SOVEREIGNTY IN THE ERA OF FRAGMENTATION – EU TRADE AGREEMENTS AND THE NOTION OF STATEHOOD IN INTERNATIONAL LAW

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In this article, we explore the theme of sovereignty in the context of fragmented international law. We observe that the sovereignty of States may become relativized, not only by the political power of other States, but by its exposure to multiple, functionally separate fields of law. We analyze this theme by asking whether trade agreements as instruments of economic law offer a venue for discussing the sovereignty of sub-statal entities that lack standing on the more traditional international forums. Our analysis focuses first on a recent decision by the Court of Justice of the European Union, which concerned the status of Western Sahara in the framework of the EU-Morocco trade agreement. We then consider the implications of that case, if any, on the situation in the region of Abkhazia within Georgia in the context of the EU-Georgia Association Agreement. We show how trade agreements in some cases may (EU-Morocco), and in other cases may not (EU-Georgia), affect the integrity of States in a novel way, depending on the intricacies of the facts and the strictures of the terms of the applicable Agreement. Reflecting the fragmentation of law, trade agreements thus have the potential to grant an avenue for sub-statal entities to establish standing before a regional court (in our case, the Court of Justice of the EU), or an international tribunal. That, in turn, may allow these entities to reinforce their claims for self-determination under international law. Beyond the possible theoretical implications on the (relativity of) sovereignty, the findings seem worth considering carefully in the context of concluding and formulating regional and international agreements in different fields of law.

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I. INTRODUCTION[1]

States are the basic units of the international community. Yet, legally speaking, what sets apart a "state" from an entity without statehood remains a source of disagreement.[2] The issue is relevant because entities other than states do not have the same rights (and duties) as do states as members of the international community. The current customary definition of a state derives from the Montevideo Convention on Rights and Duties of States of 1933.[3] The Convention defines statehood through the existence of a people, a defined territory, an independent government, and the ability to enter into

1. The article has two lead authors. The co-authors would like to thank Prof. Ricardo Gosablo Bono, Prof. Frank Hoffmeister, Dr. Luca Prete and Prof. Wouter Werner for their very useful comments. Any errors and omissions are for the authors alone.

2. Jan Klabbers, *The Right to be Taken Seriously: Self-Determination in International Law*, 28 HUM. RTS. Q. 186 (2006); Cyra Akila Choudhury, *From Bandung 1955 to Bangladesh 1971*, *in* BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES 322 (Luis Eslava et al. eds. 2017).

3. Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 3802 [hereinafter Montevideo Convention].

relations with other states:[4] these criteria constitute the minimum threshold for statehood.[5] In theory, recognition by third states is legally not required for statehood. However, ultimately, the recognition of a state is at the discretion of the already existing other states, which puts politics at the heart of the matter.[6] In practice, the actions of the other states set apart states from recognized entities without statehood. The political acceptance explains the divergences in the outcomes of otherwise relatively similar cases. For example, the capacity of Kosovo to entertain its rights as a state is wider than Palestine's, even if the former has fewer states recognizing its statehood.[7] The states that recognize Kosovo simply command greater sway in the international order.[8] Attaining the legal form of statehood has an important legitimating function, but becoming a recognized state thus entails more in practice than the criteria outlined in the Montevideo Convention.[9]

After the Second World War, most new states have come into existence

4. *Id.* art 1. There remains a scholarly disagreement on the amount of constitutive conditions of statehood. While some argue that only the first three conditions outlined in the Montevideo Convention are to be fulfilled, others see the fourth condition, namely, 'the ability to enter into relations with other states' as equally constitutive. *See id.* Without taking a stance on this long-standing debate between the differing theories of statehood, it appears evident that some part of effective statehood entails relations with other states without which a state would exist solely as an internal entity.

5. MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 119 (7th ed. 2013); JAMES R CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 45 (2007).

6. *See, e.g.*, , 87 BRIT. Y.B. INT'L L. 18 (2017) (explaining the different standards of recognition); HILARY CHARLESWORTH ET AL., THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 126 (2000).

7. Tamar Megiddo & Zohar Nevo, *Revisiting Lessons on the New Law of Statehood: Palestinian Independence in a Post-Kosovo World*, *in* STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW (Duncan French ed., 2013). At present, Palestine is recognized by 137 states, whereas Kosovo is, according to Serbia, recognised by less than one hundred states. Agata Palickova, *15 Countries, and Counting, Revoke Recognition of Kosovo, Serbia Says*, EURACTIV (Aug. 27, 2019), https://www.euractiv.com/section/enlargement/news/15-countries-and-counting-revoke-recognition-of-kosovo-serbia-says/. And according to the govenment of Kosovo, it is recognized by 117 states. *International Recognitions of the Republic of Kosovo*, MINISTRY OF FOREIGN AFFS. AND DIASPORA, https://www.mfa-ks.net/en/politika/483/njohjet-ndrkombtare-t-republiks-s-kosovs/483 (last visited Mar. 26, 2022).

8. George Kyris & Agon Demjaha, *What Makes State a State? Why Places Like Kosovo Live in Limbo?*, CONVERSATION (Aug. 5, 2020, 6:56 AM) https://theconversation.com/what-makes-a-state-a-state-why-places-like-kosovo-live-in-limbo-132403.

9. Even though international legal scholarship has recognized the inherent indeterminacy of legal norms of international law, this does not implicate the insignificance of law. *See generally* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2006) (analyzing conflicts within international law); DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987) (analyzing patterns in international legal doctrine and argument). On the praise of form (and formalism) of law, see Martti Koskenniemi, *What is International Law for?*, *in* INTERNATIONAL LAW 32–57 (Malcolm D Evans ed., 3d ed. 2010).

through the processes of decolonization or the break-up of past unitary and federal states.[10] With the new millennium, however, new claims of statehood have appeared. These claims have usually been linked to the perceived violations of the rights and interests of people that constitute a minority in parts of a state. The situations in Timor Leste, South Sudan and Kosovo, for example, have all shared this characteristic, even though in the background, the classic grounds for invoking self-determination (decolonization, military occupation, or a racist minority government) have also been present. International agreements between the conflicting parties have also paved the way for independence in these cases. These developments have led some scholars to suggest that states earn their status through the fiat of international authority.[11]

We trace a similar fiat of international authority at play in a recent case, where the two courts of the Court of Justice of the European Union (CJEU)—first the General Court and on appeal the Court of Justice ("the Court")—took decisions on the status of Western Sahara within the context of litigation on a trade agreement between the EU and Morocco.[12] The cases seem to address the relativity of sovereignty and legal personality. If in a Kelsenian conception the sovereignty of states becomes relativised by the political power of the recognising states, sovereignty may nowadays have become relativised by the fragmentation of the different functional fields of law. Tribunals and their lawyers in one field of law (such as investment law or trade law) may recognize an entity that a tribunal or lawyers in another field, such as the International Criminal Court, would not, and vice versa.

Assessing statehood from the angle of international tribunals leads to an institutional question: traditionally, recognition is given by State governments, but not by their courts. What relevance do the pronunciations of international tribunals thus have? Finally, the court interpretations cross over different levels of legal systems—in our example, those of international law and regional (European Union) law. How should conflicting interpretations between these different courts be handled?

To explore these thoughts, we first provide a short theoretical outline of

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10. The Soviet Union or Yugoslavia are examples of a dissolution of a former state into a number of new states.

11. Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 DENV. J. INT'L L. POL'Y 373, 375 (2003); Paul R Williams & Francesca Jannotti Pecci, *Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination*, 40 STAN. J. INT'L L. 347, 350 (2004).

12. Case T-512/12, Front Polisario v. Council (*Front Polisario I*), ECLI:EU:T:2015:953 (Dec. 10, 2015); Case C-104/16 P, Council v. Front Polisario, ECLI:EU:C:2016:973 (Feb. 19, 2016) Case T-512/12, Front Polisario v. Council (*Front Polisario II*), ECLI:EU:T:2015:953 (Dec. 10, 2015).

the notions of sovereignty and statehood in international legal thought in Section 2. We then focus in Section 3 on the Moroccan case, assessing the claims raised by Western Sahara ("*Front Polisario*"). We analyze whether and how the recognition of Western Sahara as an interested party in a litigation before the European Court of Justice could form a new avenue where minorities can seek to claim their rights internationally. We further investigate the wider consequences of the case on whether this legal avenue could be understood as a manifestation of self-determination and could thereby, ultimately, contribute to the emergence of states.

In Section 4, we test our findings of the *Front Polisario* case to another situation in the territories within (or adjacent to) the neighborhood agreements of the EU: the status of Abkhazia within the country of Georgia. The situation in Abkhazia is admittedly different from Western Sahara: the case for there to exist an Abkhaz people that is separate from Georgians, or oppressed by them, seems considerably weaker. The EU is also not bound by *ius cogens* to recognise Abkhazia, unlike the situation in Western Sahara. There are nonetheless sufficient substantive similarities between the Western Saharan and Abkhazian situations to allow for comparative insights on our research question: whether, and under what preconditions, standing in the CJEU under Article 263(4) TFEU could contribute to statehood under international law. Our analysis does not advocate a normative stance on whether this were desirable or not, nor on what the fate of the entities at the center of our explorative cases studies—Western Sahara and Abkhazia—should or should not be. In the final Section 5, we conclude by recapitulating the impacts that the trade agreements may have as an international platform for sub-statal entities to seek sovereignty.

II. SOVEREIGNTY AND STATEHOOD

A. The notions of sovereignty and statehood in international legal thought

Sovereignty is commonly defined as the authority of a community of people, jointly or through delegation, to issue binding decisions.[13] A state is the space wherein the sovereign resides. According to Georg Jellinek, the enmeshment of statehood and sovereignty is to secure a legal asset to the

13. Island of Palmas Case (Neth. v. U.S.), 2 R.I.A.A. 829, 831 (Perm. Ct. Arb. 1928); Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Judgment, 2002 I.C.J. 303 (Oct. 10).

political power of the State.[14] This legal asset is used to signal that those who are a part of the sovereign body ('us') stand in marked distinction to those outside it ('others').[15] Thus, to construct a new sovereign means to construct a new state.[16]

Probably the most renowned definition of statehood derives from the Treaties of Westphalia, where the European powers agreed that the internal affairs of a State are not to be meddled with by other powers. The Treaties created a shelter for the exercise of domestic power—a power to domesticate—for the sovereign within the perimeters of its own *potestas* and its borders. In contrast, in its external relations, the sovereign was limited by the powers of other sovereigns.[17] Sovereignty at that time created primarily the prerogative to go to war, and so the sovereigns also formed a natural limit to each others' self-interests. During the era of the absolute monarchy in Europe, the state and the sovereign were in most regards one and the same. This also explains the ease with which the notion of the sovereign has been replaced by that of the state; they are closely interrelated and share a common origin in the 17th century Europe.

The construction of "other" sovereigns in the Westphalian system was predominantly territorial.[18] For long, people were free to cross borders without notable limitations. Subsequently, a body politic that constituted the sovereign was bound to a territory around which fences were built and

14. Jacques Maritain, *The Concept of Sovereignty*, 44 AM. POL. SCI. REV. 343, 343 (1950) (citing 1 GEORG JELLINEK, DAS RECHT DAS MODERNEN STAATES [THE LAW OF MODERN STATES] 394 (1900)).

15. Other is anyone but us. In international law only internationally recognized sovereign powers can function independently and entertain relations with other sovereigns; here "other" indicates another sovereign in distinction to 'us'. *See, e.g.*, PATRICK RILEY, WILL AND POLITICAL LEGITIMACY: A CRITICAL EXPOSITION OF SOCIAL CONTRACT THEORY IN HOBBES, LOCKE, ROUSSEAU, KANT, AND HEGEL (1982) (analyzing contract theory and discussing the relationship between the act of willing and consenting in self-government); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT (1762) (arguing that the government only has the right to exist and govern by the consent of the governed); THOMAS HOBBES, LEVIATHAN: THE MATTER, FORM, & POWER OF A COMMONWEALTH, ECCLESIASTICAL AND CIVIL (1651) (discussing the structure of society and legitimate government).

16. *See* Stefan Talmon, *Recognition of Opposition Groups as the Legitimate Representative of a People*, 12 CHINESE J. INT'L L. 219, 246–47 (2013) (describing the question of who is the "sole representative of the people" as a question of consequence).

17. For a critical account on the legacy of the Westphalian system, see, for example, Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORG. 251 (2001).

18. *See generally* Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. INT'L L. POL. 513 (2001) (discussing the relationship between the transformation of colonial territories into sovereign states and the League of Nations).

borders were drawn on the map.[19] To gain recognition for the existence of these fences, and hence of the state, the sovereign relied on other, already recognized sovereigns.[20] Yet, this process was anything but simple. Initially, a sovereign had to indicate its civilized manners in the eyes of chiefly European states. An international polity shaped by European powers acted as a benchmark for new states through a highly subjective 'standard of civilization.' This had a direct bearing on the validity of sovereignty: under international law, even though a sovereign might hold supreme power internally, a subjugation of the sovereign to other sovereigns in its external relationships suggested that it was, in fact, not properly a sovereign unless and until so acknowledged by the others. For example, a king in Africa could have been able to command internal matters in the territory, but his claims for the recognition of sovereignty would be categorically denied.[21] Consequently, European states considered these territories *terra nullius* under international law.[22]

A reason for not recognizing the sovereignty of political communities outside of Europe was that these communities were not considered to be bound by the same moral code as the European states. Hence, they could not enter the family of states, either. If a sovereign was not considered one concomitant to the Western civilizational standard, it could not emerge as a state.[23] Without a state, no territory that would belong to anyone existed, irrespective of the presence of even a sophisticated and long-lasting political organization.[24] This thinking characterized the colonial era and allowed the

19. *See generally* CARL SCHMITT, THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF JUS PUBLICUM EUROPAEUM (2006) (describing the Sovereign as a fence builder).

20. *See generally* Brett Bowden, *In the Name of Progress and Peace: The "Standard of Civilization" and the Universalizing Project*, 29 ALTS.: GLOB., LOC. & POL. 43 (2004).

21. *See, e.g.*, BONNY IBHAWOH, IMPERIAL JUSTICE: AFRICANS IN EMPIRE'S COURT (2013) (analyzing the contradictory goals of the colonial British justice system in recognizing the exceptionality of native people and their cultures, while trying to keep the justice system in conformity with British standards).

22. The literal translation of the Latin term *terra nullius* means "nobody's land." On the use of the term in law, see, for example Randall Lesaffer, *Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription*, 16 EUR. J. INT'L L. 25 (2005); Malcolm Shaw, *The Western Sahara Case*, 49 BRIT. Y.B. INT'L L. 119 (1979).

23. *See generally* GERRIT W. GONG, THE STANDARD OF "CIVILIZATION" IN INTERNATIONAL SOCIETY (1984) (discussing the history of the Eurocentric "standard of civilization" that has come under increasing scrutiny over time); GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES (Cambridge ed. 2004) (describing how the international legal order, based on the idea sovereign equality, has accommodated the Great Powers and regulated outlaw states).

24. *See generally* ANDREW FITZMAURICE, SOVEREIGNTY, PROPERTY AND EMPIRE 1500-2000 (2014) (analyzing the laws that shaped modern European empires and the evolution of arguments

European conquests around the world.[25]

Since the Treaties of Westphalia, the notion of *statehood* has undergone an important development. Before the creation of the United Nations ("UN"), statehood was chiefly a question of the Western countries' capacity to hold onto their occupations the world over. The number of states globally before the First World War was a few dozen and before the Second World War had only increased by a few states. Most of them were still to be found in Europe, and only two were situated in Africa (Abyssinia and Liberia).[26] While a tight territorial nexus between the sovereign and the state has subsisted until the present,[27] the requirement of a 'civilization' as an element of statehood was abandoned. The Montevideo Convention on the Rights and Duties of States (1933) became the point of reference; it is considered to codify the requirements for statehood as established under customary international law.[28]

According to the Montevideo Convention, a state forms the nexus between a defined territory, a self-governing people, and a government capable of entertaining relations with other states. The introduction of formal criteria for statehood reduced the significance of the political will of the already existing states: recognition by other states became less important.[29]

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surrounding the right to occupy foreign lands).

25. The importance of shared civilization was later justified through arguments that international law was not law properly, due to its lack of superior authority to impose sanctions on states. Since non-western States did not share the civilization of the European states, the common moral consensus that established norms of international law could not extend to them and vice versa. Therefore, much of the world was no-man's-land (terra nullius) for international law before European colonies emerged.

26. These African states, however, remained subject to limitation of their rights vis-à-vis their European counterparts. *See, e.g.*, ROSE PARFITT, THE PROCESS OF INTERNATIONAL LEGAL REPRODUCTION: INEQUALITY, HISTORIOGRAPHY, RESISTANCE (Cambridge Stud. Int'l & Comp. L. Ser. 137, 2019).

27. *See generally* Abhimanyu George Jain, *The 21st century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Territory*, 50 STAN. J. INT'L L. 1 (2014) (discussing the importance of territory to sovereignty and the debate over states without territory due to rising sea levels); Derek Wong, *Sovereignty Sunk-The Position of Sinking States at International Law*, 14 MELB. J. INT'L L. 346 (2013) (same).

28. Montevideo Convention, *supra* note 3.

29. According to the dominant declaratory theory of recognition, states emerge first, and the recognition of the international community serves as a mere declaration of an already existing legal fact. This view is in contradiction with the constitutive theory of recognition. *See generally* Stefan Oeter, *The Kosovo Case—An Unfortunate Precedent*, 75 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES R. UND VÖLKERR. [ZAÖRV] [J. FOREIGN PUB. L. & INT'L L.] 51 (2015) (arguing that the recognition of Kosovo as an independent state sets a dangerous precedent of legitimizing premature self-declared secessionist movements that could threaten the peace and stability of the international order); Jure Vidmar, *Explaining the Legal Effects of Recognition*, INT'L COMP. L. Q. 361 (2012); Stefan Talmon, *The Constitutive Versus*

This also diluted the hierarchy that the past constitutive effect of recognition had functionally created between states and those still seeking such a status.[30]

Although the Montevideo Convention is widely recognized as customary international law, it has not created a self-standing right for every self-governed people that is connected to a territory to be recognized as a state.[31] In other words, the Montevideo Convention did not create a right to self-determination that would have granted all self-governed people an equal opportunity to become a state.

Self-determination, as introduced in the Atlantic Charter of 1941 based on the ideas of the British premier, David Lloyd George,[32] and especially the US President, Woodrow Wilson,[33] was taken up as a principle in Article 1(2) of the Charter of the United Nations in 1945. The UN General Assembly ("UNGA") subsequently interpreted the concept as customary international law.[34] Self-determination expressed the commitment to respect every people's free will.[35] It declared that even the formerly rightless people in the colonies will have the right, in principle, to define their future political fate.[36] The UN transformed the hierarchical order between Europe and most other states into a flatter system, highlighting the formal equality between all states and peoples.

Despite the flatness, in theory, of the new order of states and the existence of formal standards, there remained in practice constraints that prevented new states from emerging. The most notable of these was the

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the Declaratory Theory of Recognition: Tertium Non Datur?, 75 BRIT. Y.B. INT'L. L. 101 (2005).

30. Obviously, there were also other hierarchical relations between political entities during the pre-United Nations era from colonies to vassal states.

31. Cedric Ryngaert & Sven Sobrie, *Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia*, 24 LEIDEN J. INT'L L. 467, 470 (2011).

32. David Lloyd George, U.K. Prime Minister, Address at the Trade Union Conference (Jan. 5, 1918).

33. Woodrow Wilson, U.S. President, Fourteen Points Speech to the United States Congress (Jan. 8, 1918).

34. *See* G.A. Res. 1883 (III), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, pmbl. (Oct. 24, 1970) ("Convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law . . . .") [hereinafter Friendly Relations Declaration].

35. While the origin of the principle of the self-determination of the colonial people seems noncontroversial, the matter is hardly settled as exemplified by the Request of the Advisory Opinion from the ICJ on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. Rep. 169 (Feb. 25).

36. *See* Friendly Relations Declaration *supra* note 34.

principle of territorial integrity. It forms a force that is often diametrically opposed to the principle of self-determination. As Rigo Sureda has argued, at that time, self-determination was seen as secondary to territorial integrity.[37] Decolonization has, however, constituted a process that has challenged the order of precedence:

> "State practice does not support the conclusion that the people of a disputed territory have a right to self-determination . . . unless they are colonial peoples, and even then colonial territories to which pending territorial claims exist have their right of self-determination limited precisely by the existence of such claims."[38]

Even though a colonial territory could have been inhabited by multiple people, only one claim of self-determination can currently emerge from it. The people, and hence the states, became in many parts of the world defined on the basis of the territories that follow the administrative borders drawn by European empires. The former colonizers granted independence to their colonies following the borders they themselves had drawn (*uti possidetis* principle).[39]

B. ICJ Advisory Opinion on Western Sahara

The international legal debate on the newly emerged self-governed peoples and their attribution to specific territories came to the limelight in the International Court of Justice's ("ICJ") Advisory Opinion on Western Sahara.[40] The territory of Western Sahara had been a colony for a long time. Spain's colonial rule over it dissipated in the mid-1900s, actualizing the issue

37. A. RIGO SUREDA, THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION: A STUDY OF UNITED NATIONS PRACTICE 215 (1973); *see also* G.A. Res. 1514 (XV), Declaration on Granting Independence to Colonial Countries and Peoples (Dec. 14, 1960); G.A. Res. 1541 (XV), Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73 e of The Charter (Dec. 14, 1960); Tom Brower, *Reframing Kurtz's Painting: Colonial Legacies and Minority Rights in Ethnically Divided Societies*, 27 DUKE J. COMP. & INT'L L. 35 (2016).

38. SUREDA, *supra* note 37, at 215.

39. *See generally* Malcolm N. Shaw, *The Heritage of States: The Principle of* Uti Possidetis Juris *Today*, 67 BRIT. Y.B.. INT'L L. 75 (1997); Shaw, *supra* note 22 (discussing self-determination, territorial integrity, and national unity in the context of the *Western Sahara* case); Malcolm N. Shaw, *Peoples, Territorialism and Boundaries*, 8 EUR. J. INT'L L. 478 (1997); Ratner R. Steven, *Drawing a Better Line: UTI Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590 (1996); Gino J. Naldi, *The Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali): Uti Possidetis in an African Perspective*, 36 INT'L COMP. L.Q. 893 (1987).

40. Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16).

of to whom the territory would belong.[41] The UNGA sought clarity in the case by posing a two-part question to the ICJ. The UNGA first asked whether the territory of Western Sahara belonged to no-one during the colonization, i.e. whether it constituted a *terra nullius*.[42] To this, the ICJ answered in the negative, maintaining that at the time of Spanish colonization "Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them."[43] Western Sahara was thus not *terra nullius*.[44] This led the ICJ to answer the second question of the General Assembly, namely, whether the Kingdom of Morocco or the "Mauritanian entity" had legal ties with Western Sahara during this time period.[45] This time, the Court answered in the affirmative, even if with some fluidity, on both accounts. There had existed 'legal ties' between Western Sahara, on the one hand, and the Kingdom of Morocco and the Mauritanian entity, on the other.[46] They did however not constitute ties of territorial sovereignty between the aforementioned entities.[47] In the absence of such ties, the Sahrawi people had a right to self-determination once the Spanish colonization of their territory ended.[48]

From the period of the standard of civilization to that of decolonization, little has happened to the powers attached to statehood itself, despite the multiplication in the number of states. A genuine lack of a right to establish a state, even within the framework of decolonization, partly fueled the evolution that led to the present status of sovereignty in international law.[49] Sovereignty in international law is constituted of the interlinked notions of internal and external sovereignty. Internal sovereignty refers to the legitimate and ultimate rule over the territory of a state, whereas external sovereignty denotes the idea of the sovereign's autonomy from external interference by other states. Thus, any interference over the states' internal and external sovereignty is a violation of its absolute sovereignty. However, international law identifies many instances when an international authority[50]

41. *Id.* ¶¶ 1, 79, 82.

42. G.A. Res. 3292 (XXIX), ¶ 1 (Dec. 13, 1974); *Western Sahara*, 1975 I.C.J. ¶ 1.

43. *Western Sahara*, 1975 I.C.J. ¶ 81.

44. *Id.*

45. *Id.* ¶ 1.

46. *Id.* ¶ 162.

47. *Id.*

48. *Id.* ¶¶ 161–162.

49. Scharf, *supra* note 11, at 377.

50. International authority is perceived here as a nebulous development of international organizations and their mission that has mutated to a form where it appears an impartial umpire while

has interfered with states' internal sovereignty. For example, the executive rule of the United Nations was extended already during the early years to offer a justification for interferences. The UN peacekeeping missions in Suez and Congo are the first manifestations of this practice.[51]

C. Earned sovereignty and remedial secession

The ICJ Advisory Opinion on Western Sahara addressed precisely the role of an international authority in endowing sovereignty.[52] The Advisory Opinion suggested that the presence of 'certain circumstances' would be sufficient grounds for an international authority to impose statehood as a fact, even without asking the people.[53] Such special circumstances could perhaps include the gravest injustices perpetrated by the sovereign against the people. The thesis for this type of "earned sovereignty" or "remedial secession" would suggest that statehood should not be perceived (only) as a fulfillment of people's will, but also – and in some special cases even, rather – as a remedy for the experienced injustices.[54]

What, then, is the role of an international authority in addressing these injustices? In most instances, evidence of a sovereign ruler subjecting a part of its people to violence leads to the issue being brought up in an international institution or organ. The international authority then intervenes directly in the atrocities committed by a sovereign. Thus, the "special circumstances" signal a sovereign's failure to uphold its responsibility towards its people. This type of a process of remedial secession seems to have been legally and politically conducive to the emergence of a new state in a handful of cases. The seceding entity is of course not always the victim; it can also be the aggressor.

Sovereignty that is earned through a remedial secession relates closely to new forms of state responsibility that reflects the mainstreaming of human

serving ends closely aligned with, often, Euro-American ideology. *See generally* Anne Orford, *Locating the International: Military and Monetary Interventions after the Cold War*, 38 HARV. INT'L L.J. 443, 452–55 (1997) (discussing the austerity program that the former Yugoslavia was put on by the IMF).

51. Guy Fiti Sinclair, *Towards a Postcolonial Genealogy of International Organizations Law,* 31 LEIDEN J. INT'L L. 858, 860 (2018).

52. *Western Sahara*, 1975 I.C.J. ¶ 1.

53. The ICJ Advisory Opinion on Western Sahara recognizes in certain circumstances tracing the will of people is unnecessary. Klabbers, *supra* note 2, at 194–95; *Western Sahara*, 1975 I.C.J. ¶ 59.

54. *See generally* Michel Seymour, *Remedial Secession*, *in* ROUTLEDGE HANDBOOK OF STATE RECOGNITION (Gëzim Visoka et al. eds., 2020) (arguing that nations do not have a primary unilateral right to secede, but that they could if there were a special right to do so).

rights. The situations are monitored by a "faceless international authority," created by successive generations of international officials in various international organizations in the name of humanity or other global calling.[55] Earned sovereignty and the new forms of state responsibility are administered from the outside, to protect the supposedly best interests of the people concerned.[56] The emergence of newly formed states such as Kosovo, Timor Leste, and South Sudan bear characteristics of such a remedial secession, as their creation responded to the atrocities perpetrated by the sovereigns that ruled the territories.

In recent scholarship and international practice, the 'special circumstances' indicated in the Advisory Opinion have come to stand for the triple standard of democracy, rule of law and human rights.[57] The international authority can now assess and control a suspect sovereign against the triple standard. A failure to meet the standard can – sometimes still depending on the political power of those recognizing the entity—lead to the emergence of new states within the boundaries of an already existing state. It can also result in lesser intrusions or reformulations of an existing state, as in the cases of Mali or Iraq.[58] If a state has emerged from the failure of a sovereign to act responsibly towards its people, the emerged state may not be absolutely sovereign from the outset. It is usually subjected to specific conditions and continues to be monitored by the international authority. Even though these sovereigns satisfy the formal criteria of statehood, they remain suspect cases for the international authority.[59]

The establishment of sovereignty through democracy, rule of law, and

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55. G.A. Res. 60/1, 2005 World Summit Outcome (Sept. 16, 2005). On such novel forms of responsibility in the international plane, see generally Outi Korhonen & Toni Selk. . .l. . ., *Theorizing Responsibility*, *in* OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW (Anne Orford & Florian Hoffmann eds., 2016) [hereinafter OXFORD HANDBOOK]; Sinclair *supra* note 51, at 841–69; Guy Fiti Sinclair, *A 'Civilizing Task': The International Labour Organization, Social Reform, and the Genealogy of Development*, 20 J. HIST. INT'L L. REV. 145, 191–93 (2018) [hereinafter Sinclair, *Civilizing Task*].

56. *See generally* Anne Orford, *Protection in the Shadow of Empire*, *in* INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT 1 (2011) (discussing the practices of international actors aimed at maintaining order and protecting life in the decolonized world).

57. *See* Gerry J. Simpson, *Something to Do with States*, *in* OXFORD HANDBOOK, *supra* note 55, at 564–82; Rose Parfitt, *Theorizing Recognition and International Personality*, *in* OXFORD HANDBOOK, *supra* note 55, at 591–92. *See generally* Frank Hoffmeister, *The Contribution of EU Practice to International Law*, *in* DEVELOPMENTS IN EU EXTERNAL RELATIONS LAW 37 (Marise Cremona ed., 2008).

58. *See, e.g.*, Matilda Arvidsson, *The Subject in International Law: The Administrator of the Coalition Provisional Authority of Occupied Iraq and its Laws* (2016) (dissertation, Lund University).

59. Parfitt, *supra* note 57, at 583; ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 5 (John Bell et al. eds., 2007).

human rights comes into question solely when the international authority observes a grave violation of these standards. Many states ask for assistance from the international authorities to guide their democratic and economic reforms and to build a law-abiding society.[60] Usually, the interference of the international authority on the sovereignty amounts only to assistance to strengthen the state institutions and to undertake economic reforms.[61] In the past, these reforms were often aimed at creating a free market economy, fostering foreign investments, and opening the markets to a free flow of capital.[62] However, this developmental agenda resulted in instances of unsustainable levels of debt.[63] When states defaulted on their loans or had to seek the restructuring of their debts, they needed to do so in accordance with the demands and requirements of the globalized monetary and financial systems granting the loans. This effectively meant that the countries had to partly delegate their internal sovereignty to the international (financial) institutions.[64]

D. Economic sovereignty

Economic independence has long been considered a cornerstone of sovereignty. It has been fairly uncontested in international law from the times of Jean Bodin to *Serbian Loans*.[65] Bodin in his *Six Books of the*

60. Simpson, *supra* note 57, at 564–82. *See generally* GUY FITI SINCLAIR, TO REFORM THE WORLD-INTERNATIONAL ORGANIZATIONS AND THE MAKING OF MODERN STATES (Oxford University Press 2017) (analyzing the expanding role of international organizations in military, financial, economic, political, social, and cultural affairs).

61. Katharina Pistor, *From Territorial to Monetary Sovereignty*, 18 THEOR. INQUIRIES L. 491 (2017).

62. *See generally* David Williams, *Liberalism, Colonialism and Liberal Imperialism*, 45 E. CENT. EUR. 94 (2018) (discussing the discourses and practices of some modern forms of liberal imperialism stemming from post-Cold War, expansionist and interventionist policies and practices by western states); Hans Mahncke, *Sovereignty and Developing Countries: Current Status and Future Prospects at the WTO*, 22 LEIDEN J. INT'L L. 395 (2009) (discussing concerns about globalization and the increasingly complex regulatory setting for developing countries); David Williams, *Aid and Sovereignty: Quasi-States and the International Financial Institutions*, 26 REV. INT'L. STU. 557 (2000) (examining the changing status of sovereignty for some of the world's poorest countries). On the challenges of regulating Transnational Corporations (TNCs) in developing countries more broadly, see Harri Kalimo & Tim Staal, *"Softness" in International Instruments: The Case of Transnational Corporations,* 42 SYRAC. J. INT'L L. & COM. 365 (2015).

63. Pistor, *supra* note 61, at 502.

64. *Id.*

65. *See generally* Claus D. Zimmerman, *The Concept of Monetary Sovereignty Revisted*, 24 EUR. J. INT'L L. 797 (2013) (examining whether the concept of monetary sovereignty is subject to evolution under the impact of globalization and financial integration).

Commonwealth referred to the power of the monarch to coin money and to have an absolute control on its allocation and value.[66] In *Serbian Loans,* the Permanent Court of International Justice ("PCIJ") found that "[i]t is indeed a generally accepted principle that a State is entitled to regulate its own currency."[67] By the 1970s, monetary sovereignty in this traditional sense had largely eroded. The development was a consequence of the end of the Bretton Woods monetary system, marked by the unilateral decision of the United States to leave behind the gold standard and allow its currency to float. This created global capital markets that replaced the former bilateral loan agreements with privately funded state bonds.[68] In this way, the private financial institutions, facilitated by the interventions of states and the international authority, captured parts of what used to be (economic) sovereignty.

The power of the economy to discipline sovereignty is largely aligned with the tenets of modern mainstream economic thought. State finances need to be managed with discipline, with demand for austerity in cases of overspending. This is considered by some to reflect a neoliberal economic policy and be a part of economic globalization.[69] Like the international authority of the United Nations, the International Monetary Fund ("IMF") and the World Bank have also been depicted as international actors, wielding impartial economic expertise as their foremost tool.[70] Such international authorities are distinct from, and more anonymous than, the traditional sovereigns. The economy is omnipresent and not represented by any particular entity; its dictates are equally as much a part of the sovereign as an element for its control. Unlike many other constraints on sovereignty, the global economy is part of both the self and the others.

The conceptualization of sovereignty has thus gone through extensive changes in the UN era. While the UN Charter speaks of the formal equality of sovereigns, this formally flat system has transformed into one where some sovereigns are more dependent than others on the support of international

66. JEAN BODIN & M. J. TOOLEY, SIX BOOKS OF THE COMMONWEALTH 56 (1955).

67. Payment of Various Serbian Loans Issued in France (Fr. v. Yugo.), Judgment, 1929 P.C.I.J. (ser. A) No. 20, at 96 (July 12); CHARLES PROCTOR, *MANN ON THE LEGAL ASPECTS OF MONEY* 500–01 (6th ed. 2005).

68. Pistor, *supra* note 61, at 500–01.

69. *See generally, e.g.*, CORNEL BAN, RULING DEAS: HOW GLOBAL NEOLIBERALISM GOES LOCAL (2016) (explaining why neoliberal hybrids take on their forms and how they survive crises).

70. Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 253, 273 (David M. Trubek & Alvaro Santos eds., 2006).

authorities. The international authority has often been called for—and occasionally imposed—its assistance on sovereigns that are considered incapable of governing.[71] As such, the presumed flatness of sovereignty in fact admits *de facto* differences in the sovereign capacity of the states. Gradually, the state supporting functions may have become state shaping functions. The *ethos* upon which the international authority has shaped the states has markedly been that of economic liberalism. The heterarchical system has justified the international authorities' economic interference.[72] Unlike the formal equality of states, the economic system thus has elements of hierarchy. In this sense, sovereignty has gone full circle: from a handful of sovereigns during the colonial era to the proliferation of formally equal sovereigns as enshrined in the UN Charter to, finally, a set of sovereigns whose powers are limited in terms of *de facto* economic independence.

The globalization of the economy has created extensive networks of commerce between companies located in virtually all States. As a result, economic disputes also occur globally. To resolve disputes arising between the economic actors, various kinds of courts and tribunals have been set up in the global economy.[73] In addition to the prominent interstate dispute settlement of the World Trade Organization ("WTO"), free trade agreements ("FTAs") and bilateral investment treaties ("BITs"), which contain provisions on investor-state dispute settlement ("ISDS"), have steadily grown in number and importance. Thus, economic actors may increasingly have choices on which way to settle their disputes.

Asian Agricultural Products Ltd v Sri Lanka[74] is an example of these types of arbitration cases. It concerned the Sri Lanka-UK BIT. In this case, the members of the ICSID Tribunal made a 2-1 decision that Sri Lanka had failed to meet the due diligence standard when engaging in counter-insurrection activities in the country.[75] As is established under customary international law, the Sri Lankan government was to take all measures that

71. Orford, *supra* note 56, at 2.

72. SINCLAIR, *supra* note 60, at 120–21.

73. *See generally* KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS (2014) (discussing the development and trends in the creation and role of international courts); Tarald Laudal Berge & Helge Hveem, *The International Regime for Investment: A History of Failed Multilateralism*, *in* HANDBOOK OF THE INTERNATIONAL POLITICAL ECONOMY OF THE CORPORATION 311 (Andreas Nölke & Christian May eds., 2018) (discussing why there is no multilateral agreement on investment and whether one is needed).

74. Asian Agric. Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award (June 27, 1990), 6 ICSID Rev. 526 (1991).

75. *Id.* ¶¶ 40, 85.

could be reasonably expected to prevent its actions from leading to losses of human life and property.[76] It had failed to do so when targeting its use of force on the production facilities of an unrelated third-party foreign investor.[77] The BIT that protected the economic interests of investors thus limited, or at least affected, the sovereign's use of military power against insurgents. Agreements like the Sri Lanka-UK BIT may therefore set limits on the scope of a sovereign's internal sovereignty.[78]

While these clauses address the *internal* aspect of a State's sovereignty (i.e., the use of police powers and compensation for ensuing damages to third parties), they may also effectively curtail the State's *external* sovereignty: when taking measures that are required to effectively control its territory, the State will need to consider the financial consequences of the measures on other States.[79] Hence, the bilateral and multilateral treaties that lead to arbitration affect both the State's external and internal sovereignty. They may even go as far as questioning the (State's) right to conclude a treaty in the first place, as was the case in *Front Polisario.* These treaties also regulate investments in third countries, and therefore need to be carefully evaluated for their impacts on other internal policies and politics, as the controversies surrounding EU's (currently suspended) negotiations on the TTIP agreement with the US demonstrated. In many ways, the interests of the economy have become a powerful force which states need to acknowledge in various ways. In the aftermath of the *Front Polisario* decision, there have been a number of claims by different actors linked to the case of Western Sahara that have sought to challenge both private and public interests that derived their authorization from the Moroccan government. These developments may have fundamentally changed perceptions of the status of economic relations and agreements in international law.[80]

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76. *Id.* ¶¶ 85, 86.

77. *Id.* ¶ 85.

78. *See generally* Lauge N. Skovgaard Poulsen & Emma Aisbett, *When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning*, 65 WORLD POLIT. 273 (2013) (showing that developing countries often ignored the risks of bilateral investment treaties until they became subject to an investment treaty claim).

79. *See generally* DIETER GRIMM, SOVEREIGNTY: THE ORIGIN AND FUTURE OF A POLITICAL AND LEGAL CONCEPT (2015) (discussing whether recent political changes have undermined notions of national sovereignty and comparing manifestations of the concept in different parts of the world); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS THE RISE AND FALL OF INTERNATIONAL LAW 1890-1960 386 (2002) (studying the rise and fall of modern international law, agruing inteernational law was meant to "civilize" late nineteenth-century attitudes towards race and society).

80. *See Commission Staff Working Document Accompanying the Proposal for a Council Decision on the Conclusion of an Agreement in the Form of an Exchange of Letters Between the European Union*

Various international legal scholars have lamented trade disputes and fragmentation as signs of growing compartmentalization and technical management of international law.[81] Yet, through cases like *Front Polisario*, it is perhaps also possible to argue the reverse: the governance structures of the economy may, through fragmentation, serve some of the traditional interests of public international law by providing a forum for those that wish to be self-governed. Through the new venues and powers of economic interests, people's self-determination and equality, outlined in the United Nations system, may have found new ways to materialize. In the past, states may have accepted the jurisdiction of an international court, whereas now, in the interconnected world of trade, they are also bound by the dispute settlement mechanisms of the trade agreements that they are parties to.[82] States cannot foresee all the repercussions flowing from the BITs and FTAs because the range of the matters related to foreign investment and trade is so vast.[83] As a consequence, an apparently rational actor such as a state may not comprehend all the rules of an agreement that may bind it in unexpected ways in the future.

But like most fragments of law, the economic law cuts both ways. A growing body of scholarship on international law and development outlines the role of the economy in the wider developmental project of international law.[84] The presumed universality of economic development and economic indicators has rendered the economic policies and models of the developed

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and the Kingdom of Morocco on Amending Protocols 1 And 4 of 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, COM (2018) 481 final (June 11, 2018).

81. *See, e.g.*, Int'l L. Comm'n, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission,* U.N. Doc. A/CN.4/L.682 (2006); Martti Koskenniemi, *The Fate of Technique and Politics*, 70 MOD. L. REV. 1 (2007) (criticizing the technical specialization of international law into functional regimes).

82. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000) (discussing the the different types of and reasons for the "widespread legalization of international governance", such as dispute settelement mechanisms in trade agreements); Poulsen & Aisbett, *supra* note 78, at 17–18.

83. Poulsen and Aisbett, *supra* note 78, at 11.

84. *See, e.g.*, ANGHIE, *supra* note 59 (arguing that colonization was central to the formation of international law and the idea of sovereignty); Orford, supra note 56 (discussing the practices of international actors aimed at maintaining order and protecting life in the decolonized world); SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY (2011); BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE (2003) (critiquing twentieth-century international law from the perspective of Third World social movements).

world as the benchmarks that ought to be adopted by the less developed nations of the world. This linkage of development and economy has worked in favor of both the developed and developing countries and their economies: the share of the world population living in extreme poverty has decreased from approximately 55 percent in 1960 to less than 10 percent in 2015.[85] There are also, however, claims that through their influence in the international financial institutions, developed countries have promoted the policies of free trade and investments in developing countries in a manner that has constrained the opportunities of developing nations, and been more detrimental – or at least less beneficial – to them than could and should have been the case.[86]

The ever-growing network of trade and investment treaties locks the States together and may lead to contractual obligations that may be triggered in unpredictable ways in arbitration tribunals. For example, the *Yukos Universal Limited v. The Russian Federation*[87] case under the Energy Charter Treaty led to unforeseen consequences due to a seemingly innocuous treaty commitment. The dispute on the matter concerned the declared bankruptcy of Yukos that followed from Russian tax authorities' decisions in 2000-2003 concerning the taxes and fines imposed on the company.[88] Shareholders of Yukos initiated a number of legal processes in diverse venues in an attempt to regain the property lost due to the actions of the Russian Federation.[89] While the European Court of Human Rights constituted a relatively traditional international forum, the jurisdiction of which was foreseeable,[90] the Energy Treaty Charter offered a rather special

85. Max Roser & Esteban Ortiz-Ospina, *Global Extreme Poverty*, OUR WORLD IN DATA, https://ourworldindata.org/extreme-poverty (last visited Mar. 19, 2022).

86. ANGHIE, *supra* note 59 at 5.; Margot E Salomon, *From NIEO to Now and the Unfishable Story of Economic Justice*, 62 INT'L COMP. L.Q. 31 (2013) (discussing why international law has failed the global poor and what interests it served instead); Juan Pablo Bohoslavsky, Rep. of the Independent Experts on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights, U.N. Doc. A/74/178 (2019).

87. Yukos Universal Ltd. (Isle of Man) v. Russian Fed'n, P.C.A Case No. AA227 (July 18, 2014).

88. *Id.* ¶ 63.

89. *See id.* ¶¶ 8–62 (providing a summary of the winding history of the case together with access to all decisions thereof).

90. *See* Oao Neftyanaya Kompaniya Yukos v. Russ., App. No. 14902/04 (July 31, 2014) https://hudoc.echr.coe.int/eng?i=001-145730. The compensations set out in decision remain to this date unpaid due a decision by the of the Russian Constitutional Court declaring the decision by the European Court of Human Rights unconstitutional. Postanovlenie Konstitucionnogo Suda Rossijskoj Federacii ot 19 janvar' 2017 [Ruling of the Russian Federation Constitutional Court of Jan. 19, 2017, SOBRANIE ZAKONODATEL'STVA ROSSIĬSKOĬ FEDERATSII [SZ RF] [RUSSIAN FEDERATION COLLECTION OF

venue for arbitration, where there was no formal agreement on the part of the Russian Federation to allow the arbitration to take place. This precise concern was voiced by Russia after the Permanent Court of Arbitration had passed its judgment, and it led in 2016 to the Hague District Court setting aside the awards due to the lacking jurisdiction of the arbitral tribunal.[91] The Court of Appeals of the Hague, however, overturned the District Court's decision in a landmark decision.[92] The case indicates how investors' interests intersect with the sovereign's exercise of power.

A consequence of fragmentation, caused by the hundreds of trade and investment Treaties aimed at facilitating the functioning of the international economy, might thus also be the contestation of sovereignty and statehood. States enter into multiple treaties, which create a normative network. Once introduced to the network, it is difficult for the States to limit the network's normative application in settling disputes. The norms may allow parties to challenge a State's (interpretation of its) internal sovereignty. Whereas only a few States would go so far as to consider initiating interstate proceedings to protect the investments of their nationals, the private parties holding direct economic interests are not constrained in the same way.[93]

III. WESTERN SAHARA

In parallel with the fact that private parties have only limited constraints in defending their interests, the globalization of trade has extended the means of doing so—the networks of trade and investment treaties—to even the most distant of places. Western Sahara sits in arid northwestern Africa, surrounded by Morocco, Algeria, Mauritania and the Atlantic Ocean. Products emanating from this territory are a part of the trade flows to the European Union and, thus, some claim, fall within the scope of international economic law in the form of the EU-Morocco Trade Agreement.[94]

LEGISLATION] 2017, No. 5, Art. 866 (Russ.).

91. Case C/09/477160, Russian Fed'n v. Veteran Petroleum Ltd., ECLI:NL:GHDHA:2020:234 (Apr. 20, 2016).

92. Case 200.197.079/01, Judgment of the Court of Appeal of The Hague [Gerechtshof Den Haag], ECLI:NL:GHDHA:2020:234 (Feb. 18, 2020).

93. There are, of course, classic international law cases where States have done so. *See, e.g.*, Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain), Judgment, 1970 I.C.J. Rep. 4 (Feb. 5).

94. Case T-512/12, *Front Polisario I*, ECLI:EU:T:2015:953 (Dec. 10, 2015); Case C-104/16 P, *Front Polisario II*, ECLI:EU:C:2016:973 (Feb. 19, 2016).

A. The political history of Western Sahara

Western Sahara has a long, contested political history from at least the 11th century to the present. The territory of today's Western Sahara is an outcome of treaties concluded between France and Spain.[95] The question of to whom it belongs since decolonization has been a matter of heated debate. This is partly due to the fact that the people living in the area have traditionally consisted of nomadic tribes who have shown allegiance to a wide range of rulers.[96] The present and historical relationships of dependence, especially with neighboring Morocco and Mauritania, are foundational to the long-lasting crisis in Western Sahara.[97]

Before exploring in more detail, the *Front Polisario* case, a short excursus through three snapshots—colonial, decolonized, and present—on the history of the crisis in Western Sahara is in order. The borders of Western Sahara were outlined during the Berlin Conference of 1884–85[98] and enforced in bilateral treaties by the Great Powers.[99] The borders paid little attention to any existing political structures; "[t]heir arbitrariness divid[ed] people and in other ways result[ed] in absurd situations."[100] Besides the absurdity, the borders often connected vast areas under the centralized regional rule, with feuding groups unified under a possibly hostile central

95. Sidi M. Omar, *The Right to Self-Determination and the Indigenous People of Western Sahara*, 21 CAMBRIDGE REV. INT'L AFF'S 41, 43 (2008).

96. *Id.* at 43–44; Pedro Pinto Leite, *International Legality Versus* Realpolitik*: The Cases of Western Sahara and East Timor*, *in* THE WESTERN SAHARA CONFLICT: THE ROLE OF NATURAL RESOURCES IN DECOLONIZATION 11, 12 (Claes Olsson ed., 2006).

97. Gregory White, *Western Sahara: War, Nationalism, and Conflict Irresolution*, 54 AFR. STUD. REV. 194, 194–95 (2011). *See generally* H.T. Norris, *The Wind of Change in the Western Sahara*, 130 GEOGRAPHICAL J. 1 (1964) (discussing the history of the Western Sahara); Pablo San Martin, *Nationalism, Identity and Citizenship in the Western Sahara*, 10 J.N. AFR. STUD. 565 (2007) (analyzing the development of a national identity in response to the hegemonic policies of the Polisario and Morocco to better understand the Western Sahara conflict).

98. The Berlin Conference legitimized the conquest of the coastal regions, based upon which Spain launched its conquest of Western Sahara in 1884. At the same time, it was the concluding agreement with France that was finally agreed upon in 1900, but was never signed, that demarcated the area. As such, while there is no mention of Western Sahara in the Berlin Conference, without the Conference, Spain would not have launched its conquest of Western Sahara. General Act of the Berlin Conference on West Africa, Feb. 26 1885. Omar, *supra* note 95, at 45.

99. EDWARD HERTSLET, RICHARD WILLIAM BRANT & HARRY LESLIE SHERWOOD, THE MAP OF AFRICA BY TREATY 1165 (1909) ("Convention between France and Spain for the delimitation of their possessions in Western Africa, signed at Paris, 27th June 1900.").

100. Ieuan Griffiths, *The Scramble for Africa: Inherited Political Boundaries*, 152 GEOGRAPHICAL J. 204, 204, 209 (1986).

rule. From the late 19th century until the beginning of the Second World War, Spain commanded the area of Western Sahara. From 1939 onwards, the territory of Western Sahara was governed by Spanish Morocco.[101] The area itself was hardly the most prosperous of colonies, but fisheries together with mines of iron ore formed the core of the Spanish colonial economy in the area. In the post-war era, Spain was relatively slow to dismantle its dominion in Africa.[102] This, however, did not prevent claims for the area of Western Sahara from being raised by the protectorate, Morocco.[103] Since the 1950s, long before the formal end of the Spanish presence in 1975, a series of claims were raised by Morocco and partly enforced through a military presence.

During the colonial era, many of the key questions raised in *Front Polisario* were already present. The first concerned the prevalence of fisheries and fishing rights as the main source of income. The importance of fisheries for coastal states has made fisheries prominent in international law for a long time. Limitations to the rights of other states to conduct commercial fishing in exclusive economic zones have been a staple of the modern law of the seas.[104] Second, a defining feature of the governance of Western Sahara has been the changing of rulers who have established their dominion on either historical claims or military and economic might. Allegiances remained important and territorial claims were made by the rulers with limited concern for the people living in the area.

A snapshot of a decolonized Western Sahara resembles to a great extent that of the colonized Western Sahara. The UN[105] provided rights to the Sahrawi people living in the area of Western Sahara, yet nevertheless failed to convey a meaningful articulation of these rights. The calls for the people's right to self-determination, a referendum,[106] or listing Western Sahara as a non-self-governing area did little to give power to the Sahrawi people. The rights of newly decolonized people remained, to a great extent, tightly connected to the "arbitrary and absurd" colonial borders—a fact reflected in

101. Spanish Morocco was established in November 27, 1912 by the treaty between France and Spain. Omar, *supra* note 95, at 43–44; *see generally* Paula Maria Vernet, *Decolonization: Spanish Territories*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 3 1124–36 (2017).

102. Vernet, *supra* note 101; Isidoros, *supra* note 96, at 173.

103. Morocco was a protectorate under French and Spanish rule since the 1912 agreements with France and Spain.

104. *See generally* Fisheries Case (U.K. v. Norway), Judgement, 1951 I.C.J. Rep. 116 (Dec. 18) (adjudicating the validity of a decree delimiting Norwegian fisheries zone).

105. G.A. Res. 1514 (XV), *supra* note 37; G.A. Res. 1541 (XV), *supra* note 37.

106. S.C. Res. 1429 (July 30, 2002).

the Advisory Opinion of the ICJ on Western Sahara.[107] To clarify the situation, the UNGA decided to subject the issue to the ICJ. The UNGA's asked, as noted,[108] whether the area of Western Sahara is a no man's land – a *terra nullius* – or whether it belonged to Morocco or Mauritania. The UNGA's questions did not reflect the option that the area should in fact belong to the people who had lived there for very long – the Sahrawi.[109]

The move from the colonial era to decolonization changed relatively little in terms of the factual circumstances of Western Sahara. Moving from a single ruler (i.e. Spain) first to tripartite governance (i.e. Spain, Morocco, and Mauritania)[110] and back to one ruler (i.e. Morocco)[111] did not alter the status of Western Sahara.[112] Even though there were few changes in terms of the factual situation, legally the changes were relevant.[113]

In the 20th century, the recognition of peoples' right to self-governance, promoted by the United Nations, had allowed the emergence of a range of new people in international discourses, and many of them had the aspiration to create a new sovereign.[114] This was also the case with *Front Polisario*,[115]

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107. Simpson, *supra* note 57, at 580; Parfitt, *supra* note 57, at 598; Griffiths, *supra* note 100, at 209; Rep. of the S.C. on the Situation Concerning Western Sahara, ¶ 14, U.N. Doc. S/2006/817 (2006).

108. Western Sahara, Advisory Opinion, 1975 I.C.J. 12 ¶ 162 (Oct. 16); *see also* S.C. Res. 380, ¶ 2 (Nov. 6, 1975); Under-Secretary-General for Legal Affairs, Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, U.N. Doc. S/2002/161 (Feb. 12, 2002) [hereinafter "S.C. Letter Jan. 2002"].

109. *See* G.A. Res. 3292 (XXIX), ¶1 (Dec. 13, 1974).

110. U.N. Declaration of Principles on Western Sahara by Spain, Morocco and Mauritania, Nov. 19, 1975, U.N.T.S. 259 [hereinafter "U.N. Dec. of Principles on W. Sahara"]; G.A. Res. 35/118 (Dec. 11, 1980); G.A. Res. 52/78 (Dec. 10, 1997); G.A. Res. 54/91 (Dec. 6, 1999); G.A. Res. 55/147 (Dec. 8, 2000); G.A. Res. 56/74 (Dec. 8, 2001); G.A. Res. 3292 (XXIX) (Dec. 13, 1974); S.C. Letter Jan. 2002, *supra* note 108; Leite, *supra* note 96, at 13; *see also* Thomas M. Franck and Paul Hoffman, *The Right of Self-Determination in Very Small Places*, 8 N.Y.U. J. Int'l L. & Pol., 331, 341 (1976).

111. On February 26, 1976, Spain withdrew its presence from the Western Sahara territory and no longer acted as the administrative power in the territory. *See* U.N. Dec. of Principles on W. Sahara, *supra* note 110. *See also* S.C. Res. 690 (Apr. 29, 1991); Leite, *supra* note 96, at 13.

112. G.A. Res. 2983 (XXVII) ¶ 5(a) (Dec. 14, 1972); G.A. Res. 2229 (XXI) ¶¶ 3–4, (Dec. 20, 1966); G.A. Res. 2983 (XXVII), ¶ 5(b) (Dec.14 1972); *see also* Helen Quane, *The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights?*, *in* REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 259 (Stephen Allen & Alexandra Xanthaki eds., 2011).

113. G.A. Res. 48/46 (Mar. 22, 1994); G.A. Res. 49/40 (Jan. 30, 1994).

114. *See generally* Fernández-Molina, *supra* note 96 (discussing the emergence of civil protests and pro-independence activisim in the Western Sahara); Elena Fiddian-Qasmiyeh, *The Inter-generational Politics of 'Travelling Memories': Sahrawi Refugee Youth Remembering Home-land and Home-camp*, 34 J. INTERCULT. STUD. 631 (2013) (studying the politics of traveling memories between older and younger generations in Western Sahara).

115. In 1975, Front Polisario declared Western Sahara as an independent country with the official

established in 1973 as a national liberation movement in Western Sahara aiming to end the presence of Morocco on the territory.

Despite the formal granting of rights to the newly established people, their demands for independence were, however, generally ignored. The UN fostered a rights-based narrative on the international plane, but many of the rights noted in the UN Charter remained solely declaratory due to the lacking enforcement mechanisms and the conflicting, yet apparently equally potent, claims on rights, in particular, the right to self-determination versus the right to territorial integrity.[116]

As a result, states were, on the one hand, bound to the norms of the UN charter, but, on the other hand, the lack of compulsory ICJ jurisdiction makes the execution of those norms, and hence the enforcement of the rights, occasionally onerous.[117] As only a handful of states had accepted the ICJ's compulsory jurisdiction, the right of self-governance could not materialize.[118] While it is evident that the rights of people have increased, those rights lack a forum to be heard either internationally or domestically. In particular from the viewpoint of actors such as the Sahrawi people, little has changed since the decolonization process: the call for a referendum remains unfulfilled and the rights of the Sahrawi people remain mostly unaddressed.[119] At the level of international law, enforcement through courts

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name Saharan Arab Democratic Republic (SADR). SADR has been recognized by more than 80 states. Some of those states that have recognized SADR have later withdrawn or suspended their recognition. Irene Fernández-Molina, *Protests Under Occupation: The Spring Inside Western Sahara,* 20 MEDITERR. POL. 235, 236 (2015); Anne Lippert, *Sahrawi Women in the Liberation Struggle of the Sahrawi People*, 17 SIGNS 636, 636 (1992); *See generally* AXEL HONNETH, THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS (1996); Charles Taylor, *Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25 (Charles Taylor & Amy Gutmann eds., 1994); *see also* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403 (July 22).

116. Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 268 (2011) ("[I]nternational law fails on this view to be a legal regime for two reasons: (1) it lacks its own enforcement mechanisms, and (2) it lacks internal mechanisms that employ brute force."). *See generally* JACK L GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005) (arguing that international law is less powerful and less significant than the public believe and that the possibilities for what it can achieve are limited).

117. Statute of the International Court of Justice art. 36, ¶ 2 (1946).

118. The non-enforceability of the norms of international law has its counterpart in domestic jurisdictions in the shape of doctrine of non-justiciability for acts of states. This doctrine suggests that a national court has no competence to assert jurisdiction on "any actions of a governmental nature taken by a foreign sovereign state in its own territory." DIXON, *supra* note 5, at 184.

119. Nathaniel Berman, *A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework*, 33 HARV. INT'L L.J. 353, 356, 377–79 (1992); Omar, *supra* note 95 (discussing the struggle for self-determination among the Sahrawi people); HURST HANNUM,

remains at the discretion of the States, despite a growing number of courts and tribunals that are in theory able to hear cases.[120] There are, however, pockets of international law emerging where the practical enforcement of obligations may at present be the rule rather than the exception – such as international economic law as enshrined in trade and investment agreements and as then interpreted by courts such as the CJEU, which may take a liberal position on standing.

B. CJEU's reading on Western Sahara

The snapshot of present-day Western Sahara is in many ways a collage of the past.[121] *Front Polisario* as a non-statal entity is seeking a forum wherein to challenge perceived injustices over the territories and fisheries of Western Sahara. The courts of the European Union provide such an opportunity, and they are not concerned with just economic matters. The constitutive nature of EU law and the effectiveness of enforcing it are features that make the Union a special *sui generis* international legal order.[122] Thus, when the European Union concluded a bilateral treaty with the Kingdom of Morocco that applied to the coastal waters outside of Western Sahara, there appeared to be a legal opening for *Front Polisario* to, if not claim a territory, at least negate Morocco's power to unilaterally dictate the economic relationships on Western Sahara's territory.[123]

AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMODATION OF CONFLICTING RIGHTS 38 (1990); *see also* Gnanapala Welhengama, *The Legitimacy of Minorities' Claim for Autonomy Through the Right to Self-determination*, 68 NORD. J. INT'L L. 413, 415 (1999) (noting that for minorities, without having greater political power over their territorial autonomy, they are being deprived of their right to self-determination); Rep. of the G.A. on the Question of Western Sahara, U.N. Doc. A/60/116 (2005); S.C., Rep. of the Secretary-General on the Situation Concerning Western Sahara, U.N. Doc. S/2006/817 (2006).

120. *See, e.g.*, ALTER, *supra* note 73, (discussing the development of and trends in the creation and role of international courts).

121. G.A. Res. 1541 (XV), *supra* note 37; *see* Omar, *supra* note 95, at 43–46 (providing a brief history of the Sahrawi people culminating in their current struggle for self-determination); Sandra Hummelbrunner & Anne-Carlijn Pickartz, *It's Not the Fish That Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union*, 32 UTRECHT J. INT'L & EUR. L. 19, 20–23 (2016) (providing a brief history of Western Sahara culminating in the current self-determination issues faced in the region).

122. Case C-26/62, NV Algemene Transport v. Neth. Inland Revenue Admin., ECLI:EU:C:1963:1; Case C-6/64, Costa v. ENEL, ECLI:EU:C:1964:66 ¶ 583-584 (Feb. 5, 1963); PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS 267–68 (6th ed. 2015) .

123. Peter Hilpold, *"Self-determination at the European Courts: The Front Polisario Case" or "The Unintended Awakening of a Giant"*, 2 EUR. PAPERS J.L. & INTEGRATION 907, 913, 917–18 (2017).

The legal dispute in the case was about the request of *Front Polisario* to annul Council Decision 2012/497/EU on the further liberalization of trade between the Kingdom of Morocco and the European Union through a bilateral treaty between the parties. However, the focus of our analysis will be on the issues of standing before the Courts, as they go to the heart of the matter in terms of statehood and sovereignty.

The General Court and the Court of Justice differed in their interpretations of the status of Western Sahara in the bilateral Liberalisation Agreement[124] between Morocco and the EU. In short, the General Court considered *Front Polisario* to have standing in the case but annulled the Council's decision as far as Western Sahara was concerned.[125] The Court of Justice instead considered Western Sahara excluded from the territorial application of the Treaty to begin with, and hence considered a case on behalf of Western Sahara inadmissible.[126] The Court of Justice would thus not grant standing to a legal person representing a party outside of the Agreement.[127] In both instances – but for different reasons – the territory of Western Sahara was considered not to be a part of the trade agreement from the point of view of the European Union.[128] Let us have a closer look.

The General Court and the Court of Justice followed roughly the same steps in their analyses of Article 263(4) TFEU. First, the Courts asked whether there was a legal person to raise a claim. Second, they asked if there was an act of the EU that could be challenged. And third, the Courts determined whether the said act applied to *Front Polisario* directly and in a way that distinguished it individually as an addressee of the decision, sufficient to accord the organization standing on the matter.

The first question on the legal personality of *Front Polisario* was discussed in greater detail in the decision of the General Court as the initial stage of the case. The General Court reflected widely on the status of Western Sahara and its gradual change since decolonization.[129] The Court of Justice, as the appellate court in the case, did not directly address the matter but simply assumed the legal personality of the parties in prior

124. Agreement Between the European Union and the Kingdom of Morocco Concerning Reciprocal Liberalisation Measures on Agricultural Products, Processed Agricultural Products, Fish and Fishery Products, Dec. 13, 2010, 2012 O.J. (L 241) 4.

125. Case T-512/12, *Front Polisario I*, ECLI:EU:T:2015:953, 35 (Dec. 10, 2015).

126. Case C-104/16 P, *Front Polisario II*, ECLI:EU:C:2016:973, ¶134 (Dec. 21, 2016).

127. *Id.* at ¶ 133.

128. For the outcome of the case on exports from Israeli settlements, see Case C-386/08, Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen, 2010 E.C.R. I-01289.

129. *Front Polisario I* , ECLI:EU:T:2015:953, ¶¶ 34–60.

proceedings.[130] The definition of legal personality was problematic to the General Court, as the normal categories used to recognize people's legal personality were not applicable.[131] There was no document incorporating *Front Polisario* in accordance with the law of a State because *Front Polisario*, though a private organization, claimed to be itself the representative of the State and of a State that only aspired to exist but did not yet formally do so.[132] The same problem of incorporation is faced by all organizations claiming to represent non-acknowledged sub-statal entities or regions. Nonetheless, the General Court found that there was nothing as such to prevent *Front Polisario* from being recognized as having standing before the Court.[133] Moreover, the General Court re-iterated that the definition of a legal person under Article 263(4) TFEU is not confined to the notion of legal personality recognized in a given Member State but is something defined by the European Union.[134] Also, the fact that Western Sahara and *Front Polisario* as its representative had been accepted by the European Union in other forums helped to mitigate the problem of establishing legal personality.[135]

The General Court's reading of legal personality operated between international and European law. On the one hand, the Court seemed to suggest that *Front Polisario* did not enjoy international legal personality.[136] From the point of view of international law, it is not clear whether this holds true, considering that traditionally international law has recognized insurgent groups at least as its subjects even though they would not enjoy a *full* legal personality as international organizations.[137] Therefore, even if Western Sahara were not a state, a long period of insurgency in a clearly demarcated area would most likely lead to the recognition of *Front Polisario* as an

130. *Front Polisario II*, ECLI:EU:C:2016:973, ¶ 68.

131. *Front Polisario I*, ECLI:EU:T:2015:953, ¶¶ 34–38.

132. *Id.* at ¶ 68.

133. *Front Polisario I*, ECLI:EU:T:2015:953, ¶52; Case 50/84, Bensider v. Comm'n of the Eur. Communities, 1984 E.C.R. *3991, ¶ 9; Case* 135/81, Groupement des Agences de Voyages, Asbl. v. Comm'n of the Eur. Communities, 1982 E.C.R. *3799, ¶¶ 9–12; Case* C-229/05, PKK and KNK v. Council, 2007 E.C.R. I-00439, ¶¶ 109–112; Case 175–73, Union Syndicale v. Council of the Eur. Communities, 1974 E.C.R. 917, ¶¶ 9–17; Case 15-63, Claude Lassalle v. Parliament, 1963 E.C.J. 1964 50; *Front Polisario I*, ECLI:EU:T:2015:953, ¶¶ 34–60.

134. *Front Polisario I*, ECLI:EU:T:2015:953, ¶¶ 51–53; *Groupement des Agences de voyages, Asbl.*, 1982 E.C.R. ¶¶ *9–12; PKK and KNK*, 2007 E.C.R. ¶¶ 109–112.

135. *Front Polisario I*, ECLI:EU:T:2015:953, ¶¶ 52–57.

136. *Id.* at ¶ 47.

137. JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 118–20 (9th ed. 2019); Sinclair, *Civilizing Task*, *supra* note 55, at 866.

insurgent group. Additionally, the General Court took a stance different from the Council; the latter argued[138] that international legal personality does not necessarily constitute a legal person in European Union law for contested subjects of international law, such as *Front Polisario*.[139] The GC, however, seemed to give relevance to the treatment of *Front Polisario* under international law and not only to the binding decisions of the EU institutions.[140] This leads to an overlay of European Union law on top of international law when deciding issues of legal personality. Combining EU law with international law might be prudent when facing hard cases where the mere act of recognition before a European Union court would count as a major victory for the claimant. But such prudence might also result in questioning internationally the legal personality of many of the entities that the European Union considers to embody international legal personality.

The positions of the European Commission and the Council on international legal personality, reflected in the decisions of the Courts, are a part of the greater debate on the fragmentation of international law. Rather than endorsing a pre-existing reading of international legal personality and using that as a foundation for its own interpretation of the status of *Front Polisario*, the General Court decided to further develop its own conceptualization of legal personality—a notion overlapping, but not synonymous, with the existing one.[141] The General Court referred to a party's capacity to bring legal proceedings through its constituting documents and internal structures that give it independence and capacity to take responsibility in legal relationships.[142] Taking into account these qualities and the special circumstances where the contested existence of Western Sahara was discussed, *Front Polisario* was, in the General Court's view, a legal person that could bring an action in the sense of Article 263(4) TFEU.[143] The Court of Justice did not contest this fact on appeal—thus leaving the matter without a definitive answer.

The creation of mutually existing, technical and 'managerial' legal orders has, as noted, been subject to extensive debate in the international legal community. The *Front Polisario* case illustrates that such fragmentation can also have a positive, remedial quality for some parties in

138. *Front Polisario I*, ECLI:EU:T:2015:953, ¶ 43.
139. *Id.* ¶¶ 42–43.
140. *Id.* ¶¶ 54–59.
141. *Id.* ¶¶ 34–60.
142. *Id.* ¶ 51.
143. *Id.* ¶¶ 46–60.

a dispute: the more there are courts to whose jurisdictions States are bound, the less likely it is that the States can shield themselves from responding to legitimate claims. On the negative side, this fragmentation leads international law to lose sight of its more universalistic moorings.[144] The fragmentation has been accentuated through FTAs, where commercial interests and the protection of investors have traditionally received the most attention, while the protection of the more vulnerable members of the society has been included only recently.[145] Yet, in the present case, the economic aspects may indeed offer the framing for an emancipatory narrative, where actors such as *Front Polisario* are able to challenge the alleged vestiges of colonialism and assert claims for statehood. This aspect in the evolution of the international legal order has received only scant attention. Quite like the transnational cases that have brought corporations to carry the responsibility for their actions by piercing the corporate veil,[146] cases akin to *Front Polisario* might eventually pierce artificial veils of sovereignty.

Having determined and accepted the legal personality of *Front Polisario*, the General Court assessed whether there existed an act of the European Union that could be contested, and whether *Front Polisario* could be considered an applicant directly and individually implicated by said act. To do so, the General Court considered the nature of the EU-Morocco bilateral agreement and whether it constituted a legislative or a regulatory act, as that is, under EU law, relevant when defining a party's standing before the EU Courts. Making reference to its past practice,[147] the General Court determined that the EU-Morocco bilateral agreement is a legislative act, as it had been adopted following the special legislative procedure defined in Article 218(6)(a) TFEU.[148]

What then needed to be shown was whether the territory of Western Sahara fell within the remit of such a legislative act. Here the views of the General Court and the Court of Justice differed: the General Court considered the agreement to apply to the Western Sahara territory,[149]

144. KOSKENNIEMI, *supra* note 79, at 515.

145. *See, e.g.*, Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815, 821–37 (2002) (explaining views on the merits and pitfalls of economic (trade) law in developing the international legal order); Ernst-Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT'L L. 621 (2002).

146. *See, e.g.*, Chandler v. Cape Plc [2012] EWCA (Civ) 525 (UK).

147. Case T-18/10, Inuit Tapiriit Kanatami v. Parliament, 2011 E.C.R. *II-05599*, ¶ *65*.

148. *Front Polisario I*, ECLI:EU:T:2015:953, ¶¶ 69–71.

149. *Id.* ¶¶ 73–103.

whereas the Court of Justice did not.[150] This divergence in opinion was based on a nuanced interpretation of what under international law would be considered to belong to a territory, not what factually occurred within the said territory.

Both Courts relied on the rules of interpretation in the Vienna Convention on the Law of Treaties ("VCLT"). The General Court made reference to Article 31(1) VCLT, which requires the interpretation of treaties in accordance with their ordinary meaning within the relevant context.[151] Because the European Commission and the Council knew that Morocco was exporting goods from Western Sahara, the General Court considered that the European Union had come to interpret the Council Decision as well as the Association Agreement[152] between Morocco and the EU as also covering the area of Western Sahara. As the European Commission and the Council were also aware of the views of Morocco concerning the territory of Western Sahara, the EU should, according to the General Court, have excluded the territory of Western Sahara explicitly from the Council decisions if this had been its intention.[153] On the other hand, while applying the Agreement between Morocco and the EU to Western Sahara, the Council had failed to assess the protection of fundamental rights (of the Sahrawi people) in that area.[154] Hence, the Agreement was considered annulled for the part that related to Western Sahara.[155]

Unlike the General Court, the Court of Justice used articles other than 31(1) VCLT in its interpretation of the Agreement.[156] Interestingly, the Court of Justice was adamant that there was no stark separation between international law and European Union law. The Court of Justice referred to Article 31(3)(c) VCLT, according to which relevant international law that is binding upon the parties is to be taken into consideration when interpreting a treaty.[157] Further, the Court of Justice combined Article 29 VCLT, which states that a treaty is binding in the entire territory of its parties, with the right to self-determination from Article 1 of the U.N. Charter and ICJ case law

150. Case C-104/16 P, *Front Polisario II*, ECLI:EU:C:2016:973, ¶¶ 81–126 (Dec. 21, 2016).

151. *Front Polisario I*, ECLI:EU:T:2015:953, ¶¶ 91–98.

152. 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, Mar. 18, 2000, 2000 O.J. (L 70) 2.

153. *Front Polisario I*, ECLI:EU:T:2015:953, ¶ 99.

154. *Id.* ¶¶ 223–47.

155. *Id.* ¶¶ 247.

156. Case C-104/16 P, *Front Polisario II*, ECLI:EU:C:2016:973, ¶¶ 86–100 (Dec. 21, 2016).

157. *Id.* ¶ 86.

(*Portugal v Australia*), and concluded that self-determination is a legally enforceable right *erga omnes*.[158] Self-determination must thus have been interpreted to apply also to relations between the EU and Morocco, despite the actions of Morocco.[159]

The main argument of the General Court[160] for considering that the parties had intended to include Western Sahara in the Agreement—the verifiable actions and knowledge of the Commission and the Council that Morocco was also applying the Decision in the territory of Western Sahara—was simply shrugged off by the Court of Justice. The fact that all parties knew that Morocco was applying the Association Agreement in the entire territory it considered its own—Western Sahara included—was without significance for the Court of Justice.[161] The Liberalisation Agreement between Morocco and Spain did not apply to Western Sahara.[162] Essential to this conclusion was adherence to international law and its systemic coherence. Even though the pragmatic approach taken by the General Court can readily be criticized for its superimposition of European Union law over international law, the optics of the decision matter as well. According to the General Court, a formal re-drawing of the scope of the Agreement was not enough—the whole agreement needed to be re-assessed.

Thus, the General Court and the Court of Justice followed different rationales. In the view of the General Court, the Council had intended to apply the Liberalisation Agreement to Western Sahara, even if it should not have done so due to the human rights violations in that region. The scope of the Agreement as defined by the General Court nevertheless led it to grant *Front Polisario* standing in the case.[163] The Court of Justice, in contrast, rejected this viewpoint, as it considered the Agreement to not have covered Western Sahara to begin with.[164] Nevertheless, the decisions of the General Court and the Court of Justice led to the same substantive outcome: goods originating from Western Sahara were no longer to be treated as part of the Association Agreement and, therefore, were subject to customs when imported into the EU. But this outcome was of limited consequence to

158. *Front Polisario II*, ECLI:EU:C:2016:973, ¶ 88. The Latin term *erga omnes* translates into "towards all," referring in law to rights and obligations that are enforceable against anybody. *See* Hilpold, *supra* note 123 (discussing the *erga omnes* aspects of the decision).

159. *Front Polisario II*, ECLI:EU:C:2016:973, ¶¶ 89–93.

160. *Id.* ¶¶ 73–103.

161. *Id.* ¶¶ 100–26.

162. *Id.* ¶ 116.

163. Case T-512/12, *Front Polisario I*, ECLI:EU:T:2015:953, ¶ 114 (Dec. 10, 2015).

164. *Front Polisario II*, ECLI:EU:C:2016:973, ¶ 132.

Morocco. Morocco was in practice able to push aside its violation of international law—that is, to continue intervening in the external relations of Western Sahara as a UN non-self-governing territory. Morocco was able to maintain its unilateral interpretation of the territorial scope of the EU-Morocco agreement, so that nothing would prevent it from, for example, continuing to produce fish oil within the Moroccan territory, even if the fish originated from the waters of Western Sahara.[165]

The third question on whether *Front Polisario* had standing before the EU Courts was not addressed by the Court of Justice, as it found that the Decision did not apply to the territory of Western Sahara. The General Court seemed to state that the criteria of being directly and individually implicated by the legislative act did not pose a hurdle for international actors, in distinction from companies or natural persons. International actors are often, as in the case of *Front Polisario*, uniquely capable of representing the interests of people in a given territory.[166]

In summary, some conclusions can be drawn from the *Front Polisario* case. The General Court accepted in practice, and the Court of Justice did not seem hostile in principle, to the idea of a contested sub-statal entity claiming its rights in a judicial case against a legislative act of the EU. Further, it was conceivable for an international actor (*Front Polisario*) to represent such an entity in the case. However, the open-endedness of the Court of Justice's decision, caused by its rejection of the territorial applicability of the Agreement on Western Sahara to begin with, taints these conclusions with a good dose of uncertainty.

Next, we use these observations as a framework to assess another dispute, but this time a *potential* dispute: the claims for separation by the Georgian regions of Abkhazia and South-Ossetia/Tshkinvali.

The dissolution of the Soviet Union ended the period of colonial-type communist rule over Georgia. In April 1991, Georgia gained independence from Russia, and Abkhazia was part of the newly independent Georgia. Only after the 1992–1994 civil war, and with the intervention of Russian troops, did Abkhazia gain *de facto* separation from Georgia. With this separation, ethnic Georgians—a significant population—were expelled from the Abkhazian region. This issue will be addressed in further detail in the next Section.

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165. *Western Sahara's Polisario to Test EU Court Shipment*, REUTERS (Jan. 18, 2017, 7:51 AM) https://www.reuters.com/article/westernsahara-eu/western-saharas-polisario-to-test-eu-court-ruling-on-oil-shipment-idUSL5N1F82OC.

166. *Front Polisario I*, ECLI:EU:T:2015:953, ¶¶ 104–14.

The EU currently has an Association Agreement ("AA") with Georgia. Abkhazia and South-Ossetia have been described in the EU-Georgia AA in the following ways by the signatories to the agreement:

> "[Georgia's] efforts to *restore its territorial integrity* and *full and effective control* over Georgian regions of Abkhazia and the Tskhinvali region/South Ossetia . . . ."[167]
>
> "Committed to provide the benefits of closer political association and economic integration of Georgia with the EU to *all citizens* of Georgia *including the communities divided by conflict* . . . "[168]
>
> "This Agreement shall apply . . . to the territory of Georgia."[169]
>
> "The application of this Agreement . . . in relation to Georgia's regions of Abkhazia and Tshkinvali region/South Ossetia over which the Government of *Georgia does not exercise effective* control, shall commence *once* Georgia ensures the full implementation and enforcement of this Agreement . . . on its entire territory."[170]
>
> "Should a Party consider that the full implementation and enforcement of this Agreement . . . is no longer ensured in the regions of Georgia [of Abkhazia and Tshkinvali region/South Ossetia], that Party may request the Association Council to *reconsider the continued application* of this Agreement . . . in relation *to the regions concerned*."[171]

As Abkhazia and Tshkinvali continue to make claims for separation in a politically charged context, they make for an interesting case to further analyze the potential implications of economic law on statehood.[172] Could Abkhazia[173] refer to the Western Sahara case as resembling its own situation? Would Abkhazia fall under the EU-Georgia AA, given that article 429 (1) refers to the Georgian territory, and the application of the agreement is suspended by the territorial clause while the Georgian government lacks de facto control over Abkhazian territory? Could Abkhazia make, on this basis, the claim that the EU does not respect Abkhazia's right to self-determination under the EU-Georgia agreement? To what extent and how could the EU law treatment of the AA between the EU and Georgia affect the international law

167. Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the One Part, and Georgia, of the Other Part recital 16, Aug. 30, 2014, 2018 O.J. (L 261) 4 (emphasis added) [hereinafter Association Agreement].

168. *Id*. recital 18 (emphasis added).

169. *Id*. art. 429(1).

170. *Id.* (emphasis added).

171. *Id.* art. 429(4) (emphasis added).

172. *Id.* art. 429(1).

173. The analysis here is limited to Abkhazia. The idiosyncrasies of the situations do not allow us to describe multiple cases in sufficient detail in a single article.

assessment of the Abkhazian region?

IV. ABKHAZIA

A. Abkhazia in the context of the EU Georgia Association Agreement

The European Union has a range of "Association Agreements"[174] that it has concluded with its neighboring countries.[175] Similar to the case of Western Sahara in Morocco, several of these countries have contested territories within their borders. In what follows, we assess whether the Western Sahara case might have implications as a precedent with regard to Association Agreements. Does it establish an argument that the above-mentioned contested regions could, under certain circumstances, claim standing before the EU Courts by virtue of the AAs? Whatever one may think about the normative claims for statehood and sovereignty – and we take no position on that issue here – it does seem important that the geo-political legal consequences of the economic agreements be reflected upon, and have a place in the minds of the parties that conclude them.

While EU's agreements with the Eastern Partnership countries are independent of one another, they share significant similarities.[176] We focus on the provisions that refer to the territory and the area of application of the agreements. On the one hand, those provisions refer to the internationally recognized borders of the patron States, including the disputed territories. On the other hand, however, the territorial clauses may limit the applicability of the agreements in the disputed areas for as long as the State in question does not have effective control over the region. Neither these Agreements nor the EU-Morocco Agreement in the case of Western Sahara are fully unambiguous about the status of the contested territories. Whereas in the case of Western Sahara this failure emanated from the differing interpretations of the trade partners, in the Eastern Partnership AAs the confusion ensues from partly conflicting norms covering the territorial scope. The Association Agreement between Georgia and the EU offers an intriguing example for

174. Association agreement is a type of international treaty that can be concluded between the EU, the member states of the EU, and non-EU states in order to establish future cooperation.

175. The EU has three types of trade agreements: one of them is association agreements and the other two are customs unions and partnership and cooperation agreements. For a complete list of the trade agreements, see *Negotiations and Agreements*, EUR. COMM'N, https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/ (last visited Aug. 27, 2020).

176. *Id.*

analyzing the Eastern Partnership AAs.

Before analyzing the case and its implications, we briefly outline the context in Georgia. Since 1917, there has been an active conflict between Georgia and one of its (contested) territories, Abkhazia.[177] In Abkhazia, there is a group of people that consider themselves ethnically distinct from the rest of the Georgia population, and the Abkhazian region and Georgia have for long been marked by fluctuating and uncertain borders.

The present situation in Abkhazia can be most meaningfully explained in light of the Soviet Union and its collapse.[178] On March 31, 1991, Georgia held a referendum of independence, defining its leave from the then collapsing Soviet Union. 99.5 percent of voters, including ethnic Abkhazians, voted in favor of Georgia's independence and supported the restoration of Georgia's sovereignty based on the Act of Declaration of Independence of Georgia of 26 May 1918. Georgia left the Soviet Union in April 1991, with Abkhazia as its integral part. Soon thereafter, in 1992, a violent civil war erupted with the significant involvement of the Russian army in support of Abkhazia's secession. This marked a *de facto* separation of Abkhazia from Georgia, although the region remained under the rule of the Tbilisi government.[179] For more than a decade, the status quo of frozen relations between the two persisted. In 2008, a brief internal war nonetheless again erupted, and it became international through the involvement of the Russian Federation and its occupation of parts of Georgia.[180]

These events were followed by the recognition of the statehood of Abkhazia by a handful of States, most notably by Russia and countries under

177. Georgia has another contested region, South Ossetia, within its internationally recognized borders. *See generally* Situation in Georgia, ICC-01/15, Public Decision on the Prosecutor's Request for Authorization of an Investigation (Jan. 27, 2016) (holding that all requirements of Article 53(1) were met and thereby granting authorization).

178. *See generally* RONALD GRIGOR SUNY, THE REVENGE OF THE PAST: NATIONALISM, REVOLUTION, AND THE COLLAPSE OF THE SOVIET UNION (Stanford Univ. Press, 1st ed. 1993) (arguing that nationalism caused the collapse of the Soviet Union.).

179. *See generally* S.C. Res. 858 (Aug. 24, 1993); U.N. President of the S.C., Note by the President of the Security Council, U.N. Doc. S/26032 (July 2, 1993); S.C. Res. 1994/583, Annex I (May 14, 1994); S.C. Res. 937 (July 21, 1994).

180. In August 2008, the Russian Federation occupied Abkhazian territory and other areas outside the conflict zone. On August 12, 2008, leaders of the Russian Federation and France agreed to maintain peace in Georgia and signed six-point ceasefire agreement. *See generally* S.C. Draft Res. 2008/570 (Aug. 21, 2008); EU-Georgia Parliamentary Cooperation Committee Minutes of the 11th Meeting, EUR. PARL. DOC. (2009); Situation in Georgia, ICC-01/15 (regarding six-point peace plan for the Georgia-Russian conflict).

its sphere of influence.[181] Most of the international community maintains that Abkhazia remains a part of Georgia,[182] which is the state of affairs as reflected in the language of the Association Agreement between the EU and Georgia.

B. Abkhazia as a party to a dispute before the EU Courts

With this context, we assess to what extent the Front Polisario case could potentially function as a blueprint for the Abkhazian de facto government to also bring a claim as an independent entity to the courts of the EU. We will first briefly assess possible substantive claims that Abkhazia could use for this purpose, before turning to assess the possible standing of Abkhazia and the capacity of the de facto Abkhazian government to represent the interests of the region before the courts of the EU. We conclude that establishing standing for Abkhazia in this manner seems a convoluted process, and therefore its prospects seem weak. In fact, we come to the conclusion that the aspect of international external recognition, which was the ultimate threshold of statehood historically, re-surfaces. The Abkhazian case shows that even in the situation of fragmented legal regimes, external recognition remains a consideration when assessing the Montevideo Convention's formal criteria. Conversely, interference by third countries and the absence of general international recognition have relevance when standing is debated in the EU Courts.

C. The substantive grounds

Perhaps the most plausible of the substantive claims that the Abkhazian

181. On August 26, 2008 the Russian Federation recognized Abkhazia as an independent state.

182. *See* საქართველოს კონსტიტუცია [CONSTITUTION OF GEORGIA], Oct. 17, 1995, Matsne No. 786-ES, art. 1 (1995) (Geor.) (defining Georgia as an "independent, unified, and indivisible state, as confirmed by the Referendum of 31 March 1991 held throughout the territory of the country, including the Autonomous Soviet Socialist Republic of Abkhazia and the Former Autonomous Region of South Ossetia, and by the Act of Restoration of State Independence of Georgia of 9 April 1991"). *See generally* S.C. Res. 881 (Nov. 4, 1993); S.C. Res. 937 (July 21, 1994); S.C. Res. 1036 (Jan. 12, 1996); S.C. Res. 1065 (July 12, 1996); S.C. Res. 1077 (Oct. 22, 1996); S.C. Res. 1494 (July 30, 2003); S.C. Res. 15424 (Jan. 30, 2004); S.C. Res. 1554 (July 29, 2004); S.C. Res. 1582 (Jan. 28, 2005); S.C. Res. 1615 (July 29, 2005); S.C. Res. 1666 (Mar. 31, 2006); S.C. Res. 1716 (Oct. 13, 2006); S.C. Res. 1752 (Apr. 13, 2007); S.C. Res. 1752 (Oct. 15, 2007); S.C. Res. 1808 (Apr. 15, 2008); S.C. Res. 849 (July 9, 1993); S.C. Res. 854 (Aug. 6, 1993); S.C. Res. 858 (Aug. 24, 1993); S.C. Res. 876 (Oct. 19, 1993); S.C. Res. (Nov. 4, 1993); S.C. Res. 892 (Dec. 22, 1993); Rep. of the S.C., U.N. Doc. S/1996/507 (1996); Rep. of S.C., U.N. Doc. S/1996/644 (1996); Rep. of the S.C., U.N. Doc. S/2006/173 (2006).

de facto government could raise against the EU (so as to be able to bring a case by virtue of Article 263(4) TFEU) is that the EU be held liable for sustaining the economic isolation of Abkhazia through the EU-Georgia AA. The preamble of the EU-Georgia AA recognizes the territorial integrity of Georgia, including the region of Abkhazia.[183] The AA contends to apply to all of Georgia,[184] and supports a peaceful resolution of the conflict and the restoration of Georgia's effective control over Abkhazia. Article 429(2) of the AA then establishes the limited application of the agreement in Abkhazia until Georgia re-establishes a full and effective control over the region. By explicitly excluding Abkhazia from the scope of application of the AA, the Agreement could perhaps be argued to lead to a direct economic impairment on Abkhazia. Further, the argument on the impairment of the region's economic relations could potentially also include the Law of Georgia on Occupied Territories,[185] as that imposes limits on trade from and to Abkhazia. This Georgian law might be argued to be akin to the limitations on Western Saharan self-government imposed by the Moroccan government. The *de facto* Abkhazian government thus might argue that the application of the AA jointly with the Law of Georgia on Occupied Territories leads to economic limitations that are contrary to the self-determined will of that government. The EU however does not recognize Abkhazia's right to self-determination, and accordingly seeks to restrict the application of the AA to the territory where the Georgian government exercises both *de jure* and *de facto* control.[186]

While there might be some logical and legal merit to these claims, an argument on economic limitations nonetheless seems to have major weaknesses. The moratorium on trade with Abkhazia has not had an impact on the small-scale trade conducted by individuals living in the territory controlled by the Abkhazian *de facto* government. For example, produce such as nuts continue to be traded across the border to Georgia, and from there further to the European and international markets.[187] This seems to suggest that there are direct economic benefits from the EU-Georgia AA to the people living in the Abkhazian region. In the *Front Polisario* case, the

183. Association Agreement, *supra* note 167, pmbl.

184. *Id.* art. 419.

185. Law on Occupied Territories, No. 431-IIS, art. 6 (2008) (Geor.).

186. Association Agreement, *supra* note 167, art. 419.

187. Ketevan Khutsishvili, *Suddenly a Border: Hazelnut Trade Across the De Facto Border Between Abkhazia and the Zugdidi Municipal Region of Georgia*, 96 CAUCASUS ANALYTICAL DIG 9, 9–11 (2017); *see also* INTERNATIONAL CRISIS GROUP, ABKHAZIA AND SOUTH OSSETIA: TIME TO TALK TRADE 5–11 (2018).

fact that the economic benefit from the sale of goods originating from Western Sahara was not reaped by the local people was a decisive fact in GC's condemnation of the Moroccan practice.[188] The situation in the EU-Georgia AA might be different, to the extent that it would not hinder the economic interests of Abkhazians. Nonetheless, trade from Abkhazia might face other obstacles, for example on respecting the rules of origin. We shall assess these questions further below.

D. Standing

Let us then assess the question of standing that took center-stage in the *Front Polisario* case. As explained above, the criteria of standing for a claim to be admissible before the Court of Justice of the European Union include, first, that there exists an applicant—a natural person or a legal person that is entitled to bring a claim.[189] Second, there needs to be an act of the EU that can be challenged. Third, depending on the type of the act, it must either individually and directly concern the applicant, only directly concern the applicant – or neither.[190]

1. The de facto government of Abkhazia as an applicant

The interpretation of the first criteria for standing, namely, the existence of a person or an entity capable of representing Abkhazia, would find some guidance in *Front Polisario*. The Abkhazian *de facto* government would seek to rely on the (claimed) status of Abkhazia as a State, therewith commanding international legal personality par excellence. The merits of this particular argument, however, seem weak.

The issues in the nature of the *de facto* Abkhazian government's role can be approached by analyzing the recognition and then the representation of that State. As to external recognition, the EU and the majority of the international community do not recognize Abkhazia as a sovereign state, even if the region is noted in the AA. They have openly supported Georgia's internal sovereignty and borders.[191] Abkhazia has neither acceded to any

188. Case T-512/12, *Front Polisario I*, ECLI:EU:T:2015:953, ¶¶ 208–47 (Dec. 10, 2015).

189. Consolidated Version of the Treaty on the Functioning of the European Union art. 263, May 9, 2008, 2008 O.J. (C 115) 1.

190. DAMIAN CHALMERS, GARETH DAVIES & GIORGIO MONTI, EUROPEAN UNION LAW: TEXT AND MATERIALS 388–97 (4th ed. 2019).

191. International society recognizes Georgia's international borders including Abkhazia. A handful

multilateral treaties nor does it have a status in any international organizations that would count towards an acknowledgment of its international status.[192] Reflecting these circumstances, the European Union presumes that the sovereignty of Georgia extends over its entire territory, including Abkhazia. Georgia's external sovereignty curtails the Abkhazian region's capacity to command its own external relations, as internationally Abkhazia is predominantly perceived an internal affair of Georgia. The Georgian government in Tbilisi remains the sole, widely internationally recognized sovereign, exercising *de jure* control over Abkhazia.[193] At the same time, Abkhazia is recognized by a small group of states, in particular Russia, and is in that context also party to several agreements.[194] These latter facts would speak in favor of considering the *de facto* Abkhazian government to be an entity that fulfills the criteria of being independent and able to take on responsibilities.[195] However, the independence is, from a geopolitical perspective, questionable due to the strong influence of Russia in the Abkhazian affairs, and indeed in creating its existence.

Hand-in-hand with the external recognition of the Republic of Georgia as an entity covering certain geographical area comes the recognition of its internal sovereignty to provide rules for everyone within the jurisdiction. The situation in Abkhazia could be understood as a limitation to the internal sovereignty of Georgia if the *de facto* Abkhazian government in practice commanded the internal policies of the Abkhazian region. However, similar

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of countries recognized Abkhazia after August 2008 (Vanuatu and Tuvalu withdrew its recognition).

192. However, Abkhazia has several treaties with Russia. *E.g.,* Agreement between the Government of Russian Federation and the Government of the Republic of Abkhazia on the Regime of Trade in Goods, Republic of Abkhazia-Russ., May 28, 2012, BJULLETEN MEZHDUNARODNYH DOGOVOROV [BMD] [BULLETIN OF INTERNATIONAL TREATIES] 2014, No. 8, Item 29; Agreement between the Russian Federation and the Republic of Abkhazia on Joint Efforts in Protecting the State Border of the Republic of Abkhazia, Republic of Abkhazia-Russ., Apr. 30, 2009, BMD 2009, No. 10, Item 85; Law on Ratification of Russia-Abkhazia Agreement on Joint Group of Forces, Nov. 22, 2016; BMD 2017, No. 1, Item 13; Agreement between the Government of the Russian Federation and the Government of the Republic of Abkhazia on the Provision of Assistance to the Republic of Abkhazia in the Socio-Economic Development, Republic of Abkhazia-Russ., Aug. 12, 2009, BMD 2010, No. 1, Item 82.

193. Georgia became the 179th member of the United Nations on July 31, 1992. *See generally* Christian Hillgruber, *The Admission of New States to the International Community*, 9 EUR. J. INT'L L. 491 (1998) (discussing the UN's practice of recognition and its import in the context of the collapse of the Soviet Union).

194. Abkhazia is recognized by the Russian Federation, Venezuela, and Nicaragua since 2008 and Nauru since 2009. *Pacific Island Recognises Georgian Rebel Region*, REUTERS (Dec. 15, 2009, 4:19 AM) https://www.reuters.com/article/worldNews/idINIndia-44730620091215?edition-redirect=in (noting that Nauru joined Russia, Nicaragua, and Venezuela in recognizing Abkhazia).

195. Case T-512/12, *Front Polisario I*, ECLI:EU:T:2015:953, ¶ 54 (Dec. 10, 2015).

to what is stated above about its external sovereignty, the internal sovereignty of Abkhazia may be debatable since its capacity to effectively control the territory may be dependent on the role of a third party, the Russian Federation, in Abkhazia. Russia deems Abkhazia an independent State and does not recognize the authority of the Tbilisi Government on Abkhazia.[196] Russia thus provides active support to Abkhazia, and this support appears a prerequisite for Abkhazia to continue to exist independently of Georgia.

That the situation in Abkhazia is strongly influenced by Russia[197] is an argument for which the annexation of Crimea to Russia gives further credence. Quite like many African states that were contracting their lands and resources to the colonial masters, the economic and military interference of the Russian Federation questions the independence of Abkhazia to formulate a truly free will of its own. Accordingly, it would seem difficult to entertain an argument that, even if one considered there to be an Abkhazian people, that there is also an Abkhazian State. Abkhazia lacks the precise character of being internationally recognized.

Then again, the sovereignty of Western Sahara is not fully recognized, either. The General Court nonetheless considered that *Front Polisario* was a "legal person" that could represent the case of Western Sahara.[198] Western Sahara was also individually concerned by the contested decision.[199] The General Court noted that the international status of the Western Sahara territory must be determined in UN-led negotiations between the Kingdom of Morocco and *Front Polisario*.[200] No comparable negotiations have been established between Georgia and Abkhazia under the UN or any other international organizations to determine the international status of the region. The issue of standing thus collapses in this respect back to the political question on the external recognition of the contested area by the international community. The existence of the Association Agreement does not by itself

196. The Russian Federation recognized Abkhazia and South Ossetia as independent states on August 26, 2008. *See generally* TAMAR PAPAVADZE & LYUDMILA SERGEEVA, TREATY ON ALLIANCE AND STRATEGIC PARTNERSHIP BETWEEN RUSSIA AND ABKHAZIA: CONTEXTUAL ANALYSIS (2015) (discussing the Treaty on Alliance and Strategic Partnership between Russia and Abkhazia).

197. *See* Kavus Abushov, *Policing the Near Abroad: Russian Foreign Policy in the South Caucasus*, 63 AUSTRALIAN J. INT'L AFFS. 187, 187 (2009) ("The absence of Moscow's impartiality in its military and political presence in the Abkhazian and South Ossetian conflicts has pushed Georgia to seek alternative alliances to balance Russian influence.").

198. *Front Polisario I*, ECLI:EU:T:2015:953, ¶¶ 34–60.

199. *Id.* ¶¶ 69 –71, 104–114.

200. *Id.* ¶¶ 110–114.

determine the outcome of the question of sovereignty, even if it initially may seem to support such a conclusion. Rather, at this juncture the issue of sovereignty becomes a consideration in determining the standing for the entity claiming its rights, if the entity's claim is based on the argument that it represents the State in question.

This brings us to the second part of the two-fold criterion on representation. Here the question revolves around whose voice ought to be heard as the representative of Abkhazia. Should the present *de facto* government of Abkhazia be the representative of the interests of the territory and/or the population in the area it currently governs? An argument suggesting that it represents both the territory and the people seems difficult to defend before the Court.[201]

Obviously, the full support of everyone living in a territory is not expected for the fulfillment of the representativeness criteria. Unanimity is not a standard used in international law for recognizing governments in case of peaceful transitions of power. It can then hardly act as a standard in much more volatile *de facto* distributions of powers. Being a representative of a region means that the people therein have had the chance to participate in the democratic election of their representatives.[202] In other words, the representation, and through that, the individual concern (discussed further below) builds upon sufficiently wide-ranging support within the region for its elected or chosen representatives.

This brings forth an additional layer of present-day statecraft: the presumption of a (pluralist) democracy. In the case of Western Sahara, it was uncontested that *Front Polisario* was the representative of the Sahrawi people. With Abkhazia, the situation of the *de facto* Abkhazian government seems more complicated. This stems from the fact that many of the ethnically Georgian population are not allowed to enter Abkhazia and many of the ethnic Georgians from Abkhazia presently live as internally displaced persons outside Abkhazia.[203] These types of limitations to exercising the

201. According to Jones, "[i]n 1989, [Abkhazians] numbered 17.8 percent of the Abkhazian republican population," while at the same time Georgians made 45.7 percent of Autonomous republic's population. Stephen F. Jones, *Revolutions in Revolutions Within Revolution: Minorities in the Georgian Republic*, *in* THE POLITICS OF NATIONALITY AND THE EROSION OF THE USSR 77, 84 (1992).

202. On the abundant literature on political representation, see for example *SUZANNE DOVI,* POLITICAL REPRESENTATION *(Stan. Encyclopedia of Phil. 2018)*; *ADAM PRZEWORSKI, SUSAN CAROL STOKES & BERNARD MANIN,* DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION *(Cambridge Univ. Press 1999)*.

203. Based on official statistics of the Ministry of Internally Displaced Persons' Issues of Georgia, Georgia has 273,411 Internally Displaced Persons. *See* MINISTRTY OF INTERNALLY DISPLACED

right to vote and ability to return home are evidently important.[204] To construct a *de facto* Abkhazian government as representative while it excludes large, potentially majority (ethnically Georgian) groups in the area would dilute claims for representativeness. The difference to the situation in Western Sahara is here clear. Unlike the Abkhazian *de facto* government, *Front Polisario is* the internationally widely recognized representative of Sahrawi People.[205] Additionally, Western Sahara *has* for long been a part of the UN's list of non-self-governing territories, while Abkhazia is not on the list.[206]

Yet, the non-recognition of Abkhazia as a state by the European Union Member States would not alone vacate its argument for legal personality under EU law. The EU Court of Justice interprets the concept of legal personality independently of the legal systems of the Member States. An entity without an established legal personality in the Member States can still be regarded as a legal person in the EU Courts.[207] As the General Court declared in the *Front Polisario* case, legal personality in EU law can be established

> in particular, where by their acts or actions, the European Union and its institutions treat the entity in question as being a distinct person, which may have rights specific to it, or be subject to obligations or restrictions.[208]

PERSONS, NUMBER OF REGISTERED IDPS-STATISTICS BY REGION (2014) (Geor.). Return of IDPs has not taken place. G.A. Res. 71/290 (June 2, 2017); *United Nations Expert Calls for Transition to Needs-based Approaches to Address the Situation of IDPs in Georgia*, OHCHR (Oct. 7, 2016), https://www.ohchr.org/en/2016/10/united-nations-expert-calls-transition-needs-based-approaches-address-situation-idps.

204. *See, e.g.*, GIORGI GOGIA, LIVING IN LIMBO: RIGHTS OF ETHNIC GEORGIANS RETURNEES TO THE GALI DISTRICT OF ABKHAZIA 32–35 (2011).

205. SADC has for a long been the member of the African Union and as such recognized as a member of African community of nations (SADC became member of the AU in 1982 February, 22). However, on one hand, African states support Western Sahara's claims. *E.g.*, Declaration of the SADC Solidarity Conference with Western Sahara, Mar. 25–26, 2019, https://www.sadc.int/files/4915/5376/3232/Declaration_on_SADC_Western_Sahara_Solidarity_Conference_held_in_Pretoria_South_Africa.pdf. On the other hand, after Morocco's readmission in the AU, the close economic relations between the priorities of many African states' priorities and Morocco then supported Western Sahara's claims for independence. Franck Kuwonu, *Morocco Flexed Economic Muscles and Returned to the AU*, UN AFR. RENEWAL MAG. (Dec. 2016–Mar. 2017), https://www.un.org/africarenewal/magazine/december-2016-march-2017/morocco-flexed-economic-muscles-and-returned-au.

206. For the list, see *Non-Self-Governing Territories*, U.N., https://www.un.org/dppa/decolonization/en/nsgt (last visited Dec. 26, 2021).

207. *See generally Case* 135/81, Groupement des Agences de Voyages, Asbl. v. Comm'n of the Eur. Communities, 1982 E.C.R. *3799; Case* C-229/05, PKK and KNK v. Council, 2007 E.C.R. I-00439.

208. Case T-512/12, *Front Polisario I*, ECLI:EU:T:2015:953, ¶ 52 (Dec. 10, 2015).

In accordance with this interpretation, persistent and continued connections between the European Union and the Abkhazian *de facto* government might, after all, suffice to fulfill the initial step of standing criteria.[209] As the European Union provides monetary support to Abkhazia (delivered either through a proxy such as the United Nations Development Programme or Red Cross, or directly as health care and infrastructure projects[210]) these connections could be arguments in favour of considering the *de facto* Abkhazian government as a legal person that can raise a case, despite the range of aforementioned considerations that push against its recognition and representativeness.

In summary, it appears that virtually any sub-regional units that are reasonably organized would fulfill this first criterion of being a natural or a legal person having the capacity to bring forth legal proceedings, as the CJEU seems to state in *Front Polisario*. Although bringing a case before an international tribunal requires significant coordination, this first criterion seems a fairly unlikely hurdle to stumble on while trying to gain standing. Should this view—which may appear quite liberal for many experts —be retained, the focus would turn to the next steps in the process.

2. Act of the EU (open to challenge)

The second question the Court would need to address in determining standing is whether there exists an act of the EU to be contested. Similar to the Western Sahara case, the act of the EU that is potentially open to challenge in the Abkhazian case is the bilateral agreement between Georgia and the EU. The Association Agreement was signed as a Council decision[211] following the procedures under Title V International Agreements of the TFEU, with specific reference to Articles 218(5) and 218(8), and concluded in accordance with Article 218(6)(2)(a) with the consent of the European Parliament on 23 May 2016.[212] There is thus no doubt that the created rule

209. *Id.*

210. Rep. of the S.C., ¶ 8, U.N. Doc. S/2004/570 (2004); Rep. of the S.C., ¶ 10, U.N. Doc. S/2004/26 (2004); Rep. of the S.C., ¶ 3, U.N. Doc. S/2005/657 (2005); Rep. of the S.C.,¶ 6, U.N. Doc. S/2004/833 (2004); Rep. of the S.C., ¶¶ 25–29, U.N. Doc. S/2006/435 (2006); Rep. of the S.C., U.N. Doc. S/1994/80 (1994); Rep. of the S.C., U.N. Doc. S/2006/19 (2006).

211. Council Decision 2014/494, Signing on behalf of the European Union, and Provisional Application of the Association Agreement Between the European Union and the European Atomic Energy Community and Their Member States, of the One Part, and Georgia, of the Other Part, 2014 O.J. (L 261) 1.

212. Council Decision 2016/838, Concluding on Behalf of the European Union, of the Association

produces legal effects, so that it is a legally binding Act that can be challenged before the Court. Like the Western Sahara case, questions next arise upon the application of the enacted AA to Abkhazia.

3. Direct and individual concern

The Georgia–EU AA has been concluded, like the EU-Morocco Agreement, by a decision of the Council after obtaining the consent of the European Parliament. This procedure satisfies the criteria of a special legislative procedure set out in Article 289(2) TFEU. The Georgia-EU Association Agreement can be challenged by EU institutions as privileged and semi-privileged applicants, and in certain situations also by non-privileged applicants.[213] A non-privileged applicant can have standing if that natural or legal person is the immediate addressee of the act.[214] A non-privileged applicant that is not the immediate addressee of the act can have standing, if the act is of direct and individual concern to it.[215]

Here, it does not seem likely that a *de facto* government in a region (Abkhazia) whose sovereignty is not acknowledged by the European Union can be considered the immediate addressee of an EU act. This possibility cannot perhaps be entirely excluded, however. The region concerned is an addressee in the sense that the Agreement regulates trade within the entire Georgian territory, Abkhazia included, even if the applicability of the Agreement on Abkhazia is pending, or temporarily suspended, depending on the provision in question. In the latter provisions, Abkhazia is also explicitly referred to–even if in the negative sense of excluding/suspending the applicability.[216]

Assuming that the Abkhazian de facto government would *not* be

Agreement Between the European Union and the European Atomic Energy Community and Their Member States, of the One Part, and Georgia, of the Other Part, 2016 O.J. (L 141) 26.

213. CHALMERS ET AL., *supra* note 190, 388–97.

214. *Id.*

215. *See generally* CRAIG & DE BÚRCA, *supra* note 122 (providing an analysis and explanation of European law). If the challenged act were considered a *regulatory act* that does not require implementation (which is not the case here, and hence excluded from the discussion), the party would since the Lisbon Treaty only need to show direct (but not individual) concern. Albertina Albors-Llorens, *Judicial Before the Court of Justice of the European Union*, *in* EUROPEAN LAW 262–83 (Catherine Barnard & Steve Peers eds., 2d ed. 2017).

216. The Council decision to adopt the Association Agreement, between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part does not appear to be a regulatory act—and even if it were, there seems to be discretion on Georgia when implementing it via the Association Council of the Association Agreement.

considered an immediate addressee, the EU Courts would next need to assess whether it would be directly and individually concerned by the EU act.

It seems important to first assess whether the language of the Agreement addresses the territory of Abkhazia. There seem to be conflicting ways to interpret some of the norms on the territorial scope of the EU-Georgia agreement.

It seems evident, on the one hand, that Abkhazia is directly implicated by the EU-Georgia AA. According to the Preamble and Article 429(1) of the Agreement:

> " . . . [T]he commitment of Georgia . . . and its efforts to restore its territorial integrity and full and effective control over Georgian regions of Abkhazia and the Tskhinvali region . . . . "
>
> "1. This Agreement shall apply . . . to the territory of Georgia."

In the preamble, the territory of Georgia is equated with the full internationally recognized area of Georgia, Abkhazia included. Article 429(1) quoted above then simply refers to the full territory of Georgia. The territorial scope of the AA covers the Abkhazian region, but Article 429(2) complicates this straightforward interpretation:

> "2. The application of this Agreement, or of Title IV (Trade and Trade-related Matters) thereof, in relation to Georgia's regions of Abkhazia and Tskhinvali region/South Ossetia over which the Government of Georgia does not exercise effective control, shall commence once Georgia ensures the full implementation and enforcement of this Agreement, or of Title IV (Trade and Trade-related Matters) thereof, respectively, on its entire territory."

The application of the Agreement is thus limited until Georgia ensures the full implementation and enforcement of the Agreement on its entire territory.[217] A literal interpretation of the text would not seem to subject the application of the AA to the Georgians re-establishing full-fledged control over the Abkhazian territory. There is a subtle difference between Article 429(2) and the language used in the preamble. The preamble refers to Georgia's commitment to "territorial integrity and full and effective control over Georgian regions of Abkhazia . . . . "[218] However, the text in Article 429(2) refers, in a somewhat circular fashion, back to the "implementation and enforcement" of the AA itself.[219] One could thus understand this to

217. Association Agreement, *supra* note 167, art. 429(2).

218. *Id.* recital (16).

219. *Id.* art. 429(2).

already mean that when the enforcement of the AA, or even just a part thereof like the Title IV on Trade Matters, is ensured—perhaps through an agreement with those with *de facto* power in Abkhazia—the AA is also considered applicable to the Abkhazian region. Parties close to the negotiations of the AA noted on this point, however, that the meaning of the text was indeed to subject the application of the AA to Georgia's *de facto* control of the region.[220]

The ambiguity in the AA is different from that of the EU-Morocco agreement, which did not specify the area of Morocco at all.[221] Consequently, Morocco and the European Union ended up with differing understandings of the territorial scope of the agreement—whether or not it covered the area of Western Sahara. Another difference is that as Georgia does not currently effectively control the area of Abkhazia, it has limited possibilities to dictate the use of resources and goods in Abkhazia, unlike Morocco's control of trade in Western Sahara. There are thus possible ambiguities in the norms covering the territorial scope of the AA, but the ambivalence is not identical to the case of Western Sahara.

Were one to follow the interpretation of these Articles, according to which the application of the AA is limited to the area under Georgian effective control, how ought the transfers of goods over the porous border to be seen? Do such sales of goods endorse the temporal suspension outlined in Article 429(2)?

One way to answer the questions could be to address (the legality of) these economic activities in the contested territories. Virtually all trade relations of the whole Georgian territory, including Abkhazia, remain under the rule of the Tbilisi government. The Law of Georgia on Occupied Territories[222] defines that all economic relations with Abkhazia are subject to a prior approval by the Georgian Government.[223] Any economic activity in Abkhazia without a permission from the Tbilisi Government is illegal.[224] There is for example small-scale farm trade across the border, but this trade

220. Interview with [anonymous], Civil Servant, Eur. Comm'n, in Brussels (July 17, 2020) (anonymity due to the official's role in the negotiations).

221. Fisheries Partnership Agreement Between the European Communities and the Kingdom of Morocco, July 18, 2005, 2006 O.J. (L 141) 4, 11.

222. Law on Occupied Territories, No. 431-IIS (2008) (Geor.); *see generally* Nina Caspersen, *Separatism and Democracy in the Caucasus*, 50 SURVIVAL 113 (2008) (analyzing the processes of state building and democratisation in Abkhazia and Nagorno-Karabakh).

223. GOV'T OF GEOR., STATE STRATEGY ON OCCUPIED TERRITORIES: ENGAGEMENT THROUGH COOPERATION (2010).

224. Law on Occupied Territories, art. 6 (Geor.).

is outright illegal under Article 6 of the Georgian Law on Occupied Territories.[225] Therefore, it cannot be made effective evidence for establishing the territorial scope of the AA, and thus for a violation of Abkhazia's status.

Reversely, with permission from the Georgian Government, trading from occupied territories would be legal domestically. This would allow, from the vantage point of Georgian legislation for example, the transport of agricultural produce from Abkhazia to the rest of Georgia and onwards. Would this then mean that the AA is for these parts being "fully implemented and enforced" in Abkhazia as well? Probably not, as the Georgian Law on Occupied Territories stipulates that even such domestically legal actions expand the territorial scope of the AA only through a referral to a specific Council, established in the Agreement.[226] Internal trade thus has only a limited effect on the interpretation of the international AA between Georgia and the EU.

Further, and partly due to deficient controls on the border between Georgia and Abkhazia, goods produced in Abkhazia can in practice be transported to the European Union markets, even when the AA did not allow for that. The *de facto* separation of Abkhazia from Georgia has thus had only a limited effect on the everyday trade across the border.[227]

Article 429(3) gives the Parties discretion to change the territorial scope of the AA regarding Trade and Trade related matters, in case Georgia establishes a full implementation and enforcement of this Agreement (or of its Trade clauses) on the entire territory of Georgia, including Abkhazia.[228] This is the same, potentially ambiguous language as was found in Article 429(2).[229] The Association Council—a dispute settlement mechanism established in the Article 404 of the AA—decides on whether these conditions are fulfilled and whether to then change the territorial scope of the AA.[230] Two scenarios emerge. First, if the Association Council so agrees, Georgia could legalize specific Abkhazian products and declare that they originate from Georgia. The clause limiting the territorial scope of the AA

225. *See id.*

226. *Id.*

227. *See generally* Khutsishvili, *supra* note 187 (discussing how trade interacts with formal institutions, including borders).

228. Association Agreement, *supra* note 167, art. 429(3).

229. *See id.* art. 429(2).

230. *Id.* art. 429(3).

would no longer apply in such cases.[231] It is unlikely that the Georgian state would propose or agree to this. The Law of Georgia on Occupied Territories would lose its force in practice. This would cause considerable difficulties in a situation where Tbilisi *de facto* does not control Abkhazia.

The second scenario would be that Georgia sought no change on the territorial scope of the AA, so that Abkhazia would remain excluded from the scope of the AA. Based on the Georgian Law on Occupied Territories, Georgia could still legalize part of the trade domestically in Abkhazia.[232] Protocol I of the AA regulates the origin of the goods under the Agreement.[233] In Protocol I, the territory of Georgia seems to already provisionally refer to Georgia's full international territory that includes Abkhazia, not to the more limited scope outlined in the Territorial clause of Article 429(2).[234]

In sum, the (territorial) clauses in the AA are manifold, complicated and even ambivalent. The Morocco–EU AA stays silent on whether it covers the territory of Western Sahara or not; in the EU–Georgia AA, Georgia may under certain interpretations have the possibility to cover Abkhazian territory and the goods emanating therefrom, even when the territorial (limitation) clause may be valid regarding some other aspects of the AA. The matter depends ultimately on the way that the EU Court would interpret these clauses. This type of case-by-case clause is typical in EU trade agreements, not only on the inclusion of Abkhazia.

We can next widen our analysis of the criteria "of direct and individual concern." Being directly concerned is clearer than that of being individually concerned. All of the legal ramifications of either including or excluding Abkhazia from the Agreement would seem to directly concern the *de facto* government of Abkhazia. The legal situation of that government would be affected. Yet are these limitations also definite and do they restrict the rights stemming from the AA immediately, while they "leave no discretion to [the] addressees" of the decision, the Government of Georgia?[235] This question

231. A clause to limit territorial scope of the Association Agreement can be re-introduced in accordance with the Association Agreement art. 429(4).

232. The domestically legalized goods would cause problems if they were transported into the EU because formally they do not originate from the Abkhazian region, but from Georgia, as during this limited period the full territorial scope of the AA is valid.

233. Association Agreement , *supra* note 167, 429(2), Protocol I.

234. *Id.*

235. Case T-512/12, *Front Polisario I*, ECLI:EU:T:2015:953, ¶ 105 (Dec. 10, 2015). The restriction on the rights of the claimant and the discretion granted to the addressee were the two aspects raised by the General Court in the Front Polisario case when assessing whether the Council act was a direct concern

seems to hinge on how one interprets the room for discretion granted to the Georgian government, on the one hand via the Territoriality Clause of Article 294(3) of the AA, and on the other hand via the decisions of the Association Council. A decision that concerns an international agreement between two states (the EU and Georgia) can as such have legal effects on the *de facto* government of Abkhazia.[236] The conditions of trade between Abkhazia and the EU would be affected, for example.

Second, the Council Decision would need to be of individual concern to the applicant claiming standing.[237] Whether the Abkhazian *de facto* government is the party individually concerned seems more debatable. It appears likely that the *de facto* government of Abkhazia is affected by "attributes which are peculiar to them" or "by reason of circumstances in which they are differentiated from all other persons."[238] There is only the *de facto* government of Abkhazia to make the claim for governing that area, besides the Georgian government in Tbilisi. In the background of this last point are the considerations that were discussed earlier in the context of the representativeness of the Abkhazian *de facto* government. Can that government be considered to represent the interests of the Abkhazian people?

It was posited above that limiting the notion of people in Abkhazia only to those currently left in the area, with the exclusion of ethnical Georgians and other groups that have left, does seem dubious. If the individual concern requires "attributes peculiar to a group" or "circumstances that distinguish the persons,"[239] then the claim of the *de facto* government would in our view formally relate to the concerns of not all the people in Abkhazia, but only those remaining under the *de facto* leadership of the current *de facto* government. The issue may initially seem reversed from the usual contemplation, where the people concerned form too *wide* and *open-ended* a group to be "individually" concerned. Now it seems that those "individually concerned" is an *under*-inclusive denomination.

Yet, on a closer look, also here the same issue of lack of precision arises; the individual concern is in fact not specific to those living in Abkhazia, or

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to Front Polisario.

236. *Id.* ¶ 106.

237. CHALMERS, DAVIES & MONTI, *supra* note 190, at 388–97; Albors-Llorens, *supra* note 215, at 276–82.

238. *See* Case 25/62, Plaumann & Co. v. Comm'n, 1963 E.C.R. 95, ¶ 107; *Front Polisario I*, ECLI:EU:T:2015:953, ¶ 112.

239. *See Plaumann*, 1963 E.C.R. ¶ 107; *Front Polisario I*, ECLI:EU:T:2015:953, ¶ 112.

to "Abkhazian people," but an open-ended group that can be defined in a generalized and abstract manner[240] as including all those that have economic or other interests in, or may in the future move (back) to live in Abkhazia. The Abkhazian *de facto* government could probably make the counter-claim that in its view, it is able and entitled to define who constitutes the closed group of Abkhazian people with an individual concern.

E. Summarizing views

If the admissibility of an entity as a legal person in an EU judicial procedure was the first step in professing claims towards statehood, the entity's ability to be individually and directly concerned in the case constitute the steps that follow. An entity that can establish itself as having a separate, individual concern and show that the EU act affects it directly would seem to have also a stronger case for claiming its existence as a state. Thus, standing in an EU court of law can be used as a means to promote standing under international law. *Front Polisario* used this strategy by challenging the EU-Morocco trade agreement, and here we examined if Abkhazia could conceivably do the same via the EU-Georgia AA.

In the end, a careful analysis reveals that it is difficult to be fully conclusive about the case of Abkhazia in light of the *Front Polisario* decision. It appears perhaps possible, but rather improbable, that there were grounds for the *de facto* government in Abkhazia to raise a claim and gain standing before the CJEU, based on the criteria outlined in *Front Polisario*. Our analysis illustrates that a predominantly economic law Treaty, such as an Association Agreement, may indeed have bearing on issues of statehood and sovereignty, even if for Abkhazia this would not be the case. The available substantive claims (such as excluding the Abkhazian region from the AA or the complex interpretations of the rules of origin in the AA) that could emerge in the present situation in Georgia seem also much more limited than those in the case of Western Sahara.

V. CONCLUSIONS

This article set out to explore how the secessionist aspirations of sub-statal entities may be influenced by the proliferation of bi- and plurilateral economic treaties. The proliferation denotes a functional fragmentation of law, which may in turn lead to a new type of a relativization of sovereignty.

240. Cases 789 and 790/79, Calpak SpA v. Comm'n, 1980 E.C.R. 1949, ¶ 9.

If in a Kelsenian conceptualization the sovereignty of States is relativised by the political power of the recognizing states, sovereignty today may be also relativised by the fact that sovereignty is assessed by tribunals within multiple functionally separate fields of law. Tribunals in one field (such as investment law or trade law) may recognize an entity that a tribunal in another field, such as the international criminal law, would not, and vice versa. This puts the governments of the States that are Parties to the international agreements into a politically, and even legally, delicate position. Does the decision to grant standing to an entity in a (quasi-)judicial decision of such a tribunal in itself constitute an act of recognizing the entity as a sovereign State? Probably not. Yet, as the decision will politically, and often even legally, bind the Parties, it seems unavoidable that it will affect the positions of the governments in question. The (sub-)statal entities' sovereignty may thus vary depending on the diversity of and the views taken in the fields of law that they are subjected to.

We focused in this article on a recent case; the decisions of the EU's General Court and the Court of Justice regarding Western Sahara (*Front Polisario*). We then analyzed the implications of that court case on the fragile situation in Abkhazia, a region of Georgia with secessionist claims. The economic treaty pertinent to the Abkhazian case is the Association Agreement between Georgia and the European Union.

In the Western Sahara case, the General Court considered the people's liberalization front of the Sahrawi people, *Front Polisario*, to be a legal person, capable of bringing an action on behalf of Western Sahara as a non-privileged applicant under Article 263(4). *Front Polisario*'s independence and capacity to act as a responsible entity in legal relationships[241] were determining factors for the General Court, not its legal personality under international law. The Court of Justice did not dispute this conclusion. This was a fundamental aspect of the case. The General Court and the Court of Justice differed, however, in their conclusions as to whether *Front Polisario* was also directly and individually concerned in the case. The General Court considered that the criteria of being directly and individually implicated did not pose a hurdle for an international party such as *Front Polisario* to bring an action. The conclusion of the Court of Justice was that the area of Western Sahara fell outside of the contested agreement to begin with. Hence, *Front Polisario* as a representative of Western Sahara could not be directly and individually affected, even if it were able to represent the Sahrawi people.

241. *Front Polisario I*, ECLI:EU:T:2015:953, ¶¶ 51–52.

On the other hand, the exclusion of Western Sahara from the scope of the EU-Morocco Agreement also meant that Morocco's territorial claims on Western Sahara and its natural resources were rejected, and the EU was directed to negotiate on the natural resources of Western Sahara with the Sahrawi directly.

The General Court's judgment and the Court of Justice's determination that Western Sahara was not concerned by the Agreement were based on a view that sought to interpret international law and the European Union law coherently. However, it seems less obvious whether the objective of coherence was met from the viewpoint of the legal repercussions of the case. By confirming in a judicial process the ability of a legal person, representing a contested sub-statal entity, to bring an action regarding the bilateral economic treaty between the EU and Morocco, the Court of Justice in fact added to the forums that are engaged in the formulation of international law. This is prone to generate more, not less, *in*coherence and fragmentation. Institutionally, the decision also expanded the forums for recognizing State-like entities away from the politically accountable governments and towards (quasi-)judicial bodies.

What are the repercussions of the *Front Polisario* case to the potential claims of other sub-statal entities that lack sovereignty? We explored this question within the framework of the Association Agreement between the European Union and Georgia, focusing on the status of the region of Abkhazia. More precisely, we assessed whether the status of Abkhazia—which is *de facto* governed and represented by authorities separate from those governing (other parts of) Georgia, yet not recognized by the majority of the international community including the EU—could be affected by an economic Treaty between the EU and Georgia.

As for similarities, Georgia, like Morocco, has an Association Agreement with the EU. However, the EU-Georgia AA is construed in a manner that strives to be unambiguous regarding the territorial scope of the treaty already during the time that Georgia does not have effective control over the Abkhazian territory. The EU-Georgia AA thus avoids well the pitfalls of the *Front Polisario* case, even if there may remain marginal space for contradicting interpretations. In any event, the territorial application of the Association Agreement will be essential in assessing whether Abkhazia will in the future be able to raise claims similar to those brought up by *Front Polisario*. We identified the rules of origin of the Association Agreement as possibly a means for making a claim akin to the one on the natural resource of fish oil in *Front Polisario* case. Although the merits and outcome of the

claims on these grounds seem weak, they offer an example of the unintended reach that economic treaties may have in determining the fragile balance between territorial integrity and self-determination.

At the same time, our analysis on Abkhazia revealed that any interpretations of trade and investment agreements from the perspective of the potentially included sub-statal entities are likely to be highly case-dependent. The exact legal status of a party as an applicant in a case, the direct and individual concern that it may (or may not) have in an agreement, and the substantive claims it may be able to make regarding the agreement, are intertwined with the intricacies of the politico-economic situation. The substantive outcomes of the cases seem particularly varied and diverse. This clearly limits the effects of any particular arbitration or judicial process on other treaties and situations.

Considering both the similarities and the idiosyncrasies that our detailed analysis of the Abkhazian case brought forth, our general conclusion on the standing of sub-statal entities is that it was in certain *relevant* respects similar to that of *Front Polisario* case. There may hence be essential aspects to these cases that are of a more general implication. In the case of *Front Polisario*, a contested sub-statal entity was, and in the case of Abkhazia might be, in the absence of intervening external factors, considered a legal person in accordance with EU law. These types of entities are thus possibly able to bring actions under Article 263(4) TFEU in a particular case, even in the absence of a wider acknowledgement of the party's international legal personality. The establishment of the party's ability to bring an action is often quite sufficient for that party—indeed more important than its success on the substantive grounds. Standing opens a new, judicial forum for discussing and promoting the sub-statal entity's claim for rights, even sovereignty – claims that may otherwise fail to reach a political forum for discussion.

Indeed, secession is an interplay of law and politics. The legal notion of secession is codified in the contradictory rights to territorial integrity and to self-determination, while the actual weight of these rights remains ultimately decided in a political process at the international level. Where there are two or more conflicting non-hierarchical legal forums, it is usually the political process that determines the order of priority. The priority for existing states is to conserve the *status quo* in the face of secessionist tendencies, so they emphasize the principle of territorial integrity. The case of Western Sahara illustrates how a long period of stasis may ensue from the inability to verify, in an international political process, who should be entitled to decide on the

status of a sub-statal entity. The EU Courts were in the *Front Polisario* case drawn into the process of a struggle for self-determination, introducing an additional judicial forum alongside the (more) political processes. This altered the balance between the principles of territorial integrity and self-determination, and of political and judicial roles, reducing the inherent structural bias that favors the former. One may ask: does the scope of the principle of self-determination as interpreted by the CJEU reach so far as to amount even to a duty on the EU to take position, and hence to get entangled, in the (internal) affairs of a third country?[242]

The establishment of sovereignty is also a lengthy process, where a group can seek recognition for its cause by recourse to multiple legal forums. Economic treaties and their arbitration bodies offer new, prominent forums alongside the traditional calls for sovereignty through military means. Whether it is the economy, human rights, or any other additional legal discourse, they work to weaken the notions of territorial integrity, while in parallel the right to self-determination seems to be gaining in importance on the international level. Sovereignty thus becomes relativised. For the Sahrawi people, but not for secessionist Abkhazia, the economic law framework of a bilateral trade agreement tipped the scales towards their recognition.

Although economic law offers a specific legal forum, its effects may be widely generalizable. Most global trade takes place under free trade agreements, and many of those agreements allow cases to be heard before specific tribunals. Although the decision in *Front Polisario* directly applies only within the European Union and Morocco, our analysis of the Abkhazian case showed the logic of how similar cases could, if not carefully construed like the EU-Georgia AA, be raised before other tribunals. Indeed, the wide range of the EU's Association Agreements, and its trade agreements more broadly, expands the implications of the case hugely. One need only think of controversial regions with secessionist tendencies, such as Taiwan, or even of different parts of the United Kingdom, as it has now left the EU.[243]

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242. For the role of regional international courts in politically sensitive cases, see generally Salvatore Caserta, *Regional International Courts in Search of Relevance–Adjudicating Politically Sensitive Disputes in Central America and the Caribbean*, 28 DUKE J. COMP. & INT'L L. 59 (2017) on the role of regional international courts in politically sensitive cases. The decisions of such courts occasionally diverge from the preferences of the Member States, but rather than leading to discontent, they might legitimize the courts' institutional position as a source of "justice."

243. *See generally* Christopher K. Connolly, *Independence in Europe: Secession, Sovereignty, and the European Union*, 24 DUKE J. COMP. & INT'L L. 51 (2013) (describing secession and self-determination within the EU).

The *Front Polisario* case may increase the role of the courts of the European Union to act as venues for debating self-determination, secession, or simply representative democracy. From a more activist, teleological viewpoint, this could also offer the EU a novel avenue for influencing developments in the contested regions of the world. The judicial review of international agreements, unlike purely domestic acts, will impact the sphere of international relations, which is normally the sensitive competence of the executive. Taking on such a role thus necessitates careful considerations of a strategic nature that take into account not only the trading partner, but also its sub-statal entities and the neighboring states. This is especially true in situations where it is unclear whether a sub-statal region falls inside or outside the scope of the EU's bilateral or multilateral trade agreements with third countries. Despite these hurdles, trade and economy might serve as prospective means for change, change that the conference diplomacy of politically unpopular concessions is unable to reach.