UNIVERSITY OF AMSTERDAM

The Application of the EU-Moldova Free Trade Area to Transnistria

The observance of EU law in EU external trade relations

Student:	Maartje de Wit
Master track:	European Union law
Supervisor:	prof. dr. S.F. (Steven) Blockmans
Date of submission:	8th of July 2019

Abstract

In 2014 the European Union concluded a new generation of Association Agreements with Ukraine, Georgia and Moldova. All three agreements include a Deep and Comprehensive Free Trade Area (DCFTA). In 2015 the EU and Moldova concluded a technical 'deal' with the de facto administration of Transnistria about the (partial) application of the DCFTA to Transnistria's territory. Since the 1990's Transnistria has been separated from Moldova and claims to be independent. The application of the DCFTA to Transnistria brings an interesting question to the fore: is the application in conformity with the Court of Justice's case law on the application of EU trade agreements to territorially disputed areas? This thesis addresses this question. It analyses Transnistria's legal status under international law, the Union's objectives in its external actions, its approach to trading in disputed areas and the Court's case law with regard to the legality of the application of EU trade agreements to territorially disputed areas. The analysis leads to the conclusion that the EU's approach to Transnistria complies with the Court's case law and with its objective to contribute to the strict observance of international law.

Table of content

1. Introduction 3

2. Legal status of Transnistria 5

2.1 Criteria for statehood 5

2.2 Introduction to recognition 6

2.3 Meaning of recognition: constitutive or declaratory? 7

2.4 Secession and recognition 7

2.5 The creation of Transnistria 8

3. The Association Agreement 10

3.1 What the Agreement is about 10

3.2 Application of DCFTA to Transnistria 11

4. Legal review of EU international agreements 13

4.1 Jurisdiction of the Court 13

4.2 EU external action objectives 14

5. Trading in territorially disputed areas 15

5.1 Different approaches 15

5.2 The EU approach 16

5.3 What the Court says 18

6. The Transnistria deal 25

6.1 Assessment 25

6.2 Legal consequences 28

7. Concluding remarks 31

Bibliography 32

1. Introduction

The Pridnestrovian Moldovian Republic (PMR), the English translation of the official name for Transnistria, is a small strip of land between Moldova and Ukraine. The region proclaimed independence from Moldova in the 1990's and is considered one of the frozen conflicts after the collapse of the Soviet Union.

In March 1992, fights broke out between Transnistrian paramilitary groups, supported by the Russian Federation, and the Moldovan armed forces. On 21 July 1992, the Russian Federation and the Republic of Moldova signed a ceasefire agreement.[1] Transnistria has since then been separated from Moldova. Moldova has no effective control over the territory. However, Transnistria's proclaimed independence is not recognised by other states. Even Russia has not recognised Transnistria as an independent state under international law.

In 2014 the European Union and the Republic of Moldova concluded an Association Agreement.[2] Title V of the agreement aims to establish a Deep and Comprehensive Free Trade Area (DCFTA). The EU and Moldova started the negotiations on the DCFTA in 2012 and wanted to include Transnistria in its territorial scope. Therefore, they invited Transnistria's de facto administration to the talks in the role of observer.[3] Although Transnistria was reluctant at first, it eventually accepted the EU's final offer and concluded an understanding with Moldova on the special conditions for application. On 18 December 2015, the EU-Moldova Association Council established that the DCFTA applies to the whole territory of Moldova, including Transnistria.[4]

The question is how the application of the DCFTA to Transnistria relates to case law of the Court of Justice of the EU with regard to the application of EU trade agreements in territorially disputed areas. The Treaties prescribe that the EU aims to contribute to the strict observance of international law, including respect for the principles of the United Nations Charter.[5] The approach of the EU towards trading in disputed areas is however debatable. Recently, the Court of Justice ruled that the EU violates its obligations under international law, in so far as it applies trade agreements concluded with Morocco to the territory of Western Sahara.[6]

This thesis aims to analyse whether the application of Title V of the EU-Moldova Association Agreement to Transnistria is in accordance with EU law, more specifically with the case law of the Court of Justice with regard to the application of EU trade agreements in territorially disputes areas and the EU external action objectives. The thesis is structured as follows. Chapter

[1] 'Agreement on principles of a peaceful settlement of the armed conflict in the Transdniestrian region of the Republic of Moldova' <http://www.stefanwolff.com>

[2] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014] OJ L260/4

[3] Answer given by Ms Malmström on behalf of the Commission on question E-001168/2016 by Mr Ivan Jakovčić, 4 April 2016

[4] Decision No 1/2015 of the EU-Republic of Moldova Association Council of 18 December 2015 on the application of Title V of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, to the entire territory of the Republic of Moldova [2015] OJ L336

[5] Articles 3(5) and 21(1) TEU and Article 207(1) TFEU

[6] Case C-104/16 P, 21 December 2016, *Council v. Front Polisario*, ECLI:EU:C:2016:973 and C-266/16, 27 February 2018, *Western Sahara Campaign UK*, ECLI:EU:C:2018:118

2 will examine the legal status of Transnistria under international law. An analysis of the Association Agreement between the EU and Moldova and the creation of Decision 1/2015 will follow in Chapter 3. Chapter 4 will discuss the jurisdiction of the Court to review EU international agreements and the objectives that guide the Union in its external actions. Chapter 5 will offer an analysis of the case law of the Court of Justice concerning the application of EU international trade agreements to territorially disputed areas. Before doing that, it will map the EU's approach to different territorially disputed areas worldwide. Chapter 6 will address the main question of this thesis; does the application of Title V of the EU-Moldova Association Agreement to Transnistria violate EU law? I will apply the Court's case law to Transnistria. I will also discuss the legal consequences that trading in occupied territories may have. Does EU law and international law prohibit states and companies to engage in economic activities in such areas?

2. Legal status of Transnistria

This chapter addresses the legal status of Transnistria under international law. No international court has clarified the legal status of the region so far and although Transnistria is nowadays effectively separated from Moldova, its proclaimed independence is not recognised by other states. Does this lack of recognition mean that Transnistria cannot be considered a state under international law?

2.1 Criteria for statehood

There exists no generally accepted legal definition of statehood, but the criteria for statehood under international law are relatively clear. The best known formulation of the criteria is laid down in Article 1 of the Montevideo Convention on the Rights and Duties of States. This article reads as follows:

> The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.[7]

A territory is crucial for states to exist. Although states must possess some territory, there is no rule prescribing the minimum size.[8] The International Court of Justice has ruled in the *North Sea Continental Shelf Cases* that 'there is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not.'[9] Crawford argues that what matters is that 'the State must consist of a certain coherent territory effectively governed'.[10]

Second, a permanent population is necessary since states are constituted by individuals. As in the case of territory, there is no minimum amount of people described.[11] Therefore, also places like Vatican City are able to fulfil this requirement.

The third requirement is that the entity must have an effective government. It has been argued that this means that the government must be in general control of its territory, to the exclusion of other entities. International law lays down no requirements as to the nature and extent of this control, but there must be some degree of maintenance of law and order and some basic institutions must have been established.[12] Especially the existence of functioning administrative and legislative bodies is a strong indicator that an effective government exists.[13] The government structure of a state is irrelevant for the application of the statehood criteria. In the

---

[7] Convention on the Rights and Duties of States, Montevideo, 26 December 1933, 165 LNTS 19. The document is ratified by the United States and certain states in Latin America and is still in force. Despite its regional character, it is referred to extensively by international lawyers.
[8] James Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006), 46
[9] ICJ 20 February 1969, *North Sea Continental Shelf Cases (Germany v. Denmark/Netherlands)*, ICJ Reports 1969, p 3, para 46
[10] Crawford (n 8) 40. See in other words: Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997), 76
[11] Crawford (n 8) 52
[12] Crawford (n 8) 59
[13] Michael Schoiswohl, *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International law: The Case of 'Somaliland'* (Martinus Nijhoff Publishers 2004), 16

Advisory Opinion on Western Sahara the International Court of Justice stated that 'no rule of international law (…) requires the structure of a State to follow any particular pattern, as is evident from the diversity of forms of State found in the world today.'[14]

The fourth criterion mentioned in the Montevideo Convention is that the new entity must be capable of entering into relations with other states on the international level. It has been argued that this is not so much a criterion for statehood, but merely a consequence of statehood and a combination of the requirements of government and independence.[15] The ability to enter into relations with other states depends on the internal power the government enjoys, to ensure that international obligations will have effect. Furthermore, the entity should be independent from other states to be able to enter into international relations by itself.

Independence can be seen as an additional 'central criterion of Statehood'.[16] A new state seceding from a parent state has to show significant independence before it can be considered as definitively created. Permanence is not necessarily a criterion of statehood but can be important when certain criteria for statehood are not satisfied. The continuance of the entity over a period of time can be of significant evidential value.[17]

2.2 Introduction to recognition

Recognition is a core element of public international law and can be crucial for the creation of a new state. However, it is also a difficult concept and heavily debated by international lawyers. This difficulty comes from its mixture of politics and (international) law.[18] The term 'recognition of states' can be understood as:

> the formal acknowledgement by another State that an entity possesses the qualifications for statehood (…), and implies a commitment to treat that entity as a State. States may recognize an entity's statehood by formal declaration or by recognizing its government, but States often treat a qualified entity as a State without any formal act of recognition.[19]

Whether a state chooses to recognise a new entity as a state or not is often a political decision. Some states have recognised entities that do not fulfil all requirements for statehood, while refusing to recognise other entities that clearly satisfy them all.[20] It reveals the main shortage

[14] ICJ 16 October 1975, *Western Sahara*, ICJ Reports 1975, p 12, para 94
[15] Malanczuk (n 10) 80; Schoiswohl (n 13) 17; Crawford (n 8) 61-62.
[16] Crawford (n 8) 62
[17] Ibid 90
[18] Schoiswohl (n 13) 4; Malanczuk (n 10) 82
[19] American Law Institute, *Restatement of the Law, Third, Foreign Relations Law of the United States* (Vol. 1, 1987), para 202, comment a.
[20] An example is Israel, that meets all criteria for statehood, but is not recognised as such by some Arabic states. These states have held Israel responsible for international law violations. Another example is Macedonia. After its creation in the 1990's it soon fulfilled all statehood criteria, but it was only recognised as such by a handful of states. Greece vetoed the recognition by the European Community, making it impossible for the EC to recognise Macedonia as a state until 1993. It has also occurred that an entity that does not qualify as a state under the Montevideo Convention has nevertheless been recognised as such. This happened with Croatia and Bosnia and Herzegovina, where at the time they were recognised by the European Community effective control by a government was missing. Cedric Ryngaert and Sven Sobrie, 'Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia' (2011) Leiden Journal of International Law 24, 471 and 476

of public international law, namely the absence of a centralised system. States, as the primary subjects of international law, are the only actors to decide whether or not the requirements of statehood are met.[21]

2.3 Meaning of recognition: constitutive or declaratory?

In the international law scene a long-running debate has been going on about the question whether recognition is an essential requirement to become a state or whether it only confirms a factual situation. According to the constitutive theory, an entity can only become a state when it is recognised as such. According to the declaratory theory, recognition is not a condition for statehood in international law; 'an entity is not a state because it is recognised by other states; it is recognised because it is a state'.[22] The declaratory theory is currently the dominant theory in public international law.[23]

Some scholars argue that there is an interplay between the declaratory and constitutive theory and that recognition has evidentiary value too; recognition functions 'as an *indicator* whether the requirements of statehood are fulfilled, and helps to *establish* the fulfilment of these criteria in cases where the facts are unclear'.[24] It depends on the facts of each individual case whether recognition will have a declaratory or a more constitutive function.[25]

2.4 Secession and recognition

The emergence of new states is not regulated by international law but the way in which a new state is created may influence the application of the statehood criteria. The region of Transnistria has separated itself from Moldova by secession. International law does not prohibit secession but the international community usually approaches such a new entity with caution. When the former sovereign has not recognised the new entity as a state, international law requires a high level of effectiveness, especially concerning stability and independence. The requirement of effective government is applied more strictly.[26] International recognition will be necessary to prove the effectiveness of the new entity. Non-recognition does not necessarily mean that effectiveness and statehood are missing, but it does leave considerable doubt, as long as non-recognition is not largely and obviously based on political motives only. Non-recognition by other states will usually reinforce the presumption against statehood of the new entity and may have a decisive influence on its legal position.[27]

[21] Schoiswohl (n 13) 5
[22] Crawford (n 8) 93
[23] Schoiswohl (n 13) 25 and footnote 135; Crawford (n 8) 25; Ryngaert and Sobrie (n 20) 470
[24] Schoiswohl (n 13) 40 (emphasis added)
[25] Chief Justice Taft clarified the evidentiary value of recognition in the case *Tinoco Arbitration*, 10 October 1923, Arbitration between Great Britain and Costa Rica, Reports of International Arbitral Awards (2006), vol. 1, 380-381
[26] Schoiswohl (n 13) 53; Crawford (n 8) 59
[27] Schoiswohl (n 13) 57; Malanczuk (n 10) 80

2.5 The creation of Transnistria

After clarifying the legal framework on statehood and recognition, it is time to apply the criteria for statehood to Transnistria.

The first two criteria for statehood are clearly satisfied. Transnistria has a territory of approximately 4100 square kilometres, which is bordered by the Dniester river on one side and the border with Ukraine on the other side.[28] Transnistria has a population of approximately 500.000 inhabitants.[29] The fact that Transnistrians often possess different nationalities[30] is irrelevant, since the rule does not relate to the nationality of the population.[31]

The criterion of effective government is more difficult to apply. This requirement must be applied strictly, since Moldova, Transnistria's (former) sovereign, does not recognise Transnistria as a state under international law. As described above, in such situations international law requires a high level of effectiveness.

Over the years, Transnistria has set up its own administrative and legislative institutions. Transnistria established an executive and legislative body (called the Supreme Soviet), a judiciary body, a general prosecutor's office and state administrations of cities and regions.[32] After winning both the parliamentary election in 2015 and the presidential election in 2016, the political system is now controlled by the Renewal party, which gets support from the powerful business conglomerate Sheriff Enterprises.[33] Through these institutions, Transnistria is able to maintain law and order, although these institutions are in practice subject to much corruption and favouritism.[34]

The effectiveness of a government relates to its independence too. From the beginning, Transnistria has been supported by the Russian Federation through military and financial aid. Moscow maintains its political influence in Transnistria by the presence of 1500 Russian troops. The Moldovan government regularly calls for Russia to withdraw its forces, without success.[35] The main industry in Transnistria is the arms industry which is directly supported by Russian companies.[36] Transnistria receives its gas from Russia separately from (and on better terms than) Moldova. It is also fully dependent from Russia with regard to its electricity supply.[37]

Transnistria does not maintain international relations with other states. The only international agreement it has concluded so far is with Abkhazia and South Ossetia (two entities themselves

[28] It also includes the city of Bender and surrounding localities on the right bank of the Dniester river. UK Visas and Immigration, 'Country Policy and Information Note, Moldova: Human rights in Transnistria' (2017) <https://assets.publishing.service.gov.uk> 4-5
[29] Ibid
[30] Freedom House, 'Freedom in the World – Transnistria 2018' <https://freedomhouse.org>
[31] Crawford (n 8) 52
[32] Ministry of Foreign Affairs of Pridnestrovian Moldovian Republic, 'State Bodies' <http://www.mfa-pmr.org>
[33] Freedom House (n 30)
[34] Ibid
[35] Ibid; Resolution 72/282 of the General Assembly of the United Nations (26 June 2018), UN Doc A/RES/72/282, calling for the complete and unconditional withdrawal of foreign military forces from the territory of Moldova
[36] ECHR 8 July 2004, *Ilascu and others v. Moldova and Russia*, app. no. 48787/99, para 150
[37] Ibid para 156-157

unrecognised) for the establishment of the Commonwealth for Democracy and Rights of Nations.[38]

Serious doubt exists whether Transnistria is sufficiently independent from Moldova and Russia. Recognition by other states could help Transnistria to prove its effectiveness, but this recognition is missing. No single state or international organisation has recognised Transnistria as a state under international law.[39] It is not clear that the lack of recognition is solely based on political motives. In these circumstances, the non-recognition reinforces the presumption against statehood of Transnistria. The conclusion must be that Transnistria does not satisfy the third criterion and that statehood is missing. Although Transnistria might have the appearance of a state, it does not satisfy all criteria to be considered as one under international law.

[38] 'Joint Statement by Pridnestrovie, Abkhazia and South Ossetia' <http://web.archive.org>
[39] Freedom House (n 30)

3. The Association Agreement

In 2014 the European Union concluded a new generation of Association Agreements with Ukraine, Georgia and Moldova on the basis of Article 217 TFEU. They constitute three bilateral instruments of the EU Eastern Partnership (EaP) within the broader context of the European Neighbourhood Policy (ENP).[40] All three agreements include a Deep and Comprehensive Free Trade Area (DCFTA).[41] This chapter deals with the content of the EU-Moldova agreement and the territorial application of the DCFTA to Transnistria.

3.1 What the Agreement is about

With the conclusion of the Association Agreement, the EU and Moldova aim to strengthen their relations and support the political association and economic integration between the parties.[42] The agreement includes a list of reforms to be implemented by Moldova and can be divided into four parts. The first part deals with political principles, the rule of law and foreign policy. The second part, arguably the most important part of the agreement, is about the DCFTA. The third part deals with economic cooperation in multiple areas and the fourth part provides the rules for judicial dialogue and dispute settlement and establishes the Association Council to monitor the application and implementation of the agreement.[43]

The DCFTA is established in Title V of the agreement. The provisions cover both tariff and non-tariff barriers to trade and contain many legally binding obligations for both parties. A free trade area for goods has been in force since the provisional application of the agreement in September 2014.[44] The first positive results are already visible. Exports to the EU from Moldova have grown to 66% of its total in 2017, compared to 47% in 2013.[45] However, there is still room for improvement. Moldova has to ensure a friendlier business climate, eliminate technical barriers to trade and needs to comply with EU technical and food safety rules. The Moldovan Customs Service has to improve its customs procedures too, since they are still subject to a high level of corruption.[46]

The Association Agreement also contains some provisions on Transnistria. Article 1(2)(d) of the agreement provides a specific objective and states that the parties aim to 'join (…) efforts to eliminate sources of tension, enhancing border security, promoting cross-border cooperation and good neighbourly relations'. The preamble refers explicitly to Transnistria by recognising 'the importance of the commitment of the Republic of Moldova to a viable settlement of the Transnistrian conflict, and the EU's commitment to support post-conflict rehabilitation'. Further, in Article 8(2) the parties 'reiterate their commitment to a sustainable solution to the

[40] The preambles of the EU-Moldova and EU-Georgia Association Agreements explicitly refer to the EaP and ENP as the policy frameworks within which these agreements are established.
[41] See for a comparative study of the three Association Agreements: G Van der Loo, 'The EU's Association Agreements and DCFTAs with Ukraine, Moldova and Georgia: A Comparative Study' (2017) <http://www.3dcftas.eu>
[42] Article 1 of the EU-Moldova Association Agreement
[43] See for an extensive analysis of the Association Agreement: Michael Emerson and Denis Cenusa, *Deepening EU-Moldovan Relations: What, why and how?* (2nd edn, Rowman & Littlefield International 2016)
[44] Ibid 5
[45] Ibid 45 and table 4.4
[46] Ibid 5

Transnistrian issue, in full respect of the sovereignty and territorial integrity of the Republic of Moldova (…)'.[47]

3.2 Application of DCFTA to Transnistria

The territorial scope of the Association Agreement is described in Article 462, which explicitly prevents the automatic application of the Association Agreement in Transnistria. The territorial application clause provides in paragraph 1 that the agreement applies to the territory of Moldova, but adds in paragraphs 2 that the agreement does not apply to areas over which the government does not exercise effective control, unless 'the Republic of Moldova ensures the full implementation and enforcement of this Agreement, or of Title V (…) thereof, respectively, on its entire territory.' Paragraph 3 provides that the application must be activated by a decision of the Association Council. The Association Council decides 'by mutual agreement between the parties'[48], which means that also the EU must confirm that Moldova ensures the implementation and enforcement of the agreement or the DCFTA over Transnistria. On 18 December 2015 the Association Council decided that the DCFTA shall apply to the entire territory of Moldova, including Transnistria, from 1 January 2016 onwards.[49]

The decision of the Association Council was preceded by a technical 'deal' between the EU, Moldova and the de facto administration of Transnistria. When the DCFTA negotiations started in February 2012, the parties invited Transnistria to attend the negotiations in the role of observer.[50] It is doubtful whether Transnistria was truly granted an opportunity to shape the course of negotiations in observer capacity, but President Shevchuk decided to accept the invitation. In the beginning its participation was merely a formality since only one representative from Tiraspol attended the meetings to take notes.[51] In the second half of 2012, Transnistria took position against the DCFTA and the Association Agreement in general. Transnistria complained of its incapacity to influence the negotiations and argued that the DCFTA would be bad for its economy and that it would undermine the conflict settlement process. Transnistria declared that it wanted to conclude a separate trade agreement with the EU.[52]

However, the economic consequences would be significant if the DCFTA would not be applied to Transnistria's territory. The preferential trading regime between the EU and Moldova, which the EU used to extend to goods from Transnistria, ceased to apply when the DCFTA between the EU and Moldova provisionally entered into force in September 2014. The EU decided to

[47] The EU-Georgia Association Agreement contains similar provisions with regard to the breakaway regions Abkhazia and South Ossetia in the preamble and Articles 1 and 9.
[48] Decision No 1/2014 of the EU-Republic of Moldova Association Council of 16 December 2014 adopting its Rules of Procedure and those of the Association Committee and of subcommittees [2015] OJ L110, Art 11
[49] Decision No 1/2015 of the EU-Republic of Moldova Association Council of 18 December 2015 on the application of Title V of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, to the entire territory of the Republic of Moldova [2015] OJ L336
[50] Answer given by Ms Malmström on behalf of the Commission on question E-001168/2016 by Mr Ivan Jakovčić, 4 April 2016
[51] Stanislav Secrieru, 'Transnistria Zig-zagging towards a DCFTA' (2016), The Polish Institute of International Affairs (PISM) 4, 1
[52] Ibid 2

maintain the preferential trading regime for Transnistrian goods until the end of 2015.[53] In the meantime, the terms of application of the DCFTA to Transnistria had to be discussed. Without an agreement the preferential trading regime would be replaced by customs duties on imports, which, according to experts, would increase the price of Transnistrian goods with 15%.[54] The EU refused to conclude a separate trade agreement with Transnistria.

Eventually, after consultation with Moscow, Transnistria accepted the EU's final offer.[55] In October 2015, Moldova and Transnistria agreed on the special conditions under which Transnistrian companies could benefit from the DCFTA. A month later, Moldova sent an understanding with Transnistria to Brussels and made the commitment to ensure the full implementation and enforcement of the DCFTA on the entire territory of Moldova.[56] The EU-Moldova Association Council activated the application of the DCFTA to Transnistria in its decision of 18 December 2015.[57]

Although the agreement between Moldova and Transnistria on the special conditions for Transnistria to benefit from the DCFTA has not been made public, some basic features have been leaked. As far as the Moldovan authorities are concerned, they will continue to provide export certificates to companies from Transnistria. The Transnistrian authorities have to eliminate import tariffs on EU products in the same way as Moldova and provide access to the Moldovan authorities to verify whether companies comply with new standards and to certify the quality of products. Further, Transnistria has to harmonise its economic and trade legislation with EU standards in order to minimize non-tariff barriers for access to the EU market.[58] The DCFTA is only partially applied to Transnistria, since the government of Moldova and the de facto administration of Transnistria have agreed to implement only a number of activities linked to trade facilitation and preferential access to the EU market.[59] Apparently, the EU did not insist that the whole DCFTA has to be applied to Transnistria's territory.[60]

The Association Council meets at ministerial level on a yearly basis to review the implementation of the agreement.[61] Since Moldova has ensured the implementation and enforcement of the DCFTA on its entire territory, it is up to the Moldovan authorities to monitor and verify the fulfilment of conditions by Transnistria.

[53] Answer by Ms Malmström (n 50)
[54] Adrian Lupusor, Alexandru Fala, Iuri Morcotîlo, Valeriu Prohnitchi, 'Transnistrian economy at the crossroads? Regional Economic Review: Transnistrian region' (2015) < https://www.expert-grup.org>
[55] Secrieru (n 51) 3
[56] Ibid
[57] Decision No 1/2015 (n 49)
[58] Secrieru (n 51) 3-4
[59] Annex 2 of the Commission Implementing Decision of XXX on the annual action programme 2018 in favour of the Republic of Moldova (draft version), Action Document for EU Support to Confidence Building Measures V (2019-2022), p 5
[60] Van der Loo (n 41) 17
[61] Article 434(2) of the Association Agreement; The latest meeting of the EU-Moldova Association Council took place on 3 May 2018, <https://www.consilium.europa.eu>

4. Legal review of EU international agreements

This chapter discusses the jurisdiction of the Court of Justice to review EU international agreements. EU international agreements must comply with international law, the Treaties and with general principles of EU law. Therefore, they must also be in line with the external action objectives. Over the years these objectives have become an important element of the Union's international trade policy.

4.1 Jurisdiction of the Court

Article 216(2) TFEU provides that international agreements concluded by the EU are binding upon EU institutions and the Member States. According to settled case law, binding international agreements are acts of EU institutions and form an integral part of the EU legal order from the day they enter into force.[62] Therefore, the Court of Justice has jurisdiction to review EU international agreements under Articles 263 and 267 TFEU. The Court may also decide upon the interpretation or validity of mixed agreements, when the provisions concerned fall under EU competence.[63] Decisions adopted by an Association Council have in principle the same status as the association agreement itself.[64] These decisions are directly connected with the agreement to which they give effect and form an integral part of the EU legal order.[65] Therefore a decision adopted by an Association Council may be subject to judicial review by the Court of Justice.

Binding international agreements must be compatible with the Treaties and general principles of EU law.[66] Further, the EU is bound to observe international law, including rules of customary international law.[67] The Court has ruled that customary international law as codified in the Vienna Convention on the Law of the Treaties (VCLT) is binding upon the EU and forms part of the EU legal order.[68] Judicial review is limited by the vagueness of customary international law norms, which means that the EU institution must have made a manifest error of assessment concerning the conditions for applying those rules.[69] The Court has ruled that customary international law norms codified in the VCLT also apply to agreements between states and international organisations.[70]

As a result, the Court of Justice has jurisdiction to review an EU international agreement, both in an action for annulment and in a preliminary reference procedure.[71] When the action concerns the validity of an EU international agreement, the request must be understood as relating to the

[62] Case 181/73, 30 April 1974, *Haegeman*, ECLI:EU:C:1974:41, para 4-5; C-162/96, 16 June 1998, *Racke*, ECLI:EU:C:1998:293, para 41; C-386/08, 25 February 2010, *Brita*, ECLI:EU:C:2010:91, para 39
[63] Case 12/86, 30 September 1987, *Demirel*, ECLI:EU:C:1987:400, para 9
[64] Case 30/88, 14 November 1989, *Greece v. Commission*, ECLI:EU:C:1989:422, para 13
[65] Case C-192/89, 20 September 1990, *Sevince v. Staatssecretaris van Justitie*, ECLI:EU:C:1990:322, para 8-10
[66] Case C-402/05 P and C-415/05 P, 3 September 2008, *Kadi and Al Barakaat International Foundation v. Council and Commission*, ECLI:EU:C:2008:461, para 285
[67] Case C-286/90, 24 November 1992, *Poulsen and Diva Navigation*, ECLI:EU:C:1992:453, para 9-10; *Kadi v. Council and Commission* (n 66) para 291; C-366/10, 21 December 2011, *Air Transport Association of America and Others*, ECLI:EU:C:2011:864, para 101 and 123
[68] *Racke* (n 62) para 45-51
[69] Ibid para 52
[70] *Brita* (n 62) para 40-41
[71] Case C-266/16, 27 February 2018, *Western Sahara Campaign UK*, ECLI:EU:C:2018:118, para 48

EU act approving the conclusion of the agreement.[72] The Court may be required to review the legality of the EU act having regard to the actual content of the international agreement concerned.[73] If the EU act is contrary to EU or international law, the act is null and void. In accordance with Article 266 TFEU the EU institution must do what is necessary to comply with the Court's judgment. In practice, the agreement will have to be terminated or renegotiated.

4.2 EU external action objectives

In its external relations the European Union is guided by the objectives of Articles 3(5) and 21 TEU. According to these provisions, the EU has to 'uphold and promote its values and interests' abroad (Article 3(5) TEU) and 'promote an international system based on stronger multilateral cooperation and good global governance' (Article 21(2)(h) TEU). The EU has to contribute to 'free and fair trade' and 'the promotion of human rights', as well as 'the strict observance of international law' (Article 3(5) TEU).

The Common Commercial Policy (CCP), arguably the most prominent policy under exclusive competence of the EU, has been a valuable tool for the promotion of values and interests abroad. The EU is the largest trading block in the world[74] and uses this power for non-economic objectives too.[75] This is in line with Article 207(1) TFEU, which states that the CCP 'shall be conducted in the context of the principles and objectives of the Union's external action'. In the most recent EU trade strategy, the European Commission explicitly refers to using trade agreements and trade preference regimes as methods to promote EU values around the world.[76] In the Association Agreements with Moldova, Ukraine and Georgia clauses relating to democratic principles, rule of law and human rights have been included too. It illustrates how the EU external action objectives have become an important element of the Union's international trade policy.

The Court of Justice has recognised the obligatory force of the external action objectives, although this force is limited.[77] The Court has ruled that the objectives 'cannot have the effect either of imposing legal obligations on the Member States or of conferring rights on individuals'.[78] Nevertheless, the objectives do play a role in the Court's case law regarding the legal review of EU international agreements, also in the case law regarding the application of EU trade agreements to territorially disputed areas.

---

[72] Ibid para 50; Case C-327/91, 9 August 1994, *France v. Commission*, C-327/91, ECLI:EU:C:1994:305, para 17; *Kadi v. Council and Commission* (n 66) para 286 and 289

[73] *Kadi v. Council and Commission* (n 66) para 289

[74] European Commission, DG Trade, 'EU position in world trade' <http://ec.europa.eu/trade>

[75] Sophie Meunier and Kalypso Nicolaïdis, 'The European Union as a conflict trade power' (2006) 13 Journal of European Public Policy 6, 907

[76] European Commission, 'Trade for all: towards a more responsible trade and investment policy', COM/2015/0497 final

[77] Case 6/72, 21 February 1973, *Continental Can*, ECLI:EU:C:1973:22, para 25

[78] Case C-339/89, 24 January 1991, *Alsthom v. Sulzer*, ECLI:EU:C:1991:28, para 9. See also Case C-181/06, 5 July 2007, *Deutsche Lufthansa*, ECLI:EU:C:2007:412, para 31

5. Trading in territorially disputed areas

This chapter discusses the different approaches states may follow with regard to their trade relations in disputed areas, the approach the EU has taken with regard to several territories and relevant case law of the Court of Justice. The Court of Justice has had the chance to rule on the application of several EU international trade agreements in territorially disputed areas. A comparison of the different cases illustrates that the EU's approach has not been consistent.[79] In the literature it has been argued that this practice is not in accordance with the Union's commitment to the strict observance of international law.[80]

5.1 Different approaches

Through the conclusion of Association Agreements, the EU has established preferential trading regimes with several partners around the world. Rules of origin determine whether the preferential regime will be applied to a particular product. The origin of goods is usually defined on a territorial basis. When products are made in a territorially disputed area, the rules may play a significant role in political disputes about the status of that area. The ongoing debate between the EU and Israel about the origin of goods produced in Israeli settlements in Palestinian territories is an example of the link that exists between rules of origin and territorial disputes.[81] Another relevant issue is the competence of unrecognised governments to issue valid certificates of origin.[82]

Importing states that are confronted with such situations may follow one of the two alternative approaches:

1) The political-sovereign approach: solves the relevant questions about the origin of products on the basis of public international law and focusses on de jure legality and ignores a state de facto control over the disputed territory.
2) The practical-trade approach: considers the issue of origin as an issue of international trade law. This approach ignores rules regarding sovereignty, international recognition and de jure entitlement of the disputed area and focusses on de facto control, jurisdiction and international responsibility. The underlying assumption is that trade agreements are made to promote free trade and not to solve political disputes.[83] The approach is arguably recognised by the General Agreement on Tariffs and Trade (GATT) and the World Trade Organisation (WTO).[84]

[79] The Treaties emphasize that the EU has to ensure consistency in its external policy, see Articles 16(6), third subparagraph and 21(3), second subparagraph TEU and Article 7 TFEU
[80] Guy Harpaz, 'The Front Polisario Verdict and the Gap between the EU's Trade Treatment of Western Sahara and Its Treatment of the Occupied Palestinian Territories' (2018) 52 Journal of World Trade 4, 620
[81] Moshe Hirsch, 'Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip' (2002) 26 Fordham International Law Journal 3, 572-573
[82] Ibid 576-577
[83] Ibid 577. See also Harpaz (n 80) 624
[84] Article XXVI(5)(a) of the GATT rules and practice provides: 'Each government accepting this Agreement does so in respect of its metropolitan territory *and of the other territories for which it has international responsibility*, except such separate customs territories as it shall notify to the Executive Secretary to the CONTRACTING PARTIES at the time of its own acceptance.' Guide to GATT Law and Practice: Analytical

5.2 The EU approach

The approach adopted by the EU differs per area. This paragraph discusses the Union's approach towards Taiwan, Western Sahara, Northern Cyprus, Israeli settlements and Crimea.

The EU adopts the practical-trade approach with regard to goods coming from Taiwan. The EU and its Member States pursue a 'One China' policy and do not recognise Taiwan as a sovereign state. Nevertheless, the EU 'recognises Taiwan as an economic and commercial entity'[85] and allows the import of some agricultural products to the EU with a certificate of origin issued by Taiwanese authorities.[86]

The EU also applies the practical-trade approach to goods from Western Sahara. Although Morocco has control over the territory, Western Sahara is not considered to be part of Morocco under international law.[87] The EU-Morocco Association Agreement provides in Article 94 that the agreement applies 'to the territory of the Kingdom of Morocco'.[88] In practice, the EU also applies the agreement to goods from Western Sahara. The Court of Justice has ruled that the Association Agreement does not apply to Western Sahara, since that would be in breach of international law. Nevertheless, the EU institutions are still trying to include Western Sahara in the agreement's territorial scope through an amendment of the agreement.[89]

The EU applies the political-sovereign approach to Northern Cyprus. The northern third of Cyprus is controlled by Turkey and governed by the 'Turkish Republic of Northern Cyprus' (TRNC). The EU and its Member States do not recognise the TRNC and have no trade agreements with this entity.[90] For a while it was unclear whether the EU-Cyprus Association Agreement was applicable to the territory. In 1994, the Court of Justice ruled that the Association Agreement applies, which means that Member States may only accept certificates issued by the competent authorities of the Republic of Cyprus.[91]

Also the Union's policy with regard to goods from Israeli settlements in Palestinian territories illustrates the application of the political-sovereign approach. Under international law the Israeli settlement policy is illegal[92] and the EU and United Nations have declared many times that Israel violates the Geneva Conventions and the Palestinian right of self-determination.[93] In

---

Index (1994) <https://www.wto.org> (emphasis added) This approach is further supported by GATT practice, see 918-919.

[85] European Economic and Trade Office in Taiwan – Taiwan and the EU, EU and the Cross-Strait relationship <https://eeas.europa.eu>

[86] Commission Regulation (EC) 972/2008 of 3 October 2008 amending Regulation (EC) No 341/2007 opening and providing for the administration of tariff quotas and introducing a system of import licences and certificates of origin for garlic and certain other agricultural products imported from third countries [2008] OJ L265

[87] ICJ 16 October 1975, *Western Sahara*, ICJ Reports 1975, p 12, para 162

[88] 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 L70/2

[89] Text to n 151 in ch 5, para 3

[90] Eugene Kontorovich, 'Economic Dealings with Occupied Territories' (2015) 53 Columbian Journal of Transnational Law 584, 622

[91] Case C-432/92, 5 July 1994, *Anastasiou I*, ECLI:EU:C:1994:277, para 36-41

[92] ICJ 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p 136

[93] European Parliament resolution of 17 December 2014 on recognition of Palestine statehood (2014/2964(RSP)); Resolution ES-10/14 of the General Assembly of the United Nations (12 December 2003), UN Doc A/RES/ES-10/14

2010, the Court of Justice ruled that the trade preferences of the EU-Israel Association Agreement do not apply to goods coming from Israeli settlements in the West Bank or Gaza. In those territories the EU-PLO Association Agreement applies, which means that exports certificates have to be issued by the competent Palestinian authorities.[94]

Another territory to which the EU applies a political-sovereign approach is Crimea. Since the annexation of Crimea by Russia in 2014 the EU has adopted a robust non-recognition regime by forbidding the import of goods from Crimea without a Ukrainian certificate of origin. The EU cut off almost all business ties with Crimea, with a full ban on investment and a prohibition to supply tourism services.[95]

The measures taken with regard to Crimea are clearly the strongest the EU has taken in relation to any occupied territory so far. However, although Russia formally annexed the territory, the factual situation is not so different from Western Sahara, which Morocco fully incorporated.

Also the situations in the Palestinian territories and Western Sahara are very similar. The United Nations has adopted several resolutions urging Israel and Morocco to withdraw from the territories.[96] The International Court of Justice has ruled that the occupation by Israel and Morocco is in violation of international law.[97] The EU has concluded Association Agreements with Israel (1995) and with Morocco (1996). In both agreements the parties did not specify the exact scope of application. However, the EU has also concluded an Association Agreement with the Palestine Liberation Organisation (PLO) for the West Bank and Gaza Strip in 1997[98], but has not done so with Front Polisario, the organisation recognised by the United Nations as the representative of the Saharawi people.[99] This difference has also been noticed by the Court.[100] However, it does not seem to justify the EU's different treatment of Western Sahara compared to the Israeli settlements.

[94] Case C-386/08, 25 February 2010, *Brita*, ECLI:EU:C:2010:91
[95] Press Release, European External Action Service, EU restrictive measures in response to the crisis in Ukraine (16 March 2017), <https://eeas.europa.eu>
[96] Resolution ES-10/14 of the General Assembly of the United Nations (12 December 2003), UN Doc A/RES/ES-10/14 (Israeli settlements); Resolution 34/37 of the General Assembly of the United Nations (21 November 1979), UN Doc A/RES/34/37 (Western Sahara)
[97] ICJ 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p 136; ICJ 16 October 1975, *Western Sahara*, ICJ Reports 1975, p 12
[98] 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 L187
[99] Resolution 34/37 of the General Assembly of the United Nations (21 November 1979), UN Doc A/RES/34/37
[100] Case C-104/16 P, 21 December 2016, *Council v. Front Polisario*, ECLI:EU:C:2016:973, para 101-103

5.3 What the Court says

This paragraph deals with the Court's case law concerning certificates of origin for goods produced in Northern Cyprus (*Anastasiou*) and Israeli settlements (*Brita*) and the application to Western Sahara of the EU-Morocco Association Agreement and Liberalisation Agreement (*Front Polisario*) and the related Fisheries Agreement and its 2013 Protocol (*Western Sahara Campaign UK*). In *Brita, Front Polisario* and *Western Sahara Campaign UK* the Court relied on rules of international law on treaty interpretation to establish the territorial scope of the trade agreements. This is an interesting development regarding the Court's more restrictive stance to international law in earlier cases, especially in the *Kadi* and *Intertanko* judgments.

Anastasiou

This case was about the interpretation of the 1972 Association Agreement between the EU and Cyprus which established a preferential trading regime for Cypriot products.[101] The particular products in this case (citrus fruits and potatoes) were imported to the United Kingdom (UK) from Northern Cyprus, which was under the control of the TRNC. The imported goods had custom stamps of the Cyprus Customs Authority, which indicated that they were not issued by the customs authorities of the Republic of Cyprus.[102] A UK court asked the Court of Justice whether the EU-Cyprus Association Agreement precluded acceptance by Member States of products from Northern Cyprus accompanied by certificates of origin which were not issued by the Republic of Cyprus.[103]

The Court of Justice answered this question in the affirmative. The Court ruled that the de facto separation of the northern part of Cyprus from the rest of the island did not 'warrant a departure from the clear, precise and unconditional provisions of the 1977 Protocol on the origin of products'.[104] Cooperation by the Member States with the TRNC was excluded, since the authorities established in the northern part of Cyprus were not recognised by the EU and its Member States.[105] Therefore, the acceptance of certificates of origin not issued by the Republic of Cyprus 'would constitute a denial of the very object and purpose of the system established by the 1977 Protocol'.[106] The Court continued by saying that in order to ensure a uniform application of the Association Agreement, the rules of origin must be interpreted strictly, meaning that Member States may only accept certificates issued by the competent authorities of the Republic of Cyprus.[107]

The Court's reasoning is based on a close interpretation of the EU-Cyprus Association Agreement, while acknowledging the issue of international recognition.[108] In later judgments,

[101] Case C-432/92, 5 July 1994, *Anastasiou I*, ECLI:EU:C:1994:277
[102] See for the facts of the case: Ibid para 1-13
[103] See for the preliminary questions: Ibid para 14-15
[104] Ibid para 37
[105] Ibid para 40
[106] Ibid para 41
[107] Ibid para 54-55
[108] The Court mentions the issue of international recognition in paragraphs 40, 47 and 63

the Court took a more practical approach towards phytosanitary certificates for goods from Northern Cyprus which were imported to the EU via Turkey.[109]

Brita

The *Brita* case concerned the application of the preferential trading regime envisaged by the EU-Israel Association Agreement to goods coming from Israeli settlements in occupied territories. Brita, a German company, imported drink-makers for sparkling water from an Israeli supplier from Mishor-Adumin, an Israeli settlement on the occupied West Bank. On the customs declarations the origin of goods was said to be Israel. The German customs authorities requested verification of the proof of origin of the goods but the Israeli authorities failed to answer the questions satisfactorily. The German authorities consequently refused to grant preferential treatment to the goods and asked Brita to pay the applicable customs duties. Brita challenged this decision.[110] The German court asked the Court of Justice whether the German customs authorities had to refuse the preferential treatment under the EU-Israel Association Agreement if the goods come from the occupied West Bank.[111]

As recognised by Advocate-General (AG) Bot, the case did not concern an ordinary technical question about customs law, but a question about the territorial application of the EU-Israel Association Agreement.[112] The EU-Israel agreement provided in Article 83 that it applies on Israeli side to 'the territory of Israel'.[113] The EU also concluded an Association Agreement with the Palestine Liberation Organisation (PLO). This agreement applies on PLO side to the West Bank and Gaza.[114]

The Court interpreted both agreements with the help of the rules of international law on treaty interpretation as codified in the Vienna Convention on the Law of the Treaties (VCLT). According to the principle of relative effects of treaties (Article 34 VCLT), a treaty cannot affect the rights and obligations of non-parties, unless they consent thereto.[115] The Court interpreted Article 83 on the territorial scope of the Association Agreement in light of this principle.[116] The Court ruled that the EU-Israel agreement and EU-PLO agreement must be interpreted so as to leave the rights and obligations of both parties unaffected. The EU-Israel agreement cannot be interpreted in a way that would deprive the Palestinian authorities from their competence under the EU-PLO agreement to issue certificates of origin for goods coming from the West Bank and Gaza Strip. Therefore, goods originating in the West Bank do not fall within the territorial scope of the EU-Israel agreement.[117]

---

[109] Case C-219/98, 4 July 2000, *Anastasiou II*, ECLI:EU:C:2000:360; and Case C-140/02, 30 September 2003, *Anastasiou III*, ECLI:EU:C:2003:520
[110] See for the facts of the case: Case C-386/08, 25 February 2010, *Brita*, ECLI:EU:C:2010:91, para 30-35
[111] See for the preliminary questions: Ibid para 36
[112] Case C-386/08, 29 October 2009, *Brita*, C-386/08, ECLI:EU:C:2009:674 (Opinion Advocate General Bot), para 86
[113] 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 L147, Art 83
[114] EU-PLO Association Agreement (n 98), Art 4
[115] *Brita* (n 110) para 44
[116] Ibid para 45
[117] Ibid para 46-53

The Court reiterated its *Anastasiou I* case law and ruled that certificates of origin can only be lawfully issued by the authorities designated by name in the relevant Association Agreement. Therefore, only the Palestinian authorities are competent to issue export certificates for goods from the West Bank.[118]

Front Polisario

In 2015, Front Polisario brought an action for annulment before the General Court against Council Decision 2012/497/EU which approved the conclusion of an agreement between the EU and Morocco concerning reciprocal liberalisation measures on agricultural and fishery products (Liberalisation Agreement).[119] The complaints of Front Polisario focussed on the factual application of the Liberalisation Agreement to the territory of Western Sahara, which is largely controlled by Morocco but is not internationally recognised as being part of Moroccan territory. In fact, Western Sahara remains on the UN list of non-self-governing territories to which the principle of self-determination applies.[120]

In first instance, the General Court found that the territorial scope of the Liberalisation Agreement extended to Western Sahara on the basis of the context in which the agreement was concluded and the subsequent practice of the parties. The General Court ruled in substance that the Council had failed to fulfil its obligations. The Council had not taken all the relevant factors into account before concluding the agreement and failed to ensure that the fundamental rights of the Saharawi people were not infringed by applying the agreements to Western Sahara. Therefore, the General Court partially annulled the decision in so far as it approved the application of the agreement to Western Sahara.[121]

On appeal the Court of Justice took quite a different path and focussed on the interpretation by the General Court of the territorial scope of application of the Liberalisation Agreement. In absence of an express provision on the territorial scope, the Court fell back on Article 94 of the EU-Morocco Association Agreement, which provides for the application of the agreements to 'the territory of the Kingdom of Morocco'.[122] The Court of Justice ruled that the General Court had erred in law with its interpretation that the agreement also applied to Western Sahara and that it failed to take into account Article 31(3)(c) VCLT which provides that the interpretation of a treaty must be carried out in light of 'any relevant rules of international law applicable in the relations between the parties.'[123]

The Court of Justice ruled that Western Sahara enjoys a right to self-determination, which is an important international law principle and is applicable *erga omnes.* As a consequence, Western

[118] Ibid para 57
[119] Council Decision (2012/497/EU) of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2012] OJ L241/2
[120] The United Nations and Decolonization, Non-Self-Governing Territories <https://www.un.org>
[121] Case T-512/12, 10 December 2015, *Front Polisario v. Council,* ECLI:EU:T:2015:953
[122] EU-Morocco Association-Agreement (n 88), Art 94
[123] Case C-104/16 P, 21 December 2016, *Council v. Front Polisario*, ECLI:EU:C:2016:973, para 86-87

Sahara has a distinct and separate status[124] and cannot be seen as part of Moroccan territory.[125] Further, Article 29 VCLT codifies the customary rule on the territorial scope of treaties, which means that treaties are binding on the 'entire territory' of the parties, unless the treaty prescribes otherwise. According to the Court, the phrase 'entire territory' must be interpreted as the space over which a state has full sovereign power, thus excluding non-self-governing territories like Western Sahara.[126] Lastly, the General Court should have considered the principle of relative effect of treaties (Article 34 VCLT), since the people of Western Sahara should be considered a third party, who are affected by the application of the Liberalisation Agreement to their territory without their consent.[127]

Next, the Court of Justice ruled that the absence of any provision excluding the application of the agreement to Western Sahara cannot be seen as an implicit acceptance by the Council and the Commission that the agreement applies to the territory.[128] The Court of Justice referred to Article 30(2) VCLT and stated that the Liberalisation Agreement is 'subordinate' to the Association Agreement, meaning that the provisions of the Association Agreement which have not been amended, prevail. Based on Article 94 of the Association Agreement, the Liberalisation Agreement cannot be interpreted in such a way as including Western Sahara in its scope of application. A clause that expressly excludes Western Sahara from its scope is therefore unnecessary.[129]

Lastly, the Court of Justice decided that the General Court wrongfully applied the 'subsequent practice rule' of Article 31(3)(b) VCLT. [130] The requirement that there is an 'agreement' on the interpretation of the territorial scope was not satisfied. The mere factual application of the agreements to Western Sahara cannot be interpreted as establishing such an agreement justifying their application to the territory.[131] Interestingly, the Court stated that it could not have been the EU's intention to implement the agreements contrary to international law.[132] This seems to be only a short step away from concluding that the EU cannot possibly (intentionally) violate international law.[133]

Consequently, the Court of Justice allowed the Council's appeal and declared Front Polisario's action for annulment inadmissible. Since the EU-Morocco trade agreements do not apply to

[124] The Court relied on the Friendly Relations Declaration, according to which a non-self-governing territory has 'under the UN Charter, a status separate and distinct from the territory of the State administering it'. Resolution 25/2625 of the General Assembly of the United Nations (24 October 1970), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc A/RES/25/2625
[125] *Front Polisario* (n 123) para 88-92
[126] Ibid para 95-97
[127] Ibid para 106-107
[128] Ibid para 115
[129] Ibid para 110-114
[130] Ibid para 125
[131] Ibid para 120-122
[132] Ibid para 123-124
[133] Sandra Hummelbrunner and Anne-Carlijn Prickartz, 'EU-Morocco Trade Relations do not legally affect Western Sahara – Case C-104/16 P Council v. Front Polisario' (*European law blog*, 5 January 2017) <http://europeanlawblog.eu>

Western Sahara, the liberation organisation lacked standing under Article 263 TFEU because it could not be regarded as being directly and individually concerned by the Council Decision.[134]

With its judgment, the Court followed AG Wathelet's opinion, who proposed to focus on the territorial scope of the agreements. This way the Court did not have to deal directly with the legality of the factual application of the agreements. However, it follows from the conclusion of legal inapplicability that any future application of the trade agreements to Western Sahara, without the consent of the Saharawi people, is impossible.

Western Sahara Campaign UK

This case concerned a preliminary reference by the British High Court about the validity of the EU-Morocco Fisheries Partnership Agreement (FPA), the 2013 Protocol and the EU implementing acts.[135] The national proceedings were brought by Western Sahara Campaign UK, an organisation which challenged the legality of certain British policies and practices implementing the EU legal acts. The organisation argued before the referring court that the acts are contrary to Article 3(5) TEU, which obliges the EU to contribute to the strict observance of international law, insofar as they are applied to Western Sahara.[136]

The Court of Justice stated that the referring court essentially wanted to know whether the exploitation of natural resources in the waters of Western Sahara was permitted by the FPA and the 2013 Protocol and whether this rendered the EU implementing acts invalid.[137] Therefore, the territorial scope of the FPA and the 2013 Protocol had to be determined. For the interpretation of the territorial application clauses of the FPA and the 2013 Protocol, the Court referred to the rules of customary international law on treaty interpretation reflected by Article 31 VCLT.

The Court ruled that the territory of Western Sahara is not covered by the concept of 'territory of Morocco' within the meaning of Article 11 FPA. The phrase 'territory of Morocco' must be interpreted in the same way as Article 94 of the Association Agreement. The Association Agreement has an overarching role since Article 1 of the 2013 Protocol establishes that the Protocol and the FPA both form part of the Association Agreement.[138]

The waters of Western Sahara do also not form part of the 'waters falling within the sovereignty or jurisdiction' of Morocco referred to in Article 2(a) FPA. Since the Association Agreement does not use such an expression, the Court referred to the United Nations Convention on the Law of the Sea (UNCLOS), mentioned in the preamble and Article 5(4) FPA. According to the Court, it follows from the provisions about the 'territorial sea' (Article 2(1) UNCLOS) and 'exclusive economic zone' (Articles 55 and 56 UNCLOS) that the waters over which a coastal state is entitled to exercise sovereignty and jurisdiction are limited to the waters that are adjacent to its territory and form part of its territorial sea or of its exclusive economic zone. Since

[134] *Front Polisario* (n 123) para 130-134
[135] Case C-266/16, 27 February 2018, *Western Sahara Campaign UK*, ECLI:EU:C:2018:118
[136] Ibid para 31-32
[137] Ibid para 54; The EU implementing acts mentioned are Regulation 764/2006, Decision 2013/785 and Regulation 1270/2013
[138] *Western Sahara Campaign UK* (n 135) para 60-63

Western Sahara does not form part of Morocco's territory, the waters adjacent to Western Sahara are not part of Morocco's fishing zone referred to in the FPA.[139]

The EU and Morocco did not intend to give a special meaning to the territorial scope provisions of the FPA and the 2013 Protocol within the meaning of Article 31(4) VCLT. The Court ruled that such an intention would be contrary to the Union's international law obligations. The EU 'could not properly support' any intention of Morocco to include the waters of Western Sahara in the territorial scope of the agreements.[140] Further, Morocco cannot be seen as a 'de facto administrative power' or as an occupying power since this is inconsistent with Morocco's own view that Western Sahara is an integral part of its territory.[141]

Lastly, the Court considered that the 2013 Protocol has no specific territorial scope provisions. Its territorial scope is therefore the same as for the FPA.[142] The explicit notification on the geographical coordinates as submitted by Morocco did not help, since Morocco submitted the notification one day after the deadline, which means that it is excluded from the text of the Protocol.[143]

As a result, the Court of Justice ruled that the waters adjacent to the territory of Western Sahara do not fall within the scope of the FPA and the 2013 Protocol.[144] This means that there was nothing to affect the validity of the contested EU legal acts.[145]

Western Sahara saga to be continued

In an order delivered on 30 November 2018 the General Court ruled that also the territorial scope of the EU-Morocco Aviation Agreement does not cover Western Sahara.[146]

The Western Sahara rulings are important for several reasons. The judgments will have a great impact on EU-Morocco (trade) relations and are important for the Saharawi people. Further, the judgment is important for the debate about the Court's approach to international law.[147] Although in more recent case law, especially in the *Kadi* and *Intertanko* judgments, the Court seemed to restrict the effects of international law within the EU legal order[148], the Court now extensively relied on rules of international law on treaty interpretation to establish the territorial scope of the EU-Morocco trade agreements. Also in *Brita*, the Court took a friendly approach towards international law by using the Vienna Convention on the Law of the Treaties as a means of interpretation and by explaining its recourse to this instrument.

[139] Ibid para 65-69
[140] Ibid para 71
[141] Ibid para 72
[142] Ibid para 75-79
[143] Ibid para 80-81
[144] Ibid para 83
[145] Ibid para 84
[146] Case T-275/18, 30 November 2018, *Front Polisario v. Council*, ECLI:EU:T:2018:869 (Order)
[147] Eva Kassoti, 'The Council v. Front Polisario Case: The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation (Second Part)' (2017) 2 European Papers 1, 26
[148] Ibid 26-27; Christina Eckes, 'International Law as the Law of the EU: The Role of the Court of Justice' (2010) CLEER Working Papers 6, 12-16 and footnote 64

Nevertheless, the Court has received much criticism, especially on its reasoning in the *Front Polisario* case.[149] The main argument is that the Court relied on international law in a selective way, so that it did not have to deal with the real question of legality of the factual application of the agreements to Western Sahara. The authors also have critique on the way the Court applied some norms of customary international law. Some consider that the way in which the Court applied the 'subsequent practice rule' is unconvincing since there is a lot of evidence that suggests that the EU and Morocco considered Western Sahara to fall within the scope of the EU-Morocco trade agreements. The Court did not explain why this practice was irrelevant for its interpretation.[150]

A new development is that the EU institutions have adopted a Council Decision in July 2018 amending Protocols 1 and 4 of the EU-Morocco Association Agreement in order to 'expressly provide a legal basis so that products originating from Western Sahara could benefit from the same trade preferences as those from Morocco'.[151] The European Parliament has given its consent to the decision in January 2019.[152] The question is whether this decision is compatible with international law and with the Court's case law.[153] It is especially unclear whether the requirement of consent has been met.[154] Front Polisario has already announced that it is against the extension of the territorial scope of the EU-Morocco trade agreements to Western Sahara and that it is ready to challenge the new trade deal before the Court of Justice.[155]

[149] Kassoti, 'The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation' (n 147) 23-42; Eva Kassoti, 'The Empire Strikes Back: The Council Decision Amending Protocols 1 and 4 to the EU-Morocco Association Agreement' (2019) European Papers, European Forum, Insight of 27 February 2019 <www.europeanpapers.eu> 2 and footnote 9

[150] Kassoti, 'The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation' (n 147) 37-40

[151] Council Decision (EU) 2018/1893 of 16 July 2018 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 [2018] OJ L310

[152] European Parliament, Text adopted by Parliament on 16 January 2019, 1st reading/single reading, http://www.europarl.europa.eu

[153] Kassoti, 'The Empire Strikes Back' (n 149)

[154] Sweden abstained from voting in the Council, since it was 'not satisfied that the consultation process constitutes the free and informed consent of the people of Western Sahara', Western Sahara Resource Watch 'Sweden says EU-Morocco trade proposal fails court ruling', https://www.wsrw.org; Also the European Parliament's Legal Service expressed its doubts about whether the requirement of consent has been met, Western Sahara Resource Watch 'Parliament lawyers cast doubt on legality of Western Sahara trade deal', https://www.wsrw.org

[155] Western Sahara Resource Watch, 'Polisario condemns new EU-Morocco trade deal', https://www.wsrw.org

6. The Transnistria deal

In the foregoing chapters Transnistria's legal status, the Association Agreement, Decision 1/2015 and the Court's case law about the application of trade agreements to territorially disputed areas have been clarified. This chapter finally discusses the application of the EU-Moldova DCFTA to Transnistria. Is the approach taken by the European Union in conformity with EU law?

6.1 Assessment

Conformity with Article 462 Association Agreement

The territorial application of the EU-Moldova DCFTA to Transnistria is established through Article 462 of the Association Agreement in combination with Decision 1/2015 of the Association Council. As described in chapter 3, paragraph 2, the EU has adopted a flexible approach towards the application of the DCFTA to Transnistria by accepting the understanding between the government of Moldova and the de facto administration of Transnistria. The understanding provides for the implementation of only a number of activities related to trade facilitation and preferential access to the EU market. However, this is incompatible with Article 462 of the Association Agreement, which states that the Association Council can only apply the entire Association Agreement or DCFTA, and not parts thereof.

Conformity with Court of Justice's case law

A request to review the validity of an EU international agreement must be understood as relating to the EU act approving the conclusion of the agreement.[156] The EU act approving the conclusion of the EU-Moldova Association Agreement is Council Decision 2016/839 of 23 May 2016.[157] To assess the validity of the EU act the actual content of the international agreement must be taken into account.[158] Decision 1/2015 taken by the Association Council is reviewable too, since the decision is directly connected with the agreement to which it gives effect and forms an integral part of the EU legal order.[159]

According to the Court of Justice's case law on the application of EU international trade agreements to territorially disputed areas, the EU-Moldova Association Agreement must be interpreted in accordance with the rules of customary international law on treaty interpretation. The general rule on treaty interpretation is laid down in Article 31(1) VCLT, which provides that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[160] Together with the ordinary meaning of the treaty provisions and their context, paragraph 3 of Article 31 VCLT states that three other elements must be taken into account.

---

[156] Text to n 72 in ch 4, para 1
[157] Council Decision (EU) 2016/839 of 23 May 2016 on the conclusion, on behalf of the European Union, of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2016] OJ L141
[158] Text to n 73 in ch 4, para 1
[159] Text to n 65 in ch 4, para 1
[160] Vienna Convention on the Law of the Treaties (VCLT) (1969), United Nations, Treaty Series, vol 1155, nr 18232, p 331, Art 31

First, any subsequent agreement between the parties must be considered for the interpretation of the agreement or the application of its provisions. A subsequent agreement to which Article 462 of the EU-Moldova Association Agreement refers and which is crucial for its interpretation is Decision 1/2015, which explicitly extends the territorial scope of Title V of the Association Agreement to Transnistria. This decision marks a first significant difference with the situation in the Western Sahara case law, since the EU-Morocco Association Council has never adopted a decision that explicitly extends the scope of the Association Agreement (or parts thereof) to the territory of Western Sahara.

Second, any subsequent practice must be considered when this practice establishes an agreement between the parties regarding the interpretation of the treaty. The Court ruled in *Front Polisario* that the mere factual application of the agreements to Western Sahara cannot be interpreted as establishing such an agreement justifying their application to the territory.[161] Although this reasoning of the Court has been criticised by international lawyers, it is clear that the EU and Moldova have agreed on the application of the DCFTA to Transnistria's territory. This agreement led to the technical 'deal' with the de facto administration of Transnistria and resulted in the adoption of Decision 1/2015.

Third, any relevant rules of international law applicable in the relations between the parties have to be considered. The rules referred to by the Court of Justice are the right to self-determination, the territorial scope rule (Article 29 VCLT) and the principle of the relative effect of treaties (Article 34 VCLT).

The application of the DCFTA to Transnistria is not in breach of the right to self-determination. In contradiction to Western Sahara, Transnistria is not recognised as a non-self-governing territory under international law having a right to self-determination. Instead, the international community has always rejected Transnistria's claim for independence and is considered to be part of Moldova's territory.[162] For these reasons, Transnistria does not have a separate and distinct status from Moldova under the UN Charter.

The territorial scope rule of Article 29 VCLT has not been violated either. The text of Article 29 VCLT provides that 'unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory'. The Court interprets this provision as meaning that a treaty applies to the geographical space where a state exercises its full sovereign powers, thus excluding non-self-governing territories like Western Sahara.[163] When an international agreement is intended to produce extraterritorial effect, it must contain a territorial scope provision that expressly provides for this effect.[164] In case of Transnistria, the territory falls within the geographical space where Moldova exercises its full sovereign powers, since Transnistria is de jure part of Moldova's territory.[165] Further, Article

[161] Case C-104/16 P, 21 December 2016, *Council v. Front Polisario*, ECLI:EU:C:2016:973, para 120-122
[162] See text to n 39 in ch 2, para 5
[163] *Front Polisario* (n 161) para 95
[164] Ibid para 96
[165] See text to n 39 in ch 2, para 5. In this paragraph I conclude that Transnistria does not satisfy the statehood criteria and is also not recognised as a state by international actors.

462 of the Association Agreement and Decision 1/2015 expressly provide for the application of the DCFTA to Transnistria's territory.

Lastly, there is no infringement of the principle of the relative effect of treaties of Article 34 VCLT. This rule, also referred to as the *pacta tertiis* principle, implies that a treaty cannot affect the rights and obligations of non-parties, unless they consent thereto. Contrary to the situation in *Brita*, where the EU had concluded Association Agreements with Israel *and* the PLO, the EU only has an agreement with Moldova and has refused to conclude a separate agreement with Transnistria. In *Front Polisario*, the Court of Justice ruled that the people of Western Sahara should be considered a third party in relation to the EU and Morocco, due to their separate and distinct status from Morocco as a result of their right to self-determination as a non-self-governing territory.[166] The people of Western Sahara have not given consent for the application of the EU-Morocco trade agreements to their territory. They have not been involved in the negotiation process leading to the conclusion of the agreements in any way. On the other hand, even if the people of Transnistria can be considered a third party, their de facto administration has given consent to the application of the DCFTA to the territory, by accepting the Union's final offer in 2015 and by concluding an understanding with Moldova on the special conditions for application. On that basis, the Association Council adopted Decision 1/2015, providing for the application of the DCFTA to Transnistria.[167]

Conclusion

It must be concluded that the EU has acted in conformity with the Court of Justice's case law when it approved the conclusion of the EU-Moldova Association Agreement, more specifically when it approved the adoption of Decision 1/2015 by the Association Council. The EU has recognised the lack of effective control by Moldova over Transnistria, while at the same time respecting the state's territorial sovereignty. Further, the Union's refusal to conclude a separate trade deal with Transnistria is in line with its non-recognition policy. The EU adopted a political-sovereign approach under which it has solved the issue of the territorial application of the DCFTA in conformity with international law. The Union's approach is in line with its external action objective of Article 3(5) TEU to contribute to the strict observance of international law.

However, its flexible approach towards Transnistria, by accepting the understanding between Moldova and Transnistria providing for the implementation of only a number of activities linked to the DCFTA, is incompatible with the territorial application clause of Article 462 of the Association Agreement. This clause states that the Association Council can only apply the entire Association Agreement or DCFTA to Transnistria, and not parts thereof.

[166] *Front Polisario* (n 161) para 103-106
[167] See ch 3, para 2

6.2 Legal consequences

This paragraph discusses whether international law or EU law prohibit states and businesses to trade with occupied territories. Since the territorial application of the DCFTA to Transnistria is in conformity with the case law of the Court of Justice, Member States and EU-based companies are not expected to face any legal consequences in case they trade with or participate in economic activities in the territory. However, for trading with occupied territories like the West Bank and Gaza, Western Sahara, Northern Cyprus and Crimea this might be different.

When states trade with or participate in economic activities in an occupied territory, they may be in breach of the obligation of non-recognition or their participation may amount to aid or assistance in the commission of an internationally wrongful act in the meaning of Articles 16 and 41(2) ILC Draft Articles.[168] However, a state does not aid or assist unlawful conduct by merely permitting companies from its jurisdiction to trade commercially with an occupied territory.[169]

With regard to Northern Cyprus, the EU and its Member States have never suggested that EU companies are not allowed to engage in commercial activities with Turkish companies that have been involved in the occupation of Northern Cyprus.[170] Also, the EU has never sought to restrict or punish the acquisition of property (with consent) in the occupied territory.[171] However, with regard to Israeli settlements the EU and Member States actively discourage companies to engage in economic dealings because of the (often unspecified) legal and economic risks.[172] Nevertheless, the World Bank estimated in 2012 that the EU imports for approximately US$ 300 million in goods from West Bank settlements a year.[173]

In 2002 the UN Security Council asked its legal advisor Hans Corell for a legal opinion about the legality of economic activity by third-country companies under the supervision of an occupying or administering power.[174] More specifically, the opinion concerned the legality of oil exploration contracts issued by Morocco for Western Sahara to the US-based company Kerr McGee and the French-based company Total. Corell argued that, due to their right to self-determination, the people of Western Sahara have 'inalienable rights' to their mineral and other natural resources.[175] Exploitation of such resources may only take place 'for the benefit of the peoples of those territories, on their behalf or in consultation with their representatives'.[176] His opinion is largely based on the indigenous rights to scarce natural resources. For other forms of economic activity he concluded that state practice allowed the administering power to engage

[168] James Crawford, 'Opinion on Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories', <https://www.tuc.org.uk> para 84
[169] Ibid para 91
[170] Eugene Kontorovich, 'Economic Dealings with Occupied Territories' (2015) 53 Columbian Journal of Transnational Law 584, 616
[171] Ibid 618
[172] See European Council on Foreign Relations, 'EU member state business advisories on Israeli settlements', <https://www.ecfr.eu>
[173] World Bank, 'Fiscal Crisis, Economic Prospects, The Imperative for Economic Cohesion in the Palestinian Territories', Economic Monitoring Report to the Ad Hoc Liaison Committee (23 September 2012), 13
[174] Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council (12 February 2002), UN Doc S/2002/161 (Corell Opinion)
[175] Ibid para 10
[176] Ibid para 24

in economic activity that does 'not entail exploitation or the physical removal of the mineral resources' without a benefit for the local population.[177] He decided that the contracts by Morocco for oil *exploration*, instead of *extraction*, did not violate international law.[178]

Recent decisions by national courts indicate that 'international law neither prohibits business with enterprises in occupied territories, nor requires that products from such areas bear any particular identifying label'.[179] In the case *Richardson* the UK Supreme Court ruled that the economic activities of a retailer in London selling Dead Sea products produced by a company from the West Bank does not breach international humanitarian law, since the selling of the products does not amount to aid or assistance in the unlawful transfer of Israeli settlers to the territory.[180] Further, the labelling of the products as coming from 'Dead Sea, Israel' was found not to be misleading for consumers within the meaning of British consumer protection law, implemented from the EU Unfair Commercial Practices Directive 2005/29/EC.[181]

In a French decision concerning a boycott of the SodaStream company, the French court ruled that the labelling of the products coming from the West Bank as 'Made in Israel' was not fraudulent and would not mislead a typical consumer. The products and their fabrication are not illegal either.[182] The case *France-Palestine Solidarite v. Alstom* concerned an action against French industrial companies Alstom and Veolia, who had worked on a rail infrastructure project in Jerusalem which partly crossed the 1949 Green Line. The Cour d'Appel de Versailles ruled that the Geneva Conventions do not apply to private companies and that the illegality of the settlements does not mean that it is prohibited for third-country companies to participate in economic activity in the region.[183]

In 2013 the Dutch prosecutor dismissed a case against a crane rental company for involvement in the construction of the Israeli border wall. The prosecutor decided that the company had contributed to a very little extent to the construction, as opposed to other foreign companies, while the Dutch International Crimes Act (*Wet Internationale Misdrijven*) requires a 'substantial' contribution to an illegal act. Also, the danger for repetition seemed to be minor, since the company restructured its Israeli branch following the incident. Further, the question of the company's responsibility is complex and would require more research, while the lack of cooperation from Israel would hinder the obtainment of evidence.[184]

Contrary to the UK and French courts, the European Commission and several Member States argue that goods from Israeli settlements should not have the mark 'Made in Israel' on their package and certificate of origin, since this would be fraudulent and misleading for

[177] Ibid para 25
[178] Ibid para 25
[179] Kontorovich (n 170) 630
[180] UK Supreme Court 5 February 2014, *Richardson v. Director of Public Prosecutions,* [2014] UKSC 8, para 17
[181] Ibid para 22
[182] Tribunal de Grande Instance de Paris 23 January 2014, *OPM France v. France-Palestine Solidarite*, fourth chamber, second section, No. 13/06023
[183] Cour d'Appel de Versailles 22 March 2013, *France-Palestine Solidarite v. Alstom*, third chamber, No. 11/05331
[184] Openbaar Ministerie, 'Geen verder onderzoek naar kraanverhuurder' (14 mei 2013) <https://www.om.nl>

consumers.[185] In June 2018 the French Conseil d'État referred preliminary questions to the Court of Justice about this issue.[186] On 13 June 2019 Advocate General Hogan concluded that EU law[187] requires that products from Palestinian occupied territories are accompanied by the indication of the geographical name of the territory and the indication that the product comes from an Israeli settlement, if that is the case.[188] Soon, the Court of Justice will deliver its judgment which will clarify the labelling requirements under EU law for imported products from occupied territories.

[185] European Commission Interpretative Notice on indication of origin of goods from territories occupied by Israel since June 1967 [2015] OJ C375; UK Department for Environment, Food and Rural Affairs, 'Technical Advice: Labelling of Produce Grown in the Occupied Palestinian Territories' <https://webarchive.nationalarchives.gov.uk>; Western Sahara Resource Watch, 'Dutch government repeats: Western Sahara Products Are Not from Morocco', <https://www.wsrw.org>

[186] Case C-363/18, *Organisation juive européenne and Vignoble Psagot* [2018] OJ C276, 27

[187] Regulation (EU) 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers [2011] OJ L304, 18 and corrigendum [2016] OJ L266, 7

[188] Case C-363/18, 13 June 2019, *Organisation juive européenne and Vignoble Psagot*, ECLI:EU:C:2019:494 (Opinion Advocate General Hogan)

7. Concluding remarks

In this thesis I have discussed what the Court of Justice's case law with regard to the application of EU trade agreements to territorially disputed areas means for the legality of the (partial) application of the EU-Moldova DCFTA to the secessionist region of Transnistria. My conclusion is that the EU has acted in conformity with the Court's case law when it approved the conclusion of the EU-Moldova Association Agreement, more specifically when it approved the adoption of Decision 1/2015 by the Association Council. The EU has recognised the lack of effective control by Moldova over Transnistria, while at the same time respecting the state's territorial sovereignty. Further, the Union's refusal to conclude a separate trade deal with Transnistria is in line with its non-recognition policy.

The fact that the application of the EU-Moldova DCFTA to Transnistria is compatible with the Court's interpretation of international law and the fact that the application of the EU-Morocco trade agreements to Western Sahara is not, can be clarified by the different characteristics of the two territories. Contrary to Western Sahara, Transnistria is not a non-self-governing territory having a right to self-determination. Moreover, Transnistria is de jure part of Moldova's territory. It means that Transnistria falls within the geographical space where Moldova exercises its full sovereign powers, so that the territorial scope rule has not been breached. More importantly, even if the people of Transnistria could be considered a third party, like the people of Western Sahara, Transnistria's de facto administration has given consent to the application of the DCFTA to the territory. It has accepted the Union's final offer in 2015 and has concluded an understanding with Moldova on the special conditions for application. It is on that basis that the Association Council adopted Decision 1/2015, providing for the application of the DCFTA to Transnistria. For Western Sahara, such an explicit provision extending the territorial scope of the EU-Morocco trade agreements, with the consent of the representative of the Saharawi people, was missing.

However, the Union's flexible approach towards Transnistria, by accepting the understanding between Moldova and Transnistria providing for the implementation of only a number of activities linked to the DCFTA, is incompatible with the territorial application clause of Article 462 of the Association Agreement. This article states that the Association Council can only apply the entire Association Agreement or DCFTA to Transnistria, and not parts thereof.

Although the (partial) application of the EU-Moldova DCFTA to Transnistria is compatible with the Court's case law, there is a way to go for the EU concerning its approach to other territorially disputed areas. Especially its approach towards Western Sahara is debatable. If the EU is serious about its objective to contribute to the strict observance of international law, there is still a world to win.

Bibliography

Table of cases

International Court of Justice

ICJ 20 February 1969, *North Sea Continental Shelf Cases (Germany v. Denmark/Netherlands)*, ICJ Reports 1969, p. 3

ICJ 16 October 1975, *Western Sahara*, ICJ Reports 1975, p. 12

ICJ 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136

United Nations Arbitration

Chief Justice Taft (USA), 10 October 1923, *Tinoco Arbitration*, Arbitration between Great Britain and Costa Rica, Reports of International Arbitral Awards (2006), vol. 1, p. 369-399

European Court of Human Rights

ECHR 8 July 2004, *Ilascu and others v. Moldova and Russia*, app. no. 48787/99

Court of Justice of the European Union

6/72, 21 February 1973, *Continental Can*, ECLI:EU:C:1973:22

181/73, 30 April 1974, *Haegeman*, ECLI:EU:C:1974:41

12/86, 30 September 1987, *Demirel*, ECLI:EU:C:1987:400

30/88, 14 November 1989, *Greece v. Commission*, ECLI:EU:C:1989:422

C-192/89, 20 September 1990, *Sevince v. Staatssecretaris van Justitie*, ECLI:EU:C:1990:322

C-339/89, 24 January 1991, *Alsthom v. Sulzer*, ECLI:EU:C:1991:28

C-286/90, 24 November 1992, *Poulsen and Diva Navigation*, ECLI:EU:C:1992:453

C-432/92, 5 July 1994, *Anastasiou I*, ECLI:EU:C:1994:277

C-327/91, 9 August 1994, *France v. Commission*, C-327/91, ECLI:EU:C:1994:305

C-162/96, 16 June 1998, *Racke*, ECLI:EU:C:1998:293

C-219/98, 4 July 2000, *Anastasiou II*, ECLI:EU:C:2000:360

C-140/02, 30 September 2003, *Anastasiou III*, ECLI:EU:C:2003:520

C-181/06, 5 July 2007, *Deutsche Lufthansa*, ECLI:EU:C:2007:412

C-402/05 P and C-415/05 P, 3 September 2008, *Kadi and Al Barakaat International Foundation v. Council and Commission*, ECLI:EU:C:2008:461

C-386/08, 29 October 2009, *Brita*, C-386/08, ECLI:EU:C:2009:674 (Opinion Advocate General Bot)

C-386/08, 25 February 2010, *Brita,* ECLI:EU:C:2010:91

C-366/10, 21 December 2011, *Air Transport Association of America and Others,* ECLI:EU:C:2011:864

C-104/16 P, 21 December 2016, *Council v. Front Polisario*, ECLI:EU:C:2016:973

C-266/16, 27 February 2018, *Western Sahara Campaign UK*, ECLI:EU:C:2018:118

Case C-363/18, 13 June 2019, *Organisation juive européenne and Vignoble Psagot*, ECLI:EU:C:2019:494 (Opinion Advocate General Hogan)

C-363/18, *Organisation juive européenne and Vignoble Psagot* (OJ 2018, C 276), p. 27 (case in progress)

General Court of the European Union

T-512/12, 10 December 2015, *Front Polisario v. Council,* ECLI:EU:T:2015:953

T-275/18, 30 November 2018, *Front Polisario v. Council,* ECLI:EU:T:2018:869 (Order)

Other

Cour d'Appel de Versailles 22 March 2013, *France-Palestine Solidarite v. Alstom,* third chamber, No. 11/05331

Tribunal de Grande Instance de Paris 23 January 2014, *OPM France v. France-Palestine Solidarite,* fourth chamber, second section, No. 13/06023

UK Supreme Court 5 February 2014, *Richardson v. Director of Public Prosecutions,* [2014] UKSC 8

Table of legislation

International conventions

Convention on the Rights and Duties of States, Montevideo, 26 December 1933, 165 LNTS 19

Vienna Convention on the Law of the Treaties (VCLT) (1969), United Nations, Treaty Series, vol. 1155, nr. 18232, p. 331

UN documents

Resolution 25/2625 of the General Assembly of the United Nations (24 October 1970), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc A/RES/25/2625

Resolution 34/37 of the General Assembly of the United Nations (21 November 1979), UN Doc A/RES/34/37

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

Resolution ES-10/14 of the General Assembly of the United Nations (12 December 2003), UN Doc A/RES/ES-10/14

Resolution 72/282 of the General Assembly of the United Nations (26 June 2018), UN Doc A/RES/72/282

EU international agreements

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 L187

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 L147

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 L70/2

Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014] OJ L260/4

Decision No 1/2014 of the EU-Republic of Moldova Association Council of 16 December 2014 adopting its Rules of Procedure and those of the Association Committee and of subcommittees [2015] OJ L110, Art 11

Decision No 1/2015 of the EU-Republic of Moldova Association Council of 18 December 2015 on the application of Title V of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, to the entire territory of the Republic of Moldova [2015] OJ L336

EU legislation and policy documents

Commission Regulation (EC) 972/2008 of 3 October 2008 amending Regulation (EC) No 341/2007 opening and providing for the administration of tariff quotas and introducing a system of import licences and certificates of origin for garlic and certain other agricultural products imported from third countries [2008] OJ L265

Regulation (EU) 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers [2011] OJ L304 and corrigendum [2016] OJ L266

Council Decision (2012/497/EU) of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2012] OJ L241/2

European Parliament resolution of 17 December 2014 on recognition of Palestine statehood (2014/2964(RSP))

European Commission Interpretative Notice on indication of origin of goods from territories occupied by Israel since June 1967 [2015] OJ C375

European Commission, 'Trade for all: towards a more responsible trade and investment policy', COM/2015/0497 final

Answer given by Ms Malmström on behalf of the Commission on question E-001168/2016 by Mr Ivan Jakovčić, 4 April 2016 <http://www.europarl.europa.eu>

Council Decision (EU) 2016/839 of 23 May 2016 on the conclusion, on behalf of the European Union, of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2016] OJ L141

Council Decision (EU) 2018/1893 of 16 July 2018 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 [2018] OJ L310

Annex 2 of the Commission Implementing Decision of XXX on the annual action programme 2018 in favour of the Republic of Moldova (draft version), Action Document for EU Support to Confidence Building Measures V (2019-2022)

Other

'Agreement on principles of a peaceful settlement of the armed conflict in the Transdniestrian region of the Republic of Moldova' <http://www.stefanwolff.com>

Guide to GATT Law and Practice: Analytical Index (1994) <https://www.wto.org>

Joint Statement by Pridnestrovie, Abkhazia and South Ossetia (2006) <http://web.archive.org>

The United Nations and Decolonization, Non-Self-Governing Territories <https://www.un.org>

UK Visas and Immigration, ‘Country Policy and Information Note, Moldova: Human rights in Transnistria’ (2017) <https://assets.publishing.service.gov.uk>

UK Department for Environment, Food and Rural Affairs, ‘Technical Advice: Labelling of Produce Grown in the Occupied Palestinian Territories’ <https://webarchive.nationalarchives.gov.uk>

World Bank, ‘Fiscal Crisis, Economic Prospects, The Imperative for Economic Cohesion in the Palestinian Territories’, Economic Monitoring Report to the Ad Hoc Liaison Committee (23 September 2012)

Bibliography

American Law Institute, *Restatement of the Law, Third, Foreign Relations Law of the United States* (Vol. 1, 1987)

Freedom House, 'Freedom in the World – Transnistria 2018' <https://freedomhouse.org>

Crawford J, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006)

Crawford J, 'Opinion on Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories', <https://www.tuc.org.uk>

Eckes C, 'International Law as the Law of the EU: The Role of the Court of Justice' (2010) CLEER Working Papers 6

Emerson M and Cenusa D, *Deepening EU-Moldovan Relations: What, why and how?* (2nd edn, Rowman & Littlefield International 2016)

Harpaz G, 'The Front Polisario Verdict and the Gap between the EU's Trade Treatment of Western Sahara and Its Treatment of the Occupied Palestinian Territories' (2018) 52 Journal of World Trade 4

Hirsch M, 'Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip' (2002) 26 Fordham International Law Journal 3

Hummelbrunner S and Prickartz A-C, 'EU-Morocco Trade Relations do not legally affect Western Sahara – Case C-104/16 P Council v. Front Polisario' (*European law blog*, 5 January 2017) <http://europeanlawblog.eu>

Kassoti E, 'The Council v. Front Polisario Case: The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation (Second Part)' (2017) 2 European Papers 1

Kassoti E, 'The Empire Strikes Back: The Council Decision Amending Protocols 1 and 4 to the EU-Morocco Association Agreement' (2019) European Papers, European Forum, Insight of 27 February 2019 <www.europeanpapers.eu>

Kontorovich E, 'Economic Dealings with Occupied Territories' (2015) 53 Columbian Journal of Transnational Law 584

Lupusor A, Fala A, Morcotylo I, Prohnitchi V, 'Transnistrian economy at the crossroads? Regional Economic Review: Transnistrian region' (2015) <www.expert-grup.org>

Malanczuk P, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997)

Meunier S and Nicolaïdis K, 'The European Union as a conflict trade power' (2006) 13 Journal of European Public Policy 6

Ryngaert C and Sobrie S, 'Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia' (2011) Leiden Journal of International Law 24

Secrieru S, ‘Transnistria Zig-zagging towards a DCFTA’ (2016), The Polish Institute of International Affairs (PISM) 4

Schoiswohl M, *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International law: The Case of ‘Somaliland’* (Martinus Nijhoff Publishers 2004)

Van der Loo G, ‘The EU's Association Agreements and DCFTAs with Ukraine, Moldova and Georgia: A Comparative Study’ (2017) <http://www.3dcftas.eu>