling in order to guarantee consumers the possibility to make an informed choice, including on the basis of ethical and international law considerations, has farther-reaching implications than the specific case of the occupied Israeli settlements. It is hard to see why this logic would not apply with respect to other occupied or unrecognized territories such as Northern Cyprus or Western Sahara.\textsuperscript{46}

4 The Western Sahara Saga: Struggling with the Implications of ‘Self-Determination’

Even though the EU has never recognized Moroccan sovereignty over the territory of Western Sahara and has always supported UN efforts to find a solution in accordance with international law, its approach towards this territory is controversial. For a long time, the EU treated Western Sahara as a non-self-governing territory which \textit{de facto} fell within the scope of EU-Morocco agreements as a result of Morocco’s administration of the region.\textsuperscript{47} This rather pragmatic approach has often been criticized, particularly in comparison to the EU’s

\begin{enumerate}
\item Rygnaert, \textit{op.cit.} note 42, 797–798.
\item Both the Council and the Commission confirmed the \textit{de facto} application of the EU-Morocco AA to the territory of the Western Sahara at the oral hearing of Case T-512/12 \textit{Front Polisario v. Council}, EU:T:2015:953, para. 87.
\end{enumerate}
more principled position in relation to the Israeli-Palestinian conflict.\textsuperscript{48} It was only after the legality of the EU’s practice was challenged before the C\textsuperscript{J}EU that the EU institutions were bound to reconsider the scope of application of bilateral agreements with Morocco in order to take into account the specific legal status of the territory of Western Sahara. However, as will be argued below, this does not mean that all legal issues have been resolved.

4.1 The Scope of Application of the EU-Morocco Association Agreement and Fisheries Partnership Agreement

The legal fight against the established practice of the EU institutions started when \textit{Front Polisario} requested the annulment of Council Decision 2002/497/EU concluding an Agreement with Morocco on liberalization measures concerning agricultural and fish products.\textsuperscript{49} In support of its action, the applicant set out not less than eleven pleas which all directly or indirectly touched upon the EU’s commitments to respect the right to self-determination of the people of Western Sahara and the rights which derive from it. However, before discussing the substance of these claims, the General Court had to decide on the admissibility of the action. Both the Council and the Commission questioned the legal standing of \textit{Front Polisario} before the EU courts arguing that it could not be regarded as a legal person and that it was not directly and individually concerned by the contested decision. The General Court dismissed these objections. Even though Front Polisario did not have a legal personality under the law of a Member State or a non-Member State, it pointed at the very special circumstances of the Western Sahara as a non-self-governing territory to accept it as a legal person with capacity to bring an action before the courts of the EU.\textsuperscript{50} Moreover, the General Court concluded that \textit{Front Polisario} was directly and individually concerned by the contested decision. In the Court’s view, the agreement with Morocco determined the conditions under which


\textsuperscript{50}To come to this conclusion the General Court observed that the Front Polisario cannot be formally constituted as a legal person under the law of Western Sahara, as this law is still non-existent. Moreover, it pointed at the role of the Front Polisario as a party in the dispute concerning the fate of the Western Sahara, as recognized at UN level and as reflected in EU documents such as European Parliament resolutions. See: GC, Case T-512/12 \textit{Front Polisario v. Council}, EU:T:2015:953, paras. 57–60.
agricultural and fisheries products may be traded between the EU and Western Sahara (direct concern). Moreover, Front Polisario is to be differentiated from all other potential applicants in the sense that it is the only participant in the UN-led negotiations on the international status of the Western Sahara (individual concern).  

Significantly, this conclusion concerning direct and individual concern is based on the premise that the EU-Morocco AA also applies to the territory of Western Sahara. On this point, the General Court observed the divergent views of the EU and Morocco regarding the interpretation of Article 94 of the AA which refers to “the territory of the Kingdom of Morocco” without further specification. For the Moroccan authorities this territory includes the Western Sahara or, at least, the part controlled by it. Whereas the EU institutions do not share this interpretation, they nevertheless accepted the de facto application of the agreement to the territory of Western Sahara. The General Court derived this position from the failure of the EU institutions to insist on a clause excluding such application. In terms of substance, the General Court found that there is no absolute prohibition on the conclusion of international agreements applicable on a disputed territory. While accepting that the EU institutions thus enjoy a wide discretion to decide whether this is appropriate, there are certain limits to be taken into account. In particular, before concluding such an agreement, the Council must examine all relevant facts in order to ensure that an agreement is not detrimental to the population of the territory concerned or entails infringements of fundamental rights. According to the General Court, the Council made a “manifest error of assessment” in the sense that it did not examine all the elements of the case before adopting the contested decision. In particular, the Council failed to ensure that the agreement would not lead to exploitation of the natural resources of the territory of the Western Sahara and to infringement of the fundamental rights of its inhabitants.

The reasoning of the General Court is not without criticism. In the first place, the rather lenient application of the Plaumann test seemed inspired by a motivation to ensure judicial protection of the Polisario Front. Moreover, it is quite remarkable that the Court first dismissed all eleven pleas in law.

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51 Ibid., paras. 105–114.
52 Ibid., para. 112.
53 Ibid., para. 223–247.
submitted by the applicant before elaborating on its own initiative the additional plea of manifest error of assessment. This plea essentially focused on the requirement of a human rights impact assessment before the Council could legally adopt the required decision. It is noteworthy that the Court’s reasoning appeared to be rather formalistic, in the sense that it was not clear what would happen in case of a negative assessment.\footnote{Ibid.} Perhaps more important is that the General Court relied on the issue of compliance with the EU Charter of Fundamental Rights while largely ignoring the international law obligations of the EU as derived from the principle of self-determination.\footnote{Eva Kassoti, “The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration,” 2(1), European Papers (2017), 339.}

The Council was deeply dissatisfied with the decision of the General Court, not least because it complicated bilateral relations with Morocco. Indeed, just four days after the judgment, and on the same day as an EU-Morocco Association Council, the Council lodged an appeal procedure before the Court of Justice.\footnote{Van der Loo, op.cit., note 10, 255.} In contrast to the General Court, the Court of Justice concluded that the AA and the ensuing agreement on the liberalization of trade in agricultural products did not apply to the Western Sahara, implying that \textit{Polisario Front} had no standing to seek annulment of the decision at issue. Significantly, the Court of Justice based its reasoning on the principle of self-determination, which it defined as “a legally enforceable right \textit{erga omnes} and one of the essential principles of international law.”\footnote{ECJ, Case C-104/16P, Council v. Front Polisario, EU:C:2016:973, para. 88.} Building upon the ICJ Advisory Opinion on Western Sahara and UN General Assembly resolutions, it further concluded that the territory of the Western Sahara has a separate and distinct status as a non-self-governing territory within the meaning of Article 73 of the UN Charter.\footnote{Ibid., para. 90.} This special status implies that the Western Sahara cannot be included in the territorial scope of EU agreements with Morocco. The Court supported its view with references to Article 29 of the VCLT, which provides that “unless a different intention appears from a treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory” and the principle of the relative effect of treaties as laid down in Article 34 VCLT.\footnote{Ibid., paras. 97–107.}
Whereas the Court of Justice for the first time explicitly defined the binding nature of self-determination as an overriding principle of international law,\(^1\) the outcome is somewhat paradoxical in the sense that it does not clarify the substantive implications of the principle. Of course, the importance of the recognition that the Western Sahara does not form part of Moroccan territory should not be underestimated but the (il)legality of the EU’s actual practice on the ground escaped the test of judicial review. As a result, the Court’s judgment remains open to different interpretations.

This became obvious in the context of another dispute, launched by Western Sahara Campaign (\textit{wsc}) UK, concerning the validity of the Fisheries Partnership Agreement between the EU and Morocco and the Protocol setting out the fishing opportunities provided for by that agreement.\(^2\) In his opinion on this case, Advocate General Wathelet elaborated the substance of the right to self-determination with ample references to relevant opinions of the ICJ, UN General Assembly resolutions, and international law doctrine. He defined the right to self-determination as a human right, as a principle of general international law, of international treaty law, and as an obligation \textit{erga omnes}. Without entering into all the details of his reasoning, it is sufficient to point out that the Advocate General considered that the fisheries exploration of the waters adjacent to Western Sahara under the EU-Morocco Fisheries Agreement did not respect the right to self-determination of the Sahrawi people because they could not freely dispose of their natural resources. Even if it were to be found that the contested acts did not in themselves breach this right and the breach is not imputable to the Union but solely to the Kingdom of Morocco, the EU is still under an obligation not to recognize an illegal situation resulting from a breach of the right of the people of Western Sahara to self-determination and not to render aid or assistance in maintaining that situation.\(^3\)

However, in contrast to the Advocate General, the Court of Justice did not engage with the EU’s substantive obligations as derived from the international law principle of self-determination. In line with its \textit{Polisario} judgment, the Court confined itself to the finding that the territory of Western Sahara falls outside the territorial scope of application of the Fisheries Agreement and its Protocol. The Court essentially based itself on a single reference to the EU-Morocco AA in the preamble to the Fisheries Agreement in concluding that the

\(^{1}\) On the potentially far-reaching implications of this recognition, see: P. Hilpold, “Self-Determination at the European Courts: The \textit{Front Polisario} Case or The Unintended Awakening of a Giant,” \textit{European Papers} (2017), 907–921.

\(^{2}\) \textit{ECJ}, Case C-266/16, \textit{Western Sahara Campaign UK}, EU:C:2018:118.

\(^{3}\) Opinion of AG Wathelet in Case C-266/16, EU:C:2018, paras. 185–187.
latter agreement and its Protocol cannot apply to the waters adjacent to the territory of Western Sahara.\textsuperscript{64} In the Court’s reasoning, the link between the Fisheries Agreement and the EU-Morocco \textit{AA} is a crucial element of interpretation as can be derived from Article 31(3) (a) of the \textit{vclt}. Moreover, it referred to the definition of the sovereignty of a coastal state under the Convention of the Law of the Sea to conclude that the territory of Western Sahara cannot legally fall within the Moroccan fishing zone.\textsuperscript{65} Finally, the Court simply stated that an interpretation in light of the intention of the parties to include the waters adjacent to the territory of Western Sahara in the scope of the fisheries agreement cannot be accepted because such an interpretation would be contrary to the principle of self-determination and the principle of the relative effect of treaties.\textsuperscript{66} Hence, proceeding from the observation that the territory of Morocco cannot legally include the territory of Western Sahara, the \textit{ecj} simply confirmed the validity of the acts approving their conclusion and the Regulation on allocation of fishing opportunities in the territorial waters of Morocco in light of the EU’s requirement under Article 3(5) \textit{teu} to contribute to the observance of international law and respect for the principles of the UN Charter.

This conclusion is not without criticism. Once again, the Court’s reference to the \textit{vclt} and the rules of customary international law on the interpretation of treaties appears to be rather selective. For instance, it is noteworthy that Advocate General Wathelet came to an entirely different conclusion regarding application of the fisheries agreement to the waters adjacent to Western Sahara. Proceeding from a more comprehensive interpretation of Article 31 \textit{vclt}, he \textit{inter alia} refers to the minutes of the Joint Committee of the fisheries agreement, the charts and figures produced by the Commission in relation to the fishing zones, the genesis of the agreement and, last but not least, the intention of the parties.\textsuperscript{67} Contrary to the EU-Morocco \textit{AA}, the context in which the EU and Morocco concluded and applied the fisheries agreement and its protocol lead to the conclusion that the parties intentionally aimed to include the territorial waters adjacent to Western Sahara in its territorial scope of application. Taking into account that Article 31 (4) of the \textit{vclt} assigns fundamental importance to the intentions of the parties in the interpretation of treaties, it is remarkable that the Court completely ignored the \textit{AG}’s suggestion to examine whether that intention affects the legality of the Fisheries

\textsuperscript{64} \textit{ecj}, Case C-266/16, \textit{op.cit.} note62, para. 59.  
\textsuperscript{65} Ibid, paras. 67–68.  
\textsuperscript{66} Ibid., para. 63.  
\textsuperscript{67} Opinion of \textit{AG} Wathelet in Case C-266/116, EU:C:2018, paras. 63–75.
The EU and Non-Recognized Territories

Agreement and its Protocol in light of the EU’s obligation to ensure the observance of international law. Instead, the Court concluded that an analysis of the factual application of the Fisheries Agreement by the Kingdom of Morocco as the ‘de facto administrative power’ or as occupying power of the territory of Western Sahara was not necessary since the Kingdom of Morocco has categorically denied such a definition of its status.  

Arguably, this approach is singularly formalistic and turns a blind eye to the factual situation that the EU and Morocco have for many years applied the Fisheries Agreement to the waters adjacent to Western Sahara. The legality of this practice is highly questionable in light of Article 3(5) TEU. In particular, it may well be argued that, by tacitly accepting Morocco’s power in relation to the territory of Western Sahara, the EU institutions violated their international law obligation not to recognize an illegal situation resulting from the right to self-determination and not to render aid and assistance to maintain such situation. The Court’s refusal to engage with this issue and to limit itself to formally defining what legally constitutes the ‘territory of Morocco’ is a markedly minimalist interpretation of the principle of self-determination and its consequences in the EU legal order. At best, the Court’s observation that “the EU could not properly support” any intention of Morocco to include the waters of Western Sahara in the territorial scope of the agreement may be regarded as an indirect reference to the EU’s obligations under international law. In any event, the Court’s judgment carefully avoided the most contentious issues related to the (il)legality of the EU’s – and as a corollary also Morocco’s – conduct in light of the international law principle of self-determination. Whereas this may be related to the political sensitivity of the dispute, the fact remains that various questions surrounding the application of fishing rights, trade preferences and product labelling in relation to the territory of Western Sahara are still under discussion.

68 ECJ, Case C-266/16, op.cit. note 62, para. 72.
71 In this respect it is noteworthy that AG Wathelet started his opinion with a reference to the political ramifications of the answers to the legal questions put forward in this case. See: Opinion of AG Wathelet in Case C-266/16, EU:C:2018:1, para. 3.
4.2 **Implications of the Court Judgments: A Minimalist Approach**

In the wake of the Court judgments, the European Commission took the initiative towards renewing the Protocol to the Fisheries Agreement\(^\text{72}\) and amending Protocols 1 and 4 to the Association Agreement\(^\text{73}\). In essence, the Commission proposed to extend the territorial scope of the bilateral agreements with Morocco to expressly include the territory of Western Sahara. In light of the principle of self-determination, such an extension is only possible if it is beneficial for the local population and based upon their consent.\(^\text{74}\)

For this purpose, the Commission and the European External Action Service conducted “a wide-ranging consultation with the people concerned in Western Sahara.”\(^\text{75}\) Taking into account the approval of a majority of the stakeholders consulted and based upon an expected positive impact on the economy of Western Sahara, the European Parliament and the Council took the necessary steps leading to an extension of the agreements with Morocco in the form of an exchange of letters.\(^\text{76}\)

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\(^{73}\) European Commission, “Proposal for a Council Decision relation to the signature, on behalf of the Union, of the Agreement in the form of an exchange of letters between the European Union and Morocco on the amendments 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, on the other part”, \textit{COM} (2018) 479 final, 11 June 2018.

\(^{74}\) Even though the Commission does not refer to this document, its approach seems based upon the influential opinion of Hans Corell, UN Under-Secretary General for Legal Affairs and Legal Counsel, on the legality of exploring and exploiting natural resources in Western Sahara, in which he concluded that resource exploitation in non-self-governing territories are legal if conducted “for the benefit of the peoples of the territories, on their behalf or in consultation with their representatives.” See: Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, S/2002/161, para. 24.

\(^{75}\) \textit{COM} (2018) 479 final, \textit{op.cit.} note 73, 6.

Significantly, the Polisario Front and a number of non-governmental organizations opposed the extension, essentially because they fear that this will maintain Morocco’s position on the territory of Western Sahara. This, however, did not prevent the EU institutions from going ahead with the procedure, it being deemed that the fear expressed by the Polisario Front is unjustified because nothing in the terms of the agreements implies recognition of Morocco’s sovereignty over Western Sahara and the adjacent waters.\(^77\) In fact, the exchange of letters provides a clause that the agreement is concluded “without prejudice to the respective positions of the European Union and Morocco with regard to the status of Western Sahara” and that “both parties reaffirm their support for the United Nations process and back the efforts by the Secretary-General to reach a definitive political settlement in line with the principles and objectives of the Charter of the United Nations and based on the Resolutions of the UN Security Council.”\(^78\)

Whereas this pragmatic solution allowed the EU to include the territory of Western Sahara within the geographical scope of its bilateral agreements with Morocco without undermining its political relations with that country, none the less the course of events raises significant legal issues.

First, the underlying assumption that Morocco is the administrating power of Western Sahara is not undisputed. In fact, when the UN added Western Sahara to its list of non-self-governing territories in 1963 the status of ‘administrating power’ was granted to Spain. However, on 26 February 1976, Spain informed the UN Secretary-General that it was withdrawing its presence from Western Sahara and that it considered itself exempt from any international


responsibility with respect to the territory. Nevertheless, as observed by Advocate General Wathelet in the *Front Polisario* case, “it cannot be categorically ruled out that, despite its withdrawal, the Kingdom of Spain has retained its status as administering power in international law.” As a result, Morocco may be regarded as the ‘occupying’ and not the ‘administering’ power of Western Sahara, leaving it without treaty-making capacity over the territory.

Second, the question remains to what extent the consultation process conducted by the European Commission and the European External Action Service suffices to conclude that the people of Western Sahara agreed to be included within the geographical scope of EU agreements with Morocco. A key issue in this respect concerns the unclear definition of the people concerned. They may include the entire population living in the territory, without any distinction on grounds of ethnicity or origin, or it may refer more specifically to the indigenous population (Sahrawis), which also partly live outside of the territory (refugees). This distinction is important taking into account that the local population also includes Moroccan settlers. Hence, without a clear decision on this issue, it can simply not be taken for granted that the extension of the agreements is actually beneficial for the Sahrawi people. Yet, as acknowledged by the European Commission, “it can only be assumed that they would benefit, at least indirectly.”

Taken together, the question remains to what extent the revised EU policy is in compliance with the requirements of international law, in particular the duty of non-recognition and non-assistance in the commission of internationally wrongful acts. The reluctance of the Court of Justice to engage with this issue, notwithstanding the suggestion of Advocate General Wathelet (see supra) gave the EU institutions sufficient leeway to proceed with a rather pragmatic approach in relations with Morocco and the Western Sahara. However, this does not necessarily make an end to the judicial saga, taking into account that *Front Polisario* had already initiated a series of actions for annulment.

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79 See: Opinion of AG Wathelet in Case C-104/16 P, EU:C:2016:677, para. 188.
82 Kassoti, *op.cit.*, note 80, 316.
84 See Kassoti, *op.cit.* note 80.
against the Council’s decisions extending the EU-Morocco agreements to include the territory of Western Sahara.\textsuperscript{85}

The tension between adopting a principled legal position or a more pragmatic approach is also visible in the discussion concerning the labelling of products originating in the Western Sahara. In this respect, it is noteworthy that the European Commission has always been highly reluctant in drawing a comparison with its approach towards the import of products from the Israeli occupied territories.\textsuperscript{86} For a long time, it even ignored the relevance of this issue by pointing out that “neither the Association Agreement, nor the Agriculture Agreement foresees any specific rules regarding requirements as to the labelling of products” and that “products originating in Morocco and imported into the Union can thus not be differentiated on a territorial basis.”\textsuperscript{87} This approach is remarkable because the Commission has always underlined the importance of adequate labelling as part of the EU’s consumer protection legislation in relation to products from the Israeli occupied territories. As observed by Guillaume Van der Loo, it is indeed “hard to see why the indication ‘made in Israel’ for products originating in the occupied territories would be misleading in the sense of the relevant EU legislation, and the indication ‘made in Morocco’ for products originating in the occupied territories not, in particular now that the Court has made it clear that the EU-Morocco AA does not cover the Western Sahara.”\textsuperscript{88}

The \textit{Psagot} judgment only seems to strengthen this argument: if a consumer should be able to make ethical decisions based upon a clear indication of the origin of foodstuffs produced in Israeli settlements, should this not also apply to territories such as Western Sahara or Northern Cyprus?\textsuperscript{89} The European Commission appears to struggle with this question. In an answer to a parliamentary question relating to the labelling of products originating from Western

\textsuperscript{85} \textit{GC}, Case T-279/19, \textit{Front Polisario v. Council of the EU}, action brought on 27 April 2019; Case T-344/19, \textit{Front Polisario v. Council of the EU}, action brought on 10 June 2019; Case T-356/19, \textit{Front Polisario v. Council of the EU}, action brought on 12 June 2019 (all actions were still pending at the time of writing).

\textsuperscript{86} See e.g., answer given by Vice-President Mogherini on behalf of the Commission on written questions E-015222/15, E-015472/15, 4 February 2016.

\textsuperscript{87} Answer given by Mr Cioloş on behalf of the Commission, E-003971/2013, 11 June 2013; Answer given by Vice-President Mogherini on behalf of the Commission E-007130/2014, 27 January 2015; Joint answer given by HR/VP Ashton on behalf of the Commission to E-000004/11, P-000023/11, E-002315/11, 14 June 2011.

\textsuperscript{88} Van der Loo, \textit{op.cit.}, note 10, 261.

\textsuperscript{89} See also parliamentary question E-000487/2020 by MEP Miguel Urban Crespo. No answer from the Commission was available at the time of writing this contribution.
Sahara, the European Commissioner for agriculture, Janusz Wojciechowski, first responded that “all imported products, including those originating from the Western Sahara, need to comply with the relevant legislation, including the requirement to provide accurate and not misleading information on the country of origin or provenance of those products, which in such case must thus be ‘Western Sahara’. However, this response was quickly withdrawn and replaced by a more neutral statement, which no longer mentions the Western Sahara and only refers to the responsibility of the Moroccan authorities for carrying out checks on conformity with the marketing standards of fresh fruit and vegetables. This strange episode reveals the political sensitivity of the EU’s approach towards unrecognized territories and the difficult balancing act between Realpolitik and respect for international law.

## 5 Conclusions

The case law of the CJEU reveals the complex legal and political environment determining the EU’s relations with unrecognized territories. Whereas each situation is specific, implying that it is difficult to draw far-reaching conclusions, a number of general observations can be made. In the first place, it appears that the CJEU largely avoids engaging with EU and Member State international law duties with respect to these territories. In particular, the duty of non-recognition and non-assistance in the commission of internationally wrongful acts has, so far, been carefully avoided. Whereas this may be partly related to the nature of the questions and disputes reaching the Court, this is nevertheless surprising in light of the EU’s duty to observe international law as defined under Article 3 (5) TEU.

As a result, the CJEU may be criticized for applying a rather selective and sometimes creative interpretation of international law. This is not without consequences in the sense that it allows for a rather pragmatic approach in the

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90 This initial response is no longer available on the official website of the European Parliament but can be found on the website of MEP Heidi Hautala: <http://www.heidihautala.fi/wp-content/uploads/2020/02/Written-question-and-answer-Western-Sahara.pdf>.


92 See also on this tension, Van Elsuwege, op.cit. note 16.

93 See e.g., Kassoti, op.cit. note 69; Van der Loo, op.cit., note 10.
EU’s relations towards unrecognized territories. This is, perhaps, most visible in relation to the Western Sahara where the EU institutions for a long time assumed the *de facto* application of its international agreements with Morocco to also include this territory. Whereas a series of judgments revealed the limits of this approach in light of the international law principle of self-determination of people, the simple extension of the scope of application of the agreements on the basis of an exchange of letters with the Kingdom of Morocco and after a consultation process with local stakeholders does not resolve all questions from the perspective of international law.

Be that as it may, the case law of the *CjEU* reveals a number of important guidelines for the EU’s external relations practice. As can be derived from the old *Anastasiou* cases, the application of preferential trade regimes with non-recognized entities essentially depends upon the possibility of effective cooperation based upon mutual confidence in established control mechanisms. This is an important determinant for defining the scope of application of EU agreements with countries that do not exercise effective control over certain parts of their territory as is reflected in the EU’s recent treaty practice with countries such as Moldova, Georgia, and Ukraine.

In addition, *CjEU* case law on the Israeli settlements reveals the interconnection between requirements of substantive EU law – in particular in the area of consumer protection – and considerations of international law. As can derived from the *Psagot* judgment, consumers should be able to make informed decisions about their purchases taking into account, *inter alia*, ethical considerations relating to the origin of products. This is particularly relevant for products originating from territories under occupation. Whereas the *Psagot* judgment concerns the specific situation of the Israeli settlements, it seems that the same logic can also apply with respect to other disputed or unrecognized territories. However, EU practice has been rather inconsistent, which opens the gates for accusations of ‘double standards’. In any event, the ongoing discussion on labelling requirements and the definition of the geographical scope of EU agreements with third countries and unrecognized territories illustrates the legal and political dilemmas at the interface between EU and international law and practice.

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