ASSER INSTITUTE *Centre for International & European Law*

The EU and the rules based international order: territorial disputes before the CJEU in an era of geopolitics

Eva Kassoti, T.M.C. Asser Institute

Introduction

- The EU and International Law

- Constitutional Commitment to upholding International Law

  Art. 3(5) TEU: The EU commits to contributing "[i[n its relations with the wider world" to "the strict observance and the development of international law, including respect for the principles of the United Nations Charter."

  C-366/1 *Air Transport Association of America:*

  101. "Under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union."

- Constitutional commitment to IL reflected in the CJEU case-law?

Opinion of AG Wathelet, Case C-266/16 *Western Sahara Campaign UK*

85 "[T]he Court of Justice is therefore, by default, the only court with jurisdiction to review the external action of the Union and to ascertain that that action contributes to 'the strict observance … of international law [and] respect for the principles of the United Nations Charter' "

Introduction

- The CJEU's approach to IL in territorial disputes: an interesting case-study

AG Ćapeta, Joined Cases C-779/21 P and C-799/21 P *Front Polisario II:*

57. "In the European Union's external policy, the EU political institutions enjoy a wide margin of discretion. A decision to conclude an international agreement with another State, including the decision to potentially extend the application of that agreement to a third territory, is part of that discretion. The Court cannot question that choice."

- Tension between interests and values

Art. 3(5) TEU: In its relations with the wider world, *the Union shall uphold and promote its values and interests* and contribute to the protection of its citizens.

- European External Action Service, (2016) Shared vision, common action: a stronger Europe. A global strategy for the European Union's foreign and security policy, June 2016

"Our interests and values go hand in hand. We have an interest in promoting our values in the world. At the same time, our fundamental values are embedded in our interests. Peace and security, prosperity, democracy and a rules-based global order are the vital interests underpinning our external action."

Initial Approach: Indifference to IL

Case C-432/92 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and others* (*Anastasiou I*)

"47 ...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."

Case C- 386/ 08 *Brita GmbH v Hauptzollamt Hamburg- Hafen*

44 Among the relevant rules that may be relied on in the context of the relations between the parties to the EC-Israel Association Agreement is the general international law principle of the relative effect of treaties, according to which treaties do not impose any obligations, or confer any rights, on third States ('*pacta tertiis nec nocent nec prosunt*'). That principle of general international law finds particular expression in Article 34 of the Vienna Convention, under which a treaty does not create either obligations or rights for a third State without its consent.

45 It follows from those preliminary considerations that Article 83 of the EC-Israel Association Agreement, which defines the territorial scope of that agreement, must be interpreted in a manner that is consistent with the principle '*pacta tertiis nec nocent nec prosunt*'.

46 In this respect, it is common ground that the European Communities concluded two Euro-Mediterranean Association Agreements, first with the State of Israel and then with the PLO for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip.

53 It follows that Article 83 of the EC-Israel Association Agreement must be interpreted as meaning that products originating in the West Bank do not fall within the territorial scope of that agreement and do not therefore qualify for preferential treatment under that agreement.

From Indifference to (Selective) Engagement: The Western Sahara saga before the CJEU

Factual Background:

- 1963: The UN added the Spanish colony of W.S. to its list of non-self-governing territories
- 1967: The UN GA urged Spain to hold a referendum on the territory's right to exercise its right to self-determination
- 1975: ICJ's Advisory Opinion on Western Sahara –the ties between Morocco and WS were not "of such a nature as might affect the application of … the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory." (para. 162)
- 1975: Moroccan armed forced entered into the territory and an armed conflict between Front Polisario and Morocco broke out
- 1976: Spain withdraws from the territory. Morocco annexes the remainder of the territory. UN GA condemns annexation and characterises Morocco's presence in the territory as 'belligerent occupation' (UNGA 34/37; UNGA 35/19)
- UN efforts to resolve the dispute have proven futile – Spain is still listed as the administering power of WS
- EU-Morocco Agreements *de facto* applying to the territory of Western Sahara

From Indifference to (Selective) Engagement: The Western Sahara saga before the CJEU

Case C-104/16 P *Council v Front Polisario* (*Front Polisario I*):

86 It must be pointed out that, in order to be able to draw correct legal conclusions from the absence of a stipulation excluding Western Sahara from the territorial scope of the Association Agreement, in interpreting that agreement, the General Court was bound not only to observe the rules of good faith interpretation laid down in Article 31(1) of the Vienna Convention but also that laid down in Article 31(3)(c) of that convention, pursuant to which the interpretation of a treaty must be carried out by taking account of any relevant rules of international law applicable in the relations between the parties

87 Although the scope of the various relevant rules of international law applicable in the present case — namely the principle of self-determination, the rule codified in Article 29 of the Vienna Convention and the principle of the relative effect of treaties — overlap in part, each of those rules has its autonomy, with the result that it is necessary to examine them all in succession.

From Indifference to (Selective) Engagement: The Western Sahara saga before the CJEU

123 Moreover, the purported intention of the European Union, … consisting in considering the Association and Liberalisation Agreements to be legally applicable to the territory of Western Sahara, would necessarily have entailed conceding that the European Union intended to implement those agreements in a manner incompatible with the principles of self-determination and of the relative effect of treaties, even though the European Union repeatedly reiterated the need to comply with those principles, as the Commission points out.

C-266/16 *Western Sahara Campaign UK*

63 If the territory of Western Sahara were to be included within the scope of the Association Agreement, that would be contrary to certain rules of general international law that are applicable in relations between the European Union and Kingdom of Morocco, namely the principle of self-determination, stated in Article 1 of the Charter of the United Nations, and the principle of the relative effect of treaties, of which Article 34 of the Vienna Convention is a specific expression (judgment of 21 December 2016, *Council* v *Front Polisario*, C-104/16 P, EU:C:2016:973, paragraphs 88 to 93, 100, 103 to 107 and 123).

Critique

- The CJEU's Approach to Treaty Interpretation:

Over-reliance on Art. 31(3) (c) VCLT:
International Law Commission, *Draft Articles on the Law of Treaties with Commentaries*, (Yearbook of the ILC, Vol 2, 1966) 219, para 8.
The application of the means of interpretation in the article would be a single and combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation … [T]he Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule.

The It Cannot be What It Should not Be Argument

Critique

- Were the Rules of IL invoked really *relevant rules of IL*?

➢ Self-determination and sovereignty versus whom?

UN GA Res 2625 (XXV) 1970

'the territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles'

➢ Art. 29 VCLT and extraterritoriality?

Art. 29 "[a] treaty is binding upon each party in respect of its entire territory"

ILC – matter of extraterritorial application of treaties too complicated – falls outside the scope of Art. 29 VCLT

➢ The principle of the relative effect of treaties?

Art. 34 VCLT: "A treaty does not create either obligations or rights for a third *State* without its consent"

ILC: "In international law … the justification for the rule does not rest simply on this general concept of the law of contracts but on the *sovereignty and independence of States*."

Critique

- Unwillingness to Engage with the subsequent practice of the parties (31(3)(b) VCLT

ILC: "it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty." ILC Draft Articles with commentaries (1966), p. 221, para. 15

CJEU: "The subsequent practice followed in the application of a treaty may override the clear terms of that treaty if that practice reflects the parties' agreement" Case C-464/13 *Europäische Schule München v Silvana Oberto and Barbara O´Leary* para. 61

- Ignoring the Legal Status of Western Sahara as a Territory Occupied by Morocco

AG Wathelet C-266/16 *Western Sahara Campaign UK*
293. It follows from the foregoing that the contested acts, which are applicable to the territory of Western Sahara and the waters adjacent thereto in that they come within the sovereignty or jurisdiction of the Kingdom of Morocco, breach the European Union's obligation to respect the right to self-determination of the people of that territory and its obligation not to recognise an illegal situation resulting from a breach of that right and not to render aid or assistance in maintaining that situation. Furthermore, as regards the exploitation of natural resources of Western Sahara, the contested acts do not put in place the necessary safeguards in order to ensure that that

The far-reaching results of the Judgments

- In July 2018, a Council Decision amending Protocols 1 and 4 to the EU-Morocco Association Agreement was adopted, amending the territorial scope of the EU-Morocco Association Agreement to expressly include Western Sahara.

- The Western Sahara saga continues: *Front Polisario II* before the CJEU

While the earlier set of case-law concerned the territorial scope of the EU-Morocco agreements, this new set of case-law concerns the question whether the extension of the agreements to WS was done with the consent of the people of Western Sahara

GC: Front Polisario II

GC Case T-279/19, *Front Polisario v Council*

- 323 It follows that the principle expressed in Article 36(1) of the Vienna Convention whereby, if a right arises for a third State from a provision of a treaty, that State's assent to the treaty is to be presumed, unless the treaty otherwise provides, is not applicable in the present case. The expression of that consent must therefore be explicit.
- 324 In the fourth place, as regards the content and scope of the concept of consent, as used in Articles 34 to 36 of the Vienna Convention and referred to in paragraph 106 of the judgment in *Council* v *Front Polisario*, it should be noted that, as is apparent from the third paragraph of the preamble to that convention, the principle of free consent, like the principle of good faith and the rule of '*pacta sunt servanda*', constitutes a principle of 'universally recognised' law, which plays a fundamental role in the law of treaties.

GC: Front Polisario II

In *casu*:

- No *consent*

GC:321 On the other hand, although the agreement at issue is capable of creating rights with regard to exporters established in Western Sahara, those effects concern only individuals and not a third party that is subject to the agreement and capable of consenting to it. Furthermore, as regards the **benefits which may be derived from that agreement by the population of that territory as a whole, they are, in any case, purely socioeconomic and not legal. These benefits are, moreover, indirect and so cannot be equated with rights granted to a third party within the meaning of the relative effect of the treaties.**

GC: *Front Polisario II*

- No consent *by the people of Western Sahara*

374 In particular, it does not appear that the parties other than the applicant that were consulted by the Commission may be regarded as 'representative bodies' of the people of Western Sahara.

380 What is more, it should be added that the representativeness of the entities and bodies consulted by the Commission and by the EEAS is disputed by the applicant, which maintains, on the one hand, that the vast majority of the organisations that the Commission claims to have consulted in the report of 11 June 2018 did not in fact participate in that consultation (94 out of 112 organisations listed in the annex to the report) and which backs up this assertion with precise and concrete evidence. On the other hand, the applicant asserts that the vast majority of any entities consulted by the Commission are either Moroccan operators or organisations sympathetic to the interests of the Kingdom of Morocco. The Council and the Commission do not dispute the first of these assertions, and the information provided by the Commission concerning the entities that were actually consulted tends to confirm the second assertion.

- Thoughts?

Joined cases C-779/21 P and C-799/21 P Commission and Council v Front Polisario *(Grand Chamber)*

Respect for IL and Foreign Policy Choices: An Uneasy relationship

AG Ćapeta

56. The interpretation of international law within the EU legal system also raises the question of the relationship between the EU Courts and the EU political institutions when it comes to interpreting which obligations international law imposes on the European Union.

57. In the European Union's external policy, the EU political institutions enjoy a wide margin of discretion. A decision to conclude an international agreement with another State, including the decision to potentially extend the application of that agreement to a third territory, is part of that discretion. The Court cannot question that choice.

58. However, where a policy decision over the engagement with a third State or territory is taken, not only is the Court empowered to review whether the European Union's external engagement conforms to the constitutional requirements imposed by the EU and FEU Treaties, but it is even required to do so.

Front Polisario II before the CJEU

Problematizing consent:

152 In that regard, it should be noted that customary international law does not provide that the consent of a third party that is subject to an agreement which confers a right on that third party is to be expressed in a particular form (see, to that effect, judgment of the Permanent Court of International Justice of 7 June 1932, '*Free Zones of Upper Savoy and the District of Gex*', PCIJ Reports 1927, Series A/B, No 46, p. 148). It follows that customary international law does not exclude the possibility that such consent may be granted implicitly in certain circumstances. Thus, in the particular case of a people of a non-self-governing territory, the consent of that people to an international agreement in respect of which it has the status of a third party and which is to be applied in the territory to which its right to self-determination relates may be presumed so long as two conditions are satisfied.

Front Polisario II before the CJEU

153 First, the agreement in question must not give rise to an obligation for that people.

In *casu*: 147 Indeed, although the implementation of the agreement at issue means that the acts of the Moroccan authorities carried out in the territory of Western Sahara have legal effects as described in paragraphs 94 to 96 of the present judgment, changing the legal situation of the people of that territory, the fact that that agreement recognises those authorities as having certain administrative powers which are exercised in that territory does not however allow the finding that that agreement creates legal obligations for that people as a subject of international law.

153 Second, the agreement must provide that the people itself, which cannot be adequately represented by the population of the territory to which the right of that people to self-determination relates, receives a specific, tangible, substantial and verifiable benefit from the exploitation of that territory's natural resources which is proportional to the degree of that exploitation…

In *casu*: not fulfilled

Importation of Products from Occupied Territories

Case C-363/18, *Organisation juive européenne and Vignoble Psagot*

Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967

(1) The European Union, in line with international law, does not recognise Israel's sovereignty over the territories occupied by Israel since June 1967, namely the Golan Heights, the Gaza Strip and the West Bank, including East Jerusalem, and does not consider them to be part of Israel's territory …

(2) The application of existing Union legislation on indication of origin of products to products originating in Israeli-occupied territories has been the subject of notices or guidance adopted by the relevant authorities of several Member States. There is indeed a demand for clarity from consumers, economic operators and national authorities about existing Union legislation on origin information of products from Israeli-occupied territories

(4). The aim is also to ensure the respect of Union positions and commitments in conformity with international law on the non-recognition by the Union of Israel's sovereignty over the territories occupied by Israel since June 1967.

Importation of Products from Occupied Territories

Case C-363/18, *Organisation juive européenne and Vignoble Psagot*

34 Under the rules of international humanitarian law, these territories are subject to a limited jurisdiction of the State of Israel, as an occupying power, while each has its own international status distinct from that of that State.

35 The West Bank is a territory whose people, namely the Palestinian people, enjoy the right to self-determination, as noted by the International Court of Justice in its Advisory Opinion of 9 July 2004, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (ICJ Reports 2004, p. 136, paragraphs 118 and 149). The Golan Heights form part of the territory of a State other than the State of Israel, namely the Syrian Arab Republic.

Importation of Products from Occupied Territories

53 It follows from Article 3(1) of Regulation No 1169/2011, and from recitals 3 and 4 of that regulation, in the light of which that provision must be read, that the provision of information to consumers must enable them to make informed choices, with particular regard to health, economic, environmental, social and ethical considerations.

54 However, given the non-exhaustive nature of this list, it should be emphasised that other types of considerations, such as those relating to the observance of international law, may also be relevant in that context.

55 In the present case, it must be acknowledged — as the Advocate General noted, in essence, in points 51 and 52 of his Opinion — that consumers' purchasing decisions may be informed by considerations relating to the fact that the foodstuffs in question in the main proceedings come from settlements established in breach of the rules of international humanitarian law.

56 In addition, the fact that a foodstuff comes from a settlement established in breach of the rules of international humanitarian law may be the subject of ethical assessments capable of influencing consumers' purchasing decisions, particularly since some of those rules constitute fundamental rules of international law (Advisory Opinion of the International Court of Justice of 9 July 2004, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, p. 136, paragraphs 155 to 159).

Importation of Products from Occupied Territories

Case C-399/22 *Confédération paysanne*

- First Question: Unilateral ban on Importation?

46 In that regard, it should be borne in mind, first, that Article 3(1)(e) TFEU confers exclusive competence on the Union in the area of common commercial policy. According to Article 207(1) TFEU, that policy is to be based on uniform principles and conducted in the context of the principles and objectives of the Union's external action.

47 Second, under Article 2(1) TFEU, when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to legislate and adopt legally binding acts themselves in such an area only if so empowered by the Union or for the implementation of Union acts.

48 It follows that the Member States may not unilaterally adopt a measure banning the import of a category of goods originating in a third territory or country, such import being, moreover, permitted and regulated by a trade agreement concluded by the European Union, unless they are expressly empowered to do so by EU law.

Importation of Products from Occupied Territories

Case C-399/22 *Confédération paysanne*

- Labelling

73 It follows from the foregoing that the indication of the country of origin which must necessarily appear on goods such as the goods at issue in the main proceedings must not be deceptive (see, by analogy, judgment of 12 November 2019, *Organisation juive européenne and Vignoble Psagot*, C-363/18, EU:C:2019:954, paragraph 25).

78 Consequently, the country of origin of the goods at issue in the main proceedings is the country or territory where they were harvested.

87 In those circumstances, the territory of Western Sahara must be regarded as a customs territory for the purposes of Article 60 of the Union Customs Code and, consequently, of Regulation No 1308/2013 and Implementing Regulation No 543/2011. Accordingly, the indication of the country of origin which must appear on the goods at issue in the main proceedings may designate only Western Sahara as such, because those goods are harvested in that territory.

Importation of Products from Occupied Territories

- Implications for Trading with Israeli Settlements?

- Limited scope for unilateral MS action but some questions remain unresolved

Expo Casa Manta (C-296/00, para. 31) "placing products on the market is a stage subsequent to importation."