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EU External Relations and International Law: Divergence on Questions of 'Territory'?

EU External Relations and International Law

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I. Introduction

The European Union is not a state. Yet, it is increasingly involved in territorial questions, either of its own or of other states. Notions of territory and jurisdiction are central in international law.[1] Indeed, state sovereignty implies that states are the sole rule makers and rule enforcers within a jurisdiction that is intrinsically linked to their physical territory. This is obviously different for international organisations,[2] also considering that during the process of drafting the Convention on the Law of Treaties, the International Law Commission (ILC) had difficulties in accepting the existence of a 'territory of the organization'.[3] While the EU will largely leave internal border disputes to be settled on the basis of international law,[4] territorial questions are increasingly important, not just in relation to the changing role of borders in its internal market, but also in the context of its role as a global actor. As a maturing legal system, the possibility of divergence from international law is thus pertinent.[5] In that context, the main question that this chapter explores is if and how the Court of Justice of the European Union (CJEU) has used international law in the adjudication of (incidental) territorial matters that have arisen in the course of interpreting agreements with third states.

The competences of the EU to make and enforce rules within a given 'territorial space' are undisputed.[6] These days we are witnessing an extension of that 'territorial space'. The increasing membership of the EU is the most obvious factor causing the territorial scope

[1] *cf* Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2015).

[2] *cf* Article 29 (on the 'Territorial scope of treaties') of the 1986 Vienna Convention essentially copied Article 29 of the 1969 Convention and provides: 'Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more international organizations is binding upon each State party in respect of its entire territory.' It is interesting to note that, while international agreements concluded by international organisations are included, the obligations are imposed on 'each State party' only.

[3] The 1982 ILC Commentary explains this choice in the following terms: 'Is it possible to imagine a parallel provision concerning the obligations of international organizations? Despite the somewhat loose references which are occasionally made to the "territory" of an international organization, we cannot speak in this case of "territory" in the strict sense of the word. However, since this is so and since account must nevertheless be taken of the variety of situations which the multiple functions of international organizations may involve, it seemed preferable to avoid a formula which was too rigid or too narrow. If the draft articles said that, in the case of an international organization which is a party to a treaty, the scope of application of the treaty extended to the entire territory of the States members of that organization, the draft would diverge from article 29 of the Vienna Convention by raising the question of the scope of application of a treaty, which is not expressly covered by that Convention.'

[4] See pending Case C-457/18 *Republic of Slovenia v Republic of Croatia* ECLI:EU:C:2019:1067 in which the Advocate General on 11 December 2019 argued that the issue of determining the boundary between those two States is a matter of public international law.

[5] See the Introduction by Elaine Fahey to this volume.

[6] We leave aside the fact that there continue to exist territorial disputes between EU Member States, eg between the UK and Spain (Gibraltar), or Slovenia and Croatia.

of the Union to change. Needless to say, a decrease in official members via the exit of the UK from the EU is an unprecedented situation, though less so when framed in terms of 'territory' rather than 'membership'.[7] But the 'global reach' of EU law,[8] and the extent to which external territories fall within that scope, is even more important and less definable by reference to physical territory. Citizenship, boundaries and jurisdiction are three interlocking elements that have strong relationships to 'territory'. Nonetheless, the EU is treaty-bound not only to respect, but to uphold international law:[9] an obligation which has come under increased scrutiny.[10] All of this leads to the conclusion that the special nature of the EU and the transfer of a number of competences from the Member States to that organisation, cause it to be more active in relation to territorial questions than 'regular' organisations. As the EU does not exist in isolation, but is very well connected to other areas and levels of international law, the EU cannot escape these questions.[11]

Therefore, rather than convergence as a process, we are looking primarily at divergence. Since EU law was, at the outset at least, a creation of international law then the starting point would be that on such fundamental questions as territory, definitions should be the same. However, in the context of the EU as a maturing legal system, the aim of the present chapter is to consider the extent of *divergence* between EU and international law. There are two strands to the chapter. First of all—using an *internal* perspective—it will examine the effects of EU norms and rules by looking through a 'territorial' lens and by considering the EU's own definition and understanding of territory in its legal order. Second—using an *external* perspective—it will specifically look at the response by one of the EU institutions—the CJEU—in cases where international territorial questions have arisen. These have generally arisen when the Court of Justice has been faced with the highly problematic matters of the territorial application of EU law and bilateral agreements with third states as indications. The continued prevalence of occupied (or at least disputed) territories around the globe has resulted in a line of case law before the Court which at times seems to force it into deciding matters which go beyond the role envisaged for it in the original Treaty. Though questions on territorial scope are some of the most politically-charged in international law, they often emerge through seemingly mundane and technical matters of trade. This part of the chapter explores the extent to which the Court, which was set up to deal with matters of EU law and not to resolve 'general' international law quandaries,

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[7] Greenland, though remaining part of the Kingdom of Denmark, left the EU in 1984. Further back still, former various territories *de facto* left the EEC/EU when gaining independence: most notably Algeria (previously a full part of France) in 1962.

[8] Elaine Fahey, *The Global Reach of EU Law* (Routledge, 2016).

[9] Article 3(5) Treaty on European Union (TEU).

[10] Jed Odermatt, 'The Court of Justice of the European Union: International or Domestic Court' (2014) 3 *Cambridge Journal of International and Comparative Law* 3, 696–718.

[11] See for instance the various contributions to Bart Van Vooren, Steven Blockmans and Jan Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press, 2013); as well as, in particular, Arts 3(5), 21 and 22 of the TEU. See more extensively: Ramses A Wessel, 'Flipping the Question: The Reception of EU Law in the International Legal Order' (2016) *Oxford Yearbook of European Law*; Ramses A Wessel, 'Studying International and European Law: Confronting Perspectives and Combining Interests' in Sacha Garben and Inge Govaere (eds), *The Interface between International and EU Law* (Hart Publishing, 2018). See further: Fahey (n 8); Dmitry Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (Cambridge University Press, 2013); Jed Odermatt, *The European Union as a Global Actor and its Impact on the International Legal Order*, PhD thesis (University of Leuven, 2016); Penelope Nevill, 'The European Union as a Source of Public International Law' (2013) *Hungarian Yearbook of International Law and European Law* 281–95 (Eleven International Publishing, 2014); Frank Hoffmeister, 'The Contribution of EU Practice to International Law' in M Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press, 2008) 37–127. On the EU and other international organisations, see Ramses A Wessel and Jed Odermatt (eds), *Research Handbook on the European Union and International Organisations* (Edward Elgar Publishing, 2019).

has developed its own methods to grapple with such inherently 'political' and thorny questions. Although the Court is only one institution in the EU framework, its judgments reveal the legal position of the Union on an increasing number of territorial questions.

II. Internal EU Territorial Issues

A first step to assess divergence with international law is to map the various ways in which territorial questions come up within the European Union and to what extent the Union has made of the notion of territory. The present section will subsequently address various dimensions related to territory: nationality and citizenship, and jurisdiction and extra-territorial effects. First, however, we will briefly revisit how the EU treaties deal with questions of territory.

A. Territorial References

The European Union has considered territorial questions from the outset and there are many references to 'territory' in the EU Treaties. Yet, most of these are related to the Member States' territories.[12] Article 52(2) Treaty on European Union (TEU) points to the territorial scope of the Treaties as specified in Article 355 of the Treaty on the Functioning of the European Union (TFEU), which in turn lists the overseas territories belonging to some of the Member States and the extent to which EU law does or does not apply.[13] While it is mainly in this context that references by the Court to the 'territory of the EU' may be found,[14] it has been claimed that 'it is clearly possible to speak of the emergence of the concept of Union territory, given the autonomous demarcation of the territorial application of EU law defined in the Treaties'.[15] Indeed, one may also find some hints at the possible existence of an 'EU territory' in the Treaties. Thus, Article 3(3) TEU refers to the Union's objective to 'promote economic, social and territorial cohesion, and solidarity among Member States'. At the same time 'It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.' References like these are meant to create some unity while preserving the diversity, and the objective of 'territorial cohesion' has merely been the driver behind the allocation of the so-called cohesion funds aimed at 'reducing disparities between the levels of development of the various regions and the backwardness of

[12] See extensively as well as much more in detail on these provisions, Dmitry Kochenov, 'European Union Territory from a Legal Perspective: A Commentary on Articles 52 TEU, 355, 349, and 198-204 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights – A Commentary* (Oxford University Press, 2019); also available as University of Groningen Faculty of Law Research Paper 2017-05; available at SSRN https://ssrn.com/abstract=2956011 (last accessed 13 March 2020).

[13] Two Declarations (43 and 60) are attached the Treaty, both of which concern potential future changes to the status of French and Dutch territories.

[14] See for instance the frequent use of the term 'Community territory' in Case 177/95 *Ebony Maritime SA and Loten Navigation Co Ltd v Prefetto della Provincia di Brindisi and others* ECLI:EU:C:1997:89. Other cases in point may be Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* ECLI:EU:C:2011:124 and Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* ECLI:EU:C:2011:277. *cf* Dmitry Kochenov, 'A Real European Citizenship; A New Jurisdiction Text; A Novel Chapter in the Development of the Union in Europe' (2011) 18 *Columbia Journal of European Law* 56.

[15] Kochenov (n 12).

the least favoured regions'.[16] In a way, 'economic, social and territorial cohesion' intends to view the territories of the Member States as a whole, which is reinforced by the commitment to remove internal frontiers (for example, Article 3(2) TEU on the area of freedom, security and justice).

Yet, the absence of a genuine EU territory—or at least an acceptance of the continued existence of state territories—is underlined by the Treaty on European Union:

> The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. *It shall respect their essential State functions, including ensuring the territorial integrity of the State*, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.[17]

At the same time, these State territories are even to be defended on the basis of a *collective* security rule: If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power […].[18]

Similarly, the EU's security and defence policy may be used in 'the fight against terrorism, including by supporting third countries in combating terrorism in their territories', and the so-called 'solidarity clause' calls upon both the Union and its Member States to 'act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster'.[19]

More clear notions of a possible 'EU territory' can be found when the 'territorial application' of the Treaties is concerned. First of all, the Treaties apply to the EU Member States (which are all mentioned by name).[20] This is further specified in relation to the so-called countries and territories overseas, which leads to an extension of the territorial scope of the EU.[21] This latter provision provides that EU, in principle, applies to Guadeloupe, French Guiana, Martinique, Mayotte, Réunion, Saint-Martin, the Azores, Madeira and the Canary Islands. For all other overseas countries and territories (including this of the UK, the Åland Islands, the Faeroe Islands, or the Netherlands's Antilles) specific rules are to be found in Art 355 and in particular in Annex II of the Treaty. That one could perhaps indeed see this as an 'upscaling' of 'European territory' is underlined by Art 198 TFEU:

> The Member States agree to associate with the Union the non-European countries and territories which have special relations with Denmark, France, the Netherlands and the United Kingdom. These countries and territories (hereinafter called the 'countries and territories') are listed in Annex II. The purpose of association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Union as a whole.

This association brings the non-European countries and territories clearly within the reach of EU law and policies. They have a right to the same treatment as the EU Member States, for

[16] Art 174 TFEU.
[17] Art 4(2) TEU. Emphasis added.
[18] Art 42(7) TEU.
[19] See Arts 43 TEU and 222 TFEU respectively.
[20] Art 52 TEU.
[21] Art 355 TFEU.

instance in relation to trade and investment.[22] At the same time, the existence of overseas territories may have territorial implication under, for instance, the law of the sea, in particular where these territories may result in an additional economic exclusive zone (EEZ) to be used for fishing and possible mining activities. Thus, while Greenland is not part of the EU, its location does make it a place of interest to the EU in terms of debates on the future of the Arctic area.

In addition, EU 'territory' is also extended *within* Europe as 'The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible' (para 3). Although the geographic scope of the EU has undergone seven rounds of enlargement between 1973 and 2013 (with the additional incorporation of the former German Democratic Republic into the Federal Republic of Germany), it should be noted that the scope has also shrunk. Although the United Kingdom is the first Member State to ever leave the EU, Greenland left the Union in 1984 (though it remains part of the Kingdom of Denmark) and the independence of former colonies—such as Algeria from France—have changed the political map of Europe, and its frontiers.

Although we cannot see a divergence from international law approaches as such, the approach of the EU Treaties to 'territorial questions' is quite specific and largely deals with the (extended) territories of Member States and primarily in relation to the application of EU law. Despite the fact that the Treaties do not refer to 'EU territory' as such, some territorial concepts clearly hint in that direction, as will also be considered below.

B. European Citizenship

The 'idea' of EU territory comes back in the clear link between territory, nationality and citizenship. While in international law, *nationality* is related to statehood, *citizenship* can also be granted to others living on the territory of that state.[23] It is the latter notion that returns in EU law and 'European citizenship' is a key element of the process of European integration. Art 30(2) TFEU inter alia provides: 'Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have […] the right to move and reside freely within the territory of the Member States'. Indeed, the territory of *all* Member States; the rights of European citizens have largely been harmonised and European citizenship is frequently used by the CJEU to rule on extensive rights for individuals. Citizenship has thus become an essential element in the right to seek or accept jobs, to start a business or to provide cross-border services. At the same time, European citizenship entails

> the right to enjoy, *in the territory of a third country* in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State […].[24]

Hence, outside the EU a European citizen may rely on the help of another EU Member State. Thus, the traditional national diplomatic and consular assistance is extended to an EU-wide

[22] Art 199 TFEU.
[23] *cf* Kay Hailbronner, 'Nationality in Public International Law and European Law' in Rainer Bauböck, *Acquisition and Loss of Nationality: Policies and Trends in 15 European States* (Amsterdam University Press, 2006).
[24] Art 23 TFEU. Emphasis added.

system of protection of European citizens abroad. Links with international diplomatic and consular law become ever more visible. New developments in EU diplomacy indeed reveal at least an ambition of the EU to act on behalf of its Member States in situations of diplomatic protection and consular assistance. European Union Delegations can increasingly be compared to national Embassies.[25]

While currently the idea of 'supranational citizenship'[26] can most easily be seen as a dimension of the European integration process, it has been argued that the existence of the phenomenon could allow for a more general separation between states and (single) citizenship:

> This belonging to a polity, expressed in purely legal terms, is the real novelty of the European model, replicable in other geographical areas or global organizations – which could generate - one day - their one partial citizenships - and it opens the door to multiple and cumulative citizenships, not conflicting among each other, to communities partially overlapping.[27]

While 'European citizenship' could thus be seen as deviating from the clear link between statehood and nationality that can be found in public international law, it is at the same time clear that EU citizenship does not endow the EU with competences states would generally have under international law to protect their nationals. In international diplomatic and consular law, the notion of nationality remains crucial. New developments in EU diplomacy reveal at least an ambition of the EU to act on behalf of its Member States in situations of diplomatic protection and consular assistance. This clearly highlights the parallels between being a national of a state and a European citizen.[28] The Brexit debate in the UK has similarly highlighted how citizens perceive the addition of EU citizenship to national citizenship, and the intrinsic difficulties in retaining rights obtained by virtue of EU citizenship.[29]

Overall, the notion of 'European citizenship' does not seem to have led to changes in the international law notions on nationality and the rights states have in the protection of the rights of their nationals abroad.[30]

C. Jurisdiction and 'Extra-Territorial' Effects of EU Law

So-called 'extra-territorial effects' of EU law and their impact on international law receive more and more attention in EU legal scholarship.[31] As phrased by Joanne Scott:

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[25] Pia Kerres and Ramses A Wessel, 'Apples and Oranges? Comparing the European Union Delegations to National Embassies' *CLEER Papers*, No 2, 2015.

[26] See Francesca Strumia, *Supranational Citizenship and the Challenge of Diversity: Immigrants, Citizens and Member States in the EU* (Brill| Nijhoff, 2013).

[27] Susanna Cafaro, 'Peculiarities of a Supranational Citizenship' (21 November 2016), available on www.linkedin.com/pulse/peculiarities-supranational-citizenship-susanna-cafaro (last accessed 13 March 2020).

[28] Ramses A Wessel, 'Can the European Union Replace its Member States in International Affairs? An International Law Perspective' in Inge Govaere, Erwan Lannon, Peter Van Elsuwege and Stanislas Adam (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Martinus Nijhoff Publishers, 2013) 129–47; Ramses A Wessel and B Van Vooren, 'The EEAS' Diplomatic Dreams and the Reality of International and European Law' (2013) *Journal of European Public Policy* 9, 1350–67.

[29] Willem Maas, 'EU Citizenship and Free Movement after Brexit' in Scott Greer and Janet Laible (eds), *Europe after Brexit* (Manchester University Press, forthcoming in 2020).

[30] In that context, Advocate General Maduro emphasised the principle of international law that 'questions of nationality are in principle within the reserved domain of States'. Case C-135/08 *Janko Rottman v Freistaat Bayern* ECLI:EU:C:2009:588.

[31] *cf* Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law*; Joanne Scott, 'The New EU Extra-Territoriality' (2014) 51 *Common Market Law Review*

> the EU makes frequent recourse to a mechanism that may be labelled 'territorial extension.' The practice of territorial extension enables the EU to govern activities that are not centered upon the territory of the EU and to shape the focus and content of third country and international law.[32]

This may also lead to jurisdictional questions, eg with respect to international law notions of the concept.[33]

While the EU rules are, obviously, primarily related to relations between the EU Member States, these rules often affect or influence other legal systems. While part of this is related to an intentional 'export' of norms (see our earlier references to the notion of the EU as a 'normative actor'), other effects flow from an adoption of norms of standards by other states to, for instance, allow access to the EU market. This is usually referred to as 'the global reach of EU law'.[34] As Fahey argues, this includes the effects of EU regulatory standards on, for instance, US rules in the realm of inter alia genetically modified foods, data privacy standards and chemical safety rules or even the transposition of EU environmental standards in some US states.[35] This is believed to stretch the EU's legal influence beyond its own territory, and could perhaps indeed be seen as an 'upscaling' of the EU's territorial jurisdiction. In the words of Fahey:

> Included in these theorisations is the view that the size and scale of the EU, as a market and as a polity, has generated what is understood here as 'rule-transfer'. It has entailed that the EU has adopted rules and standards that other polities and markets have in turn adopted, compelled to do so or acting out of sheer necessity.[36]

Debates on this issue are related to the question to what extent the EU can be a global normative actor. The brief—reflected in for instance Articles 3(5) and 21 TEU—is quite well known. At the same time questions of the extra-territoriality of the EU's own Charter of Fundamental Rights seem to have remained unsolved, since the territorial scope of the Charter is undefined. In fact, the issue of extra-territoriality of the Charter and the opposing views of Advocate General (AG) Mengozzi in *X and X v Belgium* (against the adoption of the extra-territoriality standard developed by the European Court of Human Rights (ECtHR) and in favour of an autonomous understanding of the territorial scope of the Charter) and the one of

1343; Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press, 2020).

[32] *Ibid* at 89. In this paper, Scott is actually challenging the notion of 'extra-territoriality' as it is commonly used in the literature, and draws attention to 'territorial extension': 'a measure will be regarded as extraterritorial when it imposes obligations on persons who do not enjoy a relevant territorial connection with the regulating state. By contrast, a measure will be regarded as giving rise to territorial extension when its application depends upon the existence of a relevant territorial connection, but where the relevant regulatory determination will be shaped as a matter of law, by conduct or circumstances abroad' (*ibid* at 90). For the present contribution it suffices to note that both notions are relevant to underline the need to understand both international and EU law systematics.

[33] A case in point was formed by the *Ebony Martime* case, where the question arose of the compatibility of an EU Regulation on the enforcement of sanctions and the freedom of the high seas under international law. See *Ebony Maritime* (n 14).

[34] Fahey (n 8).

[35] Fahey (n 8) at 1

[36] Fahey (n 8) at 1.

AG Wathelet (adopting the effective control standard developed by the ECtHR) shows the potential of divergence from the notion of human rights law 'jurisdiction'.[37]

Questions of 'extra-territoriality' indeed imply questions of jurisdiction. At least as far as enforcement is concerned, in international law, state jurisdiction is traditionally quite closely linked to territorial notions, and it has also been discussed by both the CJEU and the International Court of Justice (ICJ) as such.[38] In fact, jurisdiction can be seen as the exclusive competence of states to set and enforce the rules on its territory.[39] It is well-known that part of these jurisdictional competences has been transferred to the EU, both where the creation and the enforcement of norms is involved. Fahey has argued that the merger of sovereignty, territoriality and jurisdiction in a global world is an emerging matter for EU law.[40] In the case of enforcement, we do however see differences. Where enforcement of competition law is clearly in the hands of EU institutions (or national authorities acting as agents of the EU), enforcement of criminal law, for instance, is still left to the Member States.[41] Yet, again territorial jurisdiction is stretched as, under certain conditions, Member State authorities may operate on the territory of other Member States.[42]

The question is to what extent these developments will push the jurisdiction back to a more controllable territory and in that sense to a closer convergence of EU law and traditional international law notions of jurisdiction. But in order to appreciate the full extent of the extra-territorial nature of EU law, it is also necessary to examine the specific implications of EU law when questions relating to the territories of third states come to light.

III. The CJEU and External Territorial Implications of EU Law

The above section aimed to provide insight into how questions of territory form part of, and have been defined in, the context of the EU's internal set up. Next to 'internal' questions of territory, the European Union's expanding activities as a global actor increasingly force it to be engaged in international territorial questions. These external territorial implications of EU law can arise in a number of ways. As the EU's competences have expanded, the EU finds itself dealing with 'newer' areas, such as migration from third countries and the interface with international law in both a general sense and in its more specific dimensions (eg protection of refugees). The closeness of relationships between the EU and third states, whether those in the European Economic Area (Norway, Iceland, Liechtenstein), complex bilateral agreements

[37] Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model' in Steve Peers, Tamara K Hervey, Jeff Kenner and Angela Ward (eds), *Commentary on the EU Charter of Fundamental Rights* (Hart Publishing, 2014) 1657–83; Cedric Ryngaert, 'EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations' (2018) 20 *International Community Law Review* 374; Lorand Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2015) 25 *European Journal of International Law* 4 1071–91.

[38] Jed Odermatt, 'The International Court of Justice and the Court of Justice of the European Union: Between Fragmentation and Universality of International Law' in Achilles Skordas (ed), *Research Handbook on the International Court of Justice* (Edward Elgar Publishing, forthcoming in 2020); also available as Jed Odermatt, 'The International Court of Justice and the Court of Justice of the European Union: Between Fragmentation and Universality of International Law' (10 April 2019). Forthcoming in Achilles Skordas (ed), Research Handbook on the International Court of Justice, Edward Elgar; iCourts Working Paper Series No 158, available at SSRN: https://ssrn.com/abstract=3369613 (last accessed 13 March 2020).

[39] See, much more extensively: Ryngaert (n 1).

[40] Fahey (n 8) at 12.

[41] See for instance Art 88(3) TFEU: 'Any operational action by Europol must be carried out in liaison and in agreement with the authorities of the Member State or States whose territory is concerned. The application of coercive measures shall be the exclusive responsibility of the competent national authorities.'

[42] *cf* Art 89 TFEU.

(Switzerland), neighbouring countries in Eastern Europe, the Mediterranean or, indeed, across the North Sea, brings into focus the uncertainty surrounding territorial scope. This section focuses on the capacity to make international agreements, ie when the EU enters into a contractual agreement with a third state and how this can lead to considerations of 'territory' to which the CJEU in particular has had to confront.

The EU benefits from both express and implied competence to conclude international agreements. Express competences to conclude agreements are littered throughout the Treaty, and include: Article 8(2) TEU on agreements with neighbouring countries; Article 37 TEU on the Common Foreign and Security Policy (CFSP); Article 79(3) TFEU on readmission of third country nationals; Article 207 on common commercial policy; Article 212 TFEU on economic, financial and technological cooperation with third countries; and Article 216–219 TFEU on a general competence for international agreements. The *ERTA* doctrine[43] established long ago the principle of implied external competence when the EU benefits from internal competence.[44]

As such, there are estimated to be over 1,100 agreements concluded by the EU with almost all states around the world.[45] Almost inevitably, therefore, the EU and its power to make agreements is likely to be caught up in questions of application to territory. This is particularly the case since many territorial disputes, occupied territories and breakaway regions are found in Europe and its neighbourhood.[46] An agreement may cover the territorial scope of the provisions, but this is unlikely if the international consensus and the view of the third state on where frontiers lie do not align.

It is futile, however, to suggest that the EU is merely a technocratic body, with the Court of Justice merely applying rules to specific situations. The whole project of European integration, and its increasing focus on developing its role as an external actor in international affairs, means that these inevitably collide. The EU's considerable economic weight, the values it seeks to promote via its external (and internal) identities and its legal/contractual relations with third state mean the Court is not merely responding to disputes but doing something more. As Kontorovich has commented, 'the European Union is a self-consciously "normative power," channelling its economic policies to reflect substantive legal norms'.[47]

Where complex and multi-faceted questions relating to territory arise in international relations, political means are often deployed to find a compromise or middle ground. For example, neither the EU nor its Member States have official diplomatic relations with Taiwan: as such, the EU does not have a Delegation in Taipei but rather an 'Economic and Trade Office' which serves much the same function. Similarly, in recognition of the fact that not all EU Member States recognise the statehood of Kosovo, EU documentation relating to Kosovo (which is nevertheless recognised as a potential candidate for future EU membership) makes consistent references to United Nations Security Council (UNSC) Resolution 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.[48]

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[43] Case 22/70 *Commission of the European Communities v Council of the European Communities. (ERTA)* ECLI:EU:C:1971:32

[44] See more extensively Ramses A Wessel and Joris Larik (eds), *EU External Relations Law: Text, Cases and Materials* (Hart Publishing, 2020) Ch 4.

[45] See EU Treaties database available at http://ec.europa.eu/world/agreements/default.home.do (last accessed 13 March 2020).

[46] Eugene Kontorovich, 'Economic Dealings with Occupied Territories' (2015) 53 *Columbia Journal of Transnational Law* 584, 588.

[47] *Ibid*.

[48] See, eg, Commission, '2019 Communication on EU Enlargement Policy: Kosovo* 2019 Report' COM(2019) 260 final (29 May 2019) available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-kosovo-report.pdf (last accessed 13 March 2020).

The Court of Justice has been faced with questions of territorial scope on a number of occasions. Courts are, of course, able to find means to 'fudge' all kinds of difficult matters, but the purpose of a court is to render a definitive decision, which makes the possibility of an inability to find a compromise on a significant territorial question pertinent. The Court therefore needs to tread carefully if it is to ensure that its decisions do not amount to an effective change in the relationship between the EU and its Member States and the third country/ies or territories in question. This can involve not in fact characterising the issue as one essentially relating to territory at all. For instance, *Anastasiou*[49] was a case concerning Cyprus, before it became an EU Member State, and its preferential trade agreement for goods. The Commission's policy on accepting certificates from Turkish Cypriot authorities was not consistent. When faced with a preliminary reference case concerning direct imports from northern Cyprus, the CJEU refused to recognise export certificates from authorities other than those belonging to the Republic of Cyprus (that is to say, those which bear the name 'Turkish Republic of Northern Cyprus' ('TRNC')) under the EC-Cyprus agreement. To do so would represent 'a denial of the very object and purpose of the system', ie of the agreement concluded by the (then) EC with the Government of Cyprus.[50] The Court did not engage with points made by Greece that recognition of certificates issued by TRNC would amount to a violation of Security Council resolutions calling upon all states not to recognise the entity.[51] However, it did emphasise, 'The existence of different practices among the Member States [that] creates uncertainty of a kind likely to undermine the existence of a common commercial policy and the performance by the Community of its obligations'.[52] Thus, this decision allowed the Court to adopt a cautious approach[53] to avoid the territorial dimension and the accompanying political elements by relying on the lack of recognition of the 'TRNC' rather than the reasons or justification for the non-recognition.[54]

In *Brita*, the Court was faced with a similar but more complex question than in *Anastasiou* of whether goods originating from the West Bank could be included within the EU's free trade agreement signed with the State of Israel[55] and benefit from the preferential treatment allowed for Israeli products in the EU. The EU also has an interim agreement with the Palestinian authority.[56] This was referred to the CJEU by the Hamburg *Finanzgericht* after Brita attempted to annul the customs duties which the German authorities said were owed, due to the products (listed as being from Israel) coming from the West Bank.[57]

AG Bot[58] and the Court of Justice were both of the view that the German Court should not allow the goods to benefit from the preferential treatment regime allowed under the agreement. However, their reasoning was rather different. AG Bot put great emphasis on the context of the Euro-Mediterranean partnership (of which the EU, Israel and Palestine are all part) and the question of how to be certain as to the 'real' origin of products. The Court of

[49] Case C-432/92 *Anastasiou (Pissouri) and Others* ECLI:EU:C:1994:277.
[50] *Ibid*, para 41.
[51] Panos Koutrakos, 'Legal Issues of EC-Cyprus Trade Relations' (2003) 52 *International and Comparative Law Quarterly* 2, 489–98.
[52] *Ibid* para 53.
[53] Marise Cremona, 'Case C-432/92, R. v. Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd. and others, Judgment of 5 July 1994' (1996) 33 *Common Market Law Review* 1, 125–13.
[54] Stefan Talmon, 'The Cyprus Question before the European Court of Justice' (2001) 12 *European Journal of International Law* 4, 727–50.
[55] 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 L146.
[56] 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.
[57] Case C-386/08 *Brita GmbH v Hauptzollamt Hamburg-Hafen* ECLI:EU:C:2010:91.
[58] Opinion of AG Bot, C-386/08 *Brita GmbH v Hauptzollamt Hamburg-Hafen* ECLI:EU:C:2009:674.

Justice, on the other hand, started its decision with reference to the Vienna Convention on the Law of Treaties 1969 and 'general international customary law'. It found that although there is a general level of trust required behind contracting parties, this does not prevent the Member State authorities from peering behind the verification of goods to ascertain their actual origin. Given that the Israeli authorities had not responded to clarification requests by the German authorities, the Court found that the latter could not simply make an 'elective determination' as to whether the goods should enter under the agreement or not. This would mean the national authorities unilaterally interpreting the scope of the agreement.

The Court in *Brita* was willing to refer to international law, but only so far. The AG explicitly referred to Security Council resolutions calling upon Israel to withdraw from the occupied territories for the purpose of determining the territorial scope of the Agreement.[59] However, the Court did not engage with this. Rather, it relied on the principle of the relative effect of treaties to interpret the agreement, which some commentators found unconvincing.[60] The Court underlined the importance of the respect for customary international law as a justification for its decision. The Court did not refer to the 'internal' position of the EU via the Commission's notice, but rather placed the emphasis on the 'locations which have been placed under Israeli administration since 1967' as understood in international law. In a sense, therefore, international law came to the 'rescue' of the CJEU, even though the Vienna Convention does not formally bind the EU or all its Member States. It is hardly overstating the obvious that neither the German courts nor the CJEU would wish to be seen as defining the borders of Israel, but in this case the Court avoided adopting a unilateral European view on territory. Neither did the Court—unlike AG Bot—appear to fully use the content of the UNSC Resolutions to underline its position. Yet, interpreting this as a *divergence* from international law would be unfair. International law arguments do form the background of decisions like these and it is hard to find examples of a clear deviation of EU law.

Another case in point is the *Front Polisaro* saga. In December 2016, the Court of Justice[61] set aside a judgment of the General Court,[62] which had annulled a Council Decision on an agreement with Morocco for reciprocal liberalisation measures on agricultural products, in so far as it applied to the territory of Western Sahara. The Front Polisaro, a liberation movement in the Western Sahara, brought an action for annulment in the General Court via Article 263 TFEU. The contested decision was an agreement for an Exchange of Letters between the EU and Morocco on agricultural liberalisation measures amending and replacing protocols of the EU-Morocco Association Agreement. This differed from *Brita* because the EU has not concluded association agreement concerning products form Western Sahara with any other state.[63] The agreement referred only to the 'territory of the Kingdom of Morocco'. Front Polisaro brought an action based on 11 pleas in law, claiming that the decision approving the application of the agreement to Western Sahara was unlawful. The General Court dismissed the pleas, but nevertheless annulled the decision in so far as it approved the application to Western Sahara. The Court's decision was based on the failure of the Council to 'fulfil its obligation to examine all the elements of the case before the adoption of the

[59] *Ibid* paras 111 and 108–12.
[60] Enzo Cannizzaro, 'A Higher Law for Treaties?' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011) 425, 432; Guy Harpaz and Eyal Rubinson, 'The Interface between Trade, Law and Politics and the Erosion of Normative Power Europe: Comment on *Brita*' (2010) 35 *European Law Review* 551, 562.
[61] Case C-104/16 *Council v Front Polisario* (2016) EU:C:2016:973.(Court of Justice)

[62] Case T-512/12 *Front Polisario v Council* (2015) ECLI:EU:T:2015:953 (General Court)
[63] *Front Polisario* (General Court), *ibid*, para 97.

contested decision' which related to commitment to fundamental rights in the EU Charter, a reasoning noted as 'a somewhat surprising move'.[64]

Of interest here is the question posed by the General Court:

> whether there is an absolute prohibition against concluding an international agreement on behalf of the European Union which may be applied to a territory in fact controlled by a non-Member State, without the sovereignty of that State over that territory being recognised by the European Union and its Member States or, more generally, by all other States ('the disputed territory') and, where relevant, the existence of discretion of the EU institutions in that regard, the limits of that discretion and the conditions for its exercise.[65]

The Court responded in the negative, finding that there is no absolute prohibition on concluding an agreement with a third state which may be applied to a disputed territory.[66] Furthermore, there was a marked reluctance in this instance to defer to international law. This 'might partly be motivated by its reluctance to imply that the EU may have acted in violation of international law, which in turn could bring with it questions as to the EU's international responsibility'.[67]

The Council successfully appealed to the Court of Justice, which set aside the decision of the General Court. The Court noted in its decision that 'the Association Agreement did not include any interpretation clause or any other provision which would have the consequence of excluding that territory from its scope'.[68] Furthermore, the Court's view that the General Court found that the agreement also applies to the territory of Western Sahara was based, 'not on a finding of fact, but on a legal interpretation of that agreement made by the General Court on the basis of Article 31 of the Vienna Convention'.[69] The Court felt the General Court erred in law that the Western Sahara was tacitly included in the Association Agreement.[70]

For the purposes of the discussion here, the Court's analysis of 'territory' is worth citing in full:

> it thus follows from that rule [the customary rule codified in Article 29 of the Vienna Convention], placed in the context of the interpretation of Article 94 of the Association Agreement, that a treaty is generally binding on a State in the ordinary meaning to be given to the term 'territory', combined with the possessive adjective 'its' preceding it, in respect of the geographical space over which that State exercises the fullness of the powers granted to sovereign entities by international law, to the exclusion of any other territory, such as a territory likely to be under the sole jurisdiction or the sole international responsibility of that State.
>
> In that regard … it follows from international practice that, where a treaty is intended to apply not only to the territory of a State but also beyond that territory, that treaty expressly provides for it, whether it is a territory 'under [the] jurisdiction' of that State, … or in any territory 'for whose international relations [that State] is responsible.[71]

[64] Sandra Hummelbrunner and Anne-Carlijn Prickartz, 'It's not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union' (2016) 32 *Utrecht Journal of International and European Law* 83, 19–40.
[65] *Front Polisario* (General Court) (n 63) para 117.
[66] *Front Polisario* (General Court) (n 63) para 215.
[67] *Front Polisario* (General Court) (n 63) para 40
[68] *Front Polisario* (Court of Justice) para 84
[69] *Front Polisario* (Court of Justice) para 81
[70] *Front Polisario* (Court of Justice) para 108
[71] *Front Polisario* (Court of Justice) (n 60), paras 95–96.

With this in mind, the Court appeared to back away from its view in *Brita*, where the consideration of the entry of goods under the separate agreement with the Palestinian Authority was a factor in the Court's reasoning. Here, the Court appeared to place less emphasis on assessing what the EU's commitments were towards a territory effectively controlled by a partner state, whilst at the same time reaffirming that it was upholding international law. The difficulty, as some have noted, is that it means in effect that the CJEU has de facto allowed the EU to be complicit in 'over a decade long infringement of the right to self-determination'.[72]

The way in which the Court, somewhat selectively, applied international law in this case, has been criticised in the literature. As argued by Kassoti,

> … the Court's artificial and selective reliance on international law in *Front Polisario* adds a new dimension to the ever-burgeoning debate on the relationship between international and EU law. In the past, the Court has arguably shown a great deal of judicial recalcitrance towards international law and a tendency to guard its own identity and the autonomy of the EU legal order through its reluctance to engage with international law. However, the Front Polisario judgment manifests a different and more worrisome judicial strategy. While seemingly anchoring its findings in international law, the Court, in essence, showed here a great degree of willingness to stretch international rules on treaty interpretation to a breaking point in order to avoid addressing the political disinterest that the EU has demonstrated in relation to the situation in Western Sahara.[73]

Front Polisario was followed up by a similar case one year later. In *Western Sahara*,[74] the Court again had to assess the validity of an international agreement (the EU-Morocco Fisheries Partnership Agreement (FPA) and its 2013 Protocol) and the EU implementing acts. Again, the question concerned application of the agreement to the territory of and products originating in Western Sahara. In *Western Sahara*, the Court again extensively applied international law, also to determine the EU's own obligations. By accepting Morocco's sovereignty over the Western Saharan waters, the EU would, inter alia, accept Morocco's breach of the right to self-determination of Western Sahara (and thus, the EU might also be found responsible for that breach by way of complicity).[75] As in *Front Polisario*, a way out was found in arguing that 'Moroccan fishing zones' did not include Western Sahara territory; hence, the agreements did not, in the eyes of the Court, apply to any illegally occupied territory.

The issue of rules of origin relating to Israel returned to the Court of Justice following a preliminary reference from the French *Conseil d'Etat* in a decision delivered in November 2019.[76] AG Hogan, in his opinion of 13 June 2019, pointed to 'the need to make a clear

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[72] Vivien Kube, 'The Polisario Case: Do EU Fundamental Rights Matter for EU Trade Policies?' (*EJIL:Talk*, 3 February 2017), available at www.ejiltalk.org/the-polisario-case-do-eu-fundamental-rights-matter-for-eu-trade-polices/ (last accessed 13 March 2020).

[73] 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* 23–42, 40.

[74] Case C-266/16 *Request for a preliminary ruling under Article 267 TFEU from the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) (United Kingdom), made by decision of 27 April 2016, received at the Court on 13 May 2016, in the proceedings The Queen, on the application of: Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs* EU:C:2018:118.

[75] But again the Court seems to have been selective in using international law arguments. See Eva Kassoti, 'The ECJ and the Art of Treaty Interpretation: Western Sahara Campaign UK' (2019) 56 *Common Market Law Review* 209.

[76] Case C-363/18 *Organisation Jive Européenne, Vignoble Psagot Ltd v Ministre de l'Économie et des Finances* ECLI:EU:C:2019:954.

distinction between products originating in the territory of Israel and those originating in the West Bank'[77] as the Court had decided in *Brita*. But the emphasis on Israeli settlement policy as being 'a manifest breach of international law'[78] is striking, alongside his reminder to the Court of the EU's Treaty-based commitment to the strict observance of international law.[79] The Grand Chamber of the Court decided that foodstuffs originating in a territory occupied by the state of Israel must bear not only the indication of that territory but also, where those foodstuffs come from a locality or a group of localities constituting an Israeli settlement within that territory, the indication of that provenance. In doing so, the Court considered the settlements to be 'in violation of the rules of general international humanitarian law'.[80] Whilst the rationale for doing so was the important aspect of consumer choice, the Court engaged in a more direct assessment of what constitutes a 'state' and 'territory' and explicitly referring to the ICJ and UNSC resolutions, which seem to have been welcomed by international lawyers.[81] In this case, although concerning the same geographical area, the law in question was different from *Brita*. But it does show that the Court was less inclined to avoid or ignore international law and on this basis, in a somewhat unlikely setting of ruling on consumer choices, convergence between EU and international appears to be a reality.

How the CJEU views 'territory' is a prism by which to understand the relationship between EU and international law. The very fact that in *Western Sahara*, the CJEU made the case to be one about territory is significant. The CJEU framed the issue to be one of territorial application of the agreements (and tied issues of standing to that question). It could have also framed the question of whether the EU policy had effects on the right to self-determination; whether it legally recognised an illegal situation, etc. In the Court's mind, it frames the issues in terms of territory in these cases.[82] If the view of commentators since *Kadi* is that the Court is 'much less open to international law',[83] then we can also expect that the Court uses the sources of international law and opinion as a means of justifying its normative choices. *Front Polisaro* and *Western Sahara* suggest that the Court has also shifted somewhat from its post-*Brita* characterisation as adopting a 'dualist' approach to international law in the EU legal order. However, this does not make the CJEU particularly different from national courts, which are often required to rule on the effects of international law too. And as decisions demonstrate, both the quantity and quality of international law for the Court to draw on has increased dramatically.[84] By contrast, the recent *Organisation juive européenne* decision once again shows that it is difficult to generalise and that the Court continues to have in its cannon a number of approaches to questions of territory (including avoiding the discussion of territory completely) which leave it open to charges of inconsistency.[85]

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[77] Opinion of AG Hogan in Case C-363/18 *Organisation juive européenne, Vignoble Psagot Ltd v Ministre de l'Économie et des Finances* ECLI:EU:C:2019:494, para 57.
[78] *Ibid* para 55
[79] *Ibid* para 58, citing Article 3(5) TEU.
[80] *Organisation Juive Européenne* (n 74) para 48.
[81] Joseph Weinzierl, 'An Unlikely Couple: Informed Consumer Choice in EU Law and the Middle East Conflict' (*Völkerrechtsblog*, 14 November 2019).
[82] We are grateful for discussions with Jed Odermatt on this point.
[83] Odermatt (n 10) at 697
[84] Christina Eckes, 'International Law as Law of the EU: The Role of the ECJ' (November 2010) in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers, 2011) CLEER Working Paper 2010/6 17 available at SSRN https://ssrn.com/abstract=2096203 (last accessed 13 March 2020).
[85] Olia Kanevskaia Whitaker, 'EU Labelling Practices for Products Imported from Disputed Territories' (2019) TILEC Discussion Paper No 2019-15, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3421419 (last accessed 13 March 2020).

IV. Conclusion

The very existence of the EU itself has posed a challenge to our understanding of what constitutes 'territory' and its association with citizenship, boundaries and jurisdiction. The fact that the Court is now increasingly faced with complex, and politically sensitive questions relating to the territory of third states, can be traced back to the Court's own assertion of the 'new legal order' of EU law back in *Van Gend en Loos*.[86] Had the Court not done so, then it may not have attracted the type of preliminary references, such as in *Brita* and *Organisation juive européenne*, that would have allowed it to develop the autonomous legal order concept of the EU. A doctrine by which the Court does not hear 'political' cases would in all likelihood not be helpful, since the very cases which have been confronted have been of a technical nature and relating to the physical import of goods. What remains open to the Court is often the possibility to find ways of avoiding answering questions head on which would have ramifications far beyond the confines of EU law. The cases above show where this technique has been deployed, but with the risk of inconsistency of practice that give much less direction to the other institutions as to how such questions should be treated in the law.

Therefore, an equally surprising point in considering the notion of 'territory' is that the focus of discussion is on the Court of Justice and not the other 'executive'-led institutions. A view on what constitutes the territory of a third state would normally be expected to come from a government/executive branch. In the EU sense, it is even more stark that the Court has been left to give a ruling on an essential matter of foreign policy, since the CFSP is deliberately functioning on the basis of distinct rules and procedures—and with a more limited scope granted to the Court to oversee it.[87] The ability of the Court to impact on what the other institutions have in mind when dealing with territorial disputes may be limited[88]—but is dependent of course on the Court having the opportunity to do so. As per the case law above, these opportunities often arise from unlikely areas in relation to foreign policy, such as consumer choice.

It is difficult to see, however, how the Court could do anything other than a case-by-case resolution depending on the highly context-specific nature of the cases. It would be futile to suggest, for example, that the Court could spearhead a singular view of how EU agreements apply to third countries. But it is equally futile to suggest that the Court of Justice would be any more at ease with defining the borders of Israel than the national German Court that referred the *Brita* dispute to it. In this respect, it seems that the Court's oscillation between asserting the autonomous legal order of the EU and examining the purpose of the agreements as well as their scope, to relying on a more deferential approach to international law, can be explained by its desire to find a normative solution to a technical problem.

In short, understanding the internal and external aspects of the EU through a prism of 'territory' is enlightening—both of the unsettled nature of the international system on seemingly basic questions as to what constitutes a 'territory' and also the EU's contribution to the legal order, which goes beyond what was originally intended as a role for the Court. Our short overview of internal and external dimensions of the way in which territorial questions are approached by the EU, not only underlines the 'specificities' of the EU as a non-state entity in a state-centred world, but also reveals the attempts by the Court and other institutions to find arguments within the realm of public international law. The tendency not to *create*

[86] Case C-26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1

[87] See Christophe Hillion and Ramses A Wessel, 'The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP' in Steven Blockmans and Panos Koutrakos (eds), *Research Handbook on EU Common Foreign and Security Policy* (Edward Elgar Publishing, 2018).

[88] See, eg, the contributions to Marco Balboni and Giuliana Laschi (eds), *The European Union Approach towards Western Sahara* (Peter Lang, 2017).

divergence is fully in line with the well-known open attitude of the EU towards international law and its so-called '*Völkerrechtsfreundlichkeit*'.[89] The question is whether the further development of the Union as an international and diplomatic actor will not force the international legal system to accept a certain deviation.

[89] See on this discussion already Cannizzaro, Palchetti and Wessel (n 82).