TREATY INTERPRETATION IN THE EU: ENSURING CONSISTENCY WITH THE *BONA FIDE* PRINCIPLE AND *JUS COGENS*

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Abstract

Treaty interpretation in the EU involves not only the observance of principles governing the interpretation of international agreements, but also the observance of substantive rules of international law applicable in the relations between the parties. While compliance with the former rarely presents an issue for the EU Court of Justice, perhaps because of the open-ended character of rules on treaty interpretation, its judicial practice shows the importance of carefully interpreting treaties so as to ensure their full consistency with customary international rules of a peremptory nature, such as the principle of self-determination of peoples. The Western Sahara saga is illustrative in this regard. These issues are addressed by the article.

Keywords: European Union; general principles on treaty interpretation; ECJ case law on treaty interpretation; Western Sahara cases.

1. Introduction

International treaties are commonly interpreted and applied by the European Union (EU) institutions. Being international instruments, either concluded by the Union or otherwise relevant to the application of the Union's acquis, it is common ground that they may not be interpreted as if they were internal law. International customary rules governing treaty interpretation apply instead, along with any norm of international law linked to the agreement being interpreted. As will be seen, further rules of general international law applicable in the relations between the parties also influence the construction of a treaty. This is particularly so when assessing either the conformity of a given agreement with *jus cogens*, or the direct effect of the prescriptions of an international treaty within the Union legal order – the latter issue is also governed by principles of international law.

This article analyzes the judicial practice of the EU Court of Justice with respect to treaty interpretation, adopting an inductive method of research, with the aim to draw conclusions as to whether such practice is consistent with international principles and rules governing treaty interpretation. Before moving on to the analysis, a caveat seems necessary. The relevant Court rulings will be divided according to which of the Vienna Convention on the Law of Treaties (VCLT) principles of interpretation they best illustrate. Of course, the classification of rulings in this way is, first, subjective, and therefore open to criticism; second, it may also sound artificial, to the extent

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that the same judgment can be relevant to a plurality of principles: in fact, judges often use several tools simultaneously within one integrated operation to shed light on the interpreted text. Admittedly, these criteria are not watertight compartments and interpretation is a holistic process in which several competing principles may have a role. Yet, a classification of the rulings seems necessary to ensure a systematic analysis.

As a preliminary remark in our inquiry, it should be mentioned that the Union is bound to respect general international law, including its principles and rules on treaty interpretation. First, the EU, as an international subject, is under a general obligation to act in line with the rules of international law. Second, pursuant to Article 3(5) TEU, when acting on the global stage the EU shall contribute "to the strict observance and the development of international law, including respect for the principles of the United Nations Charter".[1] As a consequence, from the EU constitutional perspective, such incorporation of international law into the EU order implies that the obligation to respect general international law is also an internal rule addressed to the institutions and bodies of the Union.[2]

The judicial practice of the EU Court of Justice conforms to the obligation of the EU to abide by international law. In the landmark judgment *Poulsen and Diva Navigation* – a preliminary ruling which concerned the scope of a fishery Regulation and its consistency with the international law of the sea – the Court of Justice took the view that a Union institution "must respect international law in the exercise of its powers".[3] The Regulation at issue was interpreted, and its scope limited, in accordance with the relevant rules of general international law.[4] There is no question that the interpretation given in *Poulsen* to the fishery regulation was substantially affected by those rules. By contrast, it could be argued that the *Diakité* case showed some resistance to international law, as the definition of "internal armed conflict" was based on an autonomous meaning under Union law, rather than on criteria established by international humanitarian law.[5] However, in that case, the Directive in question

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[1] See also Arts. 21 and 23 TEU. Given the object of this piece and the space allowed, that preliminary remark cannot be further explored here. See, however, for a different approach, Klabbers, "Straddling the Fence: The EU and International Law", in Chalmers and Arnull (eds.), *The Oxford Handbook of European Union Law*, Oxford, 2015, p. 55 ff., who, however, does not consider the key role played by Article 3(5) TEU in the EU system.

[2] A logical consequence of the incorporation of international law into the EU legal system dictated by Art. 3(5) TEU is that in the EU system the duty to respect general international law need not be theoretically explained, nor is it to be justified as a matter of practicality, as some scholars are inclined to do when they share no specific theory about the ultimate legal force of international law.

[3] Case C-286/90, *Poulsen and Diva Navigation*, 24 November 1992, ECLI:EU:C:1992:453, para. 9.

[4] *Ibid.*, para. 9. In the same vein, see Case C-162/96, *Racke*, 16 June 1998, EU:C:1998:293, paras. 45 and 46; Case C-366/10, *Air Transport Association of America*, 21 December 2011, EU:C:2011:864, paras. 101 and 123. On the binding character of rules of customary international law, see also the judgment of the General Court, Case T-115/94, *Opel Austria*, 22 January 1997, EU:T:1997:3, para. 90 ff., as regards the principle of good faith according to which pending the entry into force of an international agreement, the signatories to the same may not adopt measures which would defeat its object and purpose.

[5] Case C-285/12, *Aboubacar Diakité v. Commissaire Général aux Réfugiés et aux Apatrides*, 30 January 2014, ECLI:EU:C:2014:39, para. 17 ff.

used this wording in a context that did not impinge on any obligation to comply with international law. The Court thus justified an autonomous definition of the notion of "internal armed conflict" because international law and the concerned Union instrument pursued different purposes and had distinct areas of application.[6]

In *Western Sahara Campaign* – one of the judgments concerning the disputed application of agreements concluded by the Union to a region claimed by a liberation movement recognized by the United Nations (UN) (see below) – the Court of Justice once again summarized the Union's position in relation to international obligations of a customary nature by stating that the Union is bound, "when exercising its powers, to observe international law in its entirety, including not only the rules and principles of general and customary international law, but also the provisions of international conventions that are binding on it".[7] This quote reaffirms the need to respect the international rule of law embedded in the *consuetudo est servanda* and *pacta sunt servanda* principles. It also entails that a treaty concluded by the EU should be interpreted *inter alia* against the background of other rules of customary law, unless the Contracting Parties have agreed to depart from them – something that they can always do, as is well known, except where the customary rule is a peremptory norm of general international law.

2. The Interpretation of Treaties by the Union Judicature: An Overview

A voluminous case law of the Union judicature has applied customary principles on treaty interpretation. Over the years, the EU Court of Justice reiterated that

> An international treaty is to be interpreted not only on the basis of its wording, but also in the light of its objectives. Article 31 of the Vienna Convention [...] stipulates in this respect that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.[8]

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[6] Indeed, "EU legislature wished to grant subsidiary protection not only to persons affected by 'international armed conflicts' and by 'armed conflict not of an international character', as defined in international humanitarian law, but also to persons affected by internal armed conflict, provided that such conflict involves indiscriminate violence" (*ibid.*, para. 21).

[7] Case C-266/16, *Western Sahara Campaign UK*, 27 February 2018, EU:C:2018:118, para. 47; see also likewise earlier Cases C-402/05 and C-415/05, *Kadi I*, 3 September 2008, EU:C:2008:461, para. 291; *Air Transport Association of America*, *cit. supra* note 4, paras. 101 and 123; recently, Cases C-14/22 and 15/22, *Sea Watch E.V.*, 1 August 2022, EU:C:2022:604, para. 92.

[8] Opinion 1/91 of 14 December 1991 on the Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, para. 14; Case C-268/99, *Jany and Others*, 20 November 2001, 20 November 2001, ECLI:EU:C:2001:616, para. 35; recently, see to that effect, Case C-15/17, *Bosphorus Queen Shipping Ltd Corp.*, 11 July 2018, EU:C:2018:557, para. 67. As has been remarked, the Court regularly takes account of the case law of the International Court of Justice: Rosas, "With a Little Help from My Friends: International Case-Law as a Source of Reference for the EU Courts", The Global Community. Yearbook of International Law and Jurisprudence, 2005, p. 203 ff.

Overall, the Court's approach usually starts from the ordinary meaning of the terms of the treaty being discussed, as their wording conveys *prima facie* meaning (textuality). The Court then frequently goes beyond this, as the international rules on treaty interpretation require. Therefore, provisions in the treaty are not examined in isolation and other principles of interpretation enjoy considerable weight. Good faith and the obligation to perform a treaty in good faith are drawn upon to preserve the integrity and the scope of a treaty. Its object and purpose (teleological interpretation) are considered too. The overall context, nature, and structure of a treaty (contextualism or contextual interpretation) are always given significant weight,[9] if only because any provision of a treaty is normally placed within a wider set of international rules.

It is to be emphasized that according to the views held here, context is understood broadly as not only composed of the elements listed in Article 31(2) VCLT, but also those mentioned in Article 31(3)(c) VCLT. Under this perspective, contextual treaty interpretation necessarily has to consider any other rule of international law as a fundamental criterion of orientation. In the opinion of the current writer, characterizing treaty interpretation as *internationally oriented* is coherent with Article 31(3)(c) VCLT.[10]

A more detailed overview of the Union judges' general approaches may be tentatively sketched as follows.

3. Good Faith – Evaluating International Agreements Through the Principle of the Integrity of Treaties

In accordance with the general obligation to perform treaties in good faith,[11] any process of interpretation must be based on fair and sincere grounds and must aim to

[9] See, for instance, Case 12/86, *Demirel*, 30 September 1987, EU:C:1987:400, para. 14.

[10] **See to this effect, Art. 31(3) VCLT, which refers to "together with the context", and the commentary of the ILC, Draft Articles on the Law of Treaties with Commentaries, YILC, 1966, Vol. II, p. 220, defining the word "context" as a label that includes para. 2. With regard to para. 3 of Art. 31, the ILC goes on as follows: "[e]qually, the opening phrase of paragraph 3 'There shall be taken into account *together with the context*' is designed to incorporate in paragraph 1 the elements of interpretation set out in paragraph 3" (original italics). Even the Special Rapporteur Waldock pointed out that an agreement is part of the body of international law and is to be interpreted in the context of general international law. "His assumption was that no treaty is drafted and concluded in isolation of other rules of international law" (Van Damme, *Treaty Interpretation by the WTO Appellate Body*, Oxford, 2009, p. 47). According to Bernhardt, *Interpretation in International Law*, in *Encyclopedia of Public International Law*, Vol. 2, Lausanne/New York/Oxford, 1992, "[s]ystematic interpretation (the context)" may have a broad sense: "[i]n a broader sense systematic interpretation can also include the consideration of texts and events outside the framework of the treaty" (p. 1420). Likewise, Ammann, *Domestic Courts and the Interpretation of International Law*, Den Haag, 2019, pp. 195 and 203: according to this author, international courts "refer to context both *stricto sensu* (as per Art. 31(1) and (2) VCLT) and *lato sensu* (pursuant to Art. 31(3) and 33 VCLT)".

[11] "Every treaty in force is binding upon the parties to it and must be performed by them in good faith" (Art. 26 VCLT). To this effect, see, for instance, Case 104/81, *Kupferberg*, 26 October 1982, EU:C:1982:362, para. 18.

discern the content of the treaty while preserving its integrity, in order to ensure full compliance with the *pacta sunt servanda* principle.[12]

Good faith has been used by the EU Court of Justice as a tool for construing the meaning and scope of the UN Convention on the Law of the Sea (UNCLOS) in the light of another international instrument to which the Union was not a Contracting Party. In *Bosphorus Queen Shipping*, the Court stated that "[i]n view of the customary principle of good faith, which forms part of general international law, and of Article 4(3) TEU, the Court is to interpret the [UNCLOS] provisions by taking account of the MARPOL Convention 73/78"[13] (International Convention for the Prevention of Pollution from Ships). The latter was in fact deemed to have consequences for the interpretation of the former, even though the Union was not a party to MARPOL.

Another significant implication of the principle of good faith emerges from the judicial practice of the Union. Under general international law, good faith requires preserving the *effet utile* (effectiveness) of the conventions concluded by the parties concerned.[14] Reflected in the Latin maxim *ut res magis valeat quam pereat*, protecting the effectiveness of a treaty and its obligations is required by the need to accurately consider the will of the parties.[15] To preserve their treaty engagements is a corollary of good faith. Consequently, the interpreter is expected to make his best efforts to avoid interpreting the treaty in a way that would render any of its provisions otiose.[16] The fact that the VCLT does not embody the Latin maxim *ut res magis valeat quam pereat* in Article 31 does not mean that this principle is immaterial when it comes to the interpretation of treaties, but only that the ILC did not want to encourage any liberal interpretation going beyond "what is expressed or necessarily to be implied in the terms of the treaty".[17] Moreover, it considered that "insofar as it reflects a true general rule of interpretation, it is embodied" in what would become Article 31(1) VCLT.[18]

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[12] As the ILC stated, "the interpretation of treaties in good faith and according to law is essential if the *pacta sunt servanda* rule is to have any real meaning" (Draft Articles on the Law of Treaties with Commentaries, *cit. supra* note 10, p. 219); Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, Oxford, 2008, p. 301 ff., in particular p. 308; Gardiner, *Treaty Interpretation*, 2nd ed., Oxford, 2015, p. 167 ff.

[13] *Bosphorus Queen Shipping Ltd Corp.*, *cit. supra* note 8, para. 45. See also earlier to that effect, Case C-308/06, *Intertanko*, 3 June 2008, EU:C:2008:312, paras. 47 and 52.

[14] Gardiner, *cit. supra* note 12, pp. 168 and 179 ff.

[15] Dailler and Pellet, *Droit international public*, 7th ed., Paris, 2002, pp. 263-264.

[16] It is worth recalling that in the *Corfu Channel Case* (Judgment of 9 April 1949, ICJ Reports, 1949, p. 4 ff.), in assessing its own jurisdiction, the International Court of Justice concluded that it had jurisdiction to assess the amount of the compensation between the parties (p. 26), by stating that "[i]t would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision" included in an international agreement "should be devoid of purport or effect", and quoting an earlier order of the Permanent Court of International Justice (p. 24). See also the case concerning the *Territorial Dispute between Libya and Chad* (Judgment of 3 February 1994, ICJ Reports 1994, p. 6 ff., whereby the Court rejected any construction of an international agreement which, among other things, would have rendered completely ineffective the reference to one or the other of those instruments; see also, to the same effect, the arbitral award of 21 October 1994 regarding the *Laguna del Desierto* case (Argentina/Cile), in RGDIP, 1996, p. 520 ff., p. 586).

[17] Draft Article on the Law of Treaties with Commentaries, *cit. supra* note 10, p. 219.

[18] *Ibid.*

The practice of the EU Court of Justice is quite illustrative in this respect. Let us consider the interpretation of Article 9(3) of the Aarhus Convention. According to the Court, this provision is intended to ensure effective environmental protection.[19] Consequently, in the Court's eyes, it would be deprived "of all useful effect, and even of its very substance" if it had to be conceded that environmental associations that satisfy the requirements laid down in Article 2(5) of the Aarhus Convention are to be denied any right to bring proceedings against acts and omissions which contravene certain provisions relating to the environment.[20]

As a result, the Union judges, when contextualizing a given conventional prescription within the related general international legal framework, are required to design a coherent set of rules with the aim of upholding the *effet utile* of the treaty, construed accordingly.

4. Textuality and Teleological Approaches

Textual interpretation, taking account of the words in their ordinary and, to a certain extent, narrowest meaning, is another settled method of interpretation recognized by international law. The textual approach commends itself for its simplicity and aptness to insulate the judge, as far as possible, from charges of political activism.[21]

The *Budvar* case is illustrative as regards textuality. The question referred for a preliminary ruling in *Budvar* concerned the interpretation of the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPs) in relation to a dispute concerning Budvar, which had marketed its products in a Member State by using a sign that allegedly infringed the trademark owned by another undertaking in that State.[22] Indeed, the wording of Articles 70(1) and (4) of the TRIPs Agreement played a key role in the Court's answer. It emphasized that, according to the natural and ordinary meaning of the terms of these rules, as also applied in the case law of the WTO Appellate Body, the situation fell under the provisions of the Agreement.[23]

Yet the wording of a treaty may not always be sufficiently clear and decisive to readily permit a textual interpretation. In the *Simutenkov* case brought against the Spanish Ministry of Education and Culture and the Royal Spanish Football Federation, a contested provision of the Communities-Russia Partnership Agreement was worded ambiguously in the official Spanish language version. In this circumstance, the Court implicitly let the unambiguous English language version of the Agreement prevail, yet without considering Article 33 VCLT. On the contrary, the Advocate General had

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[19] Case C-240/09, *Lesoochranárske zoskupenie*, 8 March 2011, EU:C:2011:125, para. 46.

[20] Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, 20 December 2017, EU:C:2017:987, para. 46; Case C-873/19, *Deutsche Umwelthilfe v. Bundesrepublik Deutschland*, 8 November 2022, EU:C:2022:857, para. 67.

[21] See e.g. *Demirel* case, *cit. supra* note 9, para. 15.

[22] Case C-245/02, *Budějovický Budvar, národní podnik*, 16 November 2004, EU:C:2004:717, paras. 49-53.

[23] *Ibid.*, para. 51.

argued in favour of the application of the English text, albeit through a more detailed but somewhat convoluted analysis.[24] When similar situations arise in future cases, it would be helpful if Article 33 VCLT could be given more careful consideration by the Union judges.

Considering the object and purpose of a treaty is a further key principle of interpretation applied by Union judges, as they often acknowledge that the terms of a treaty need to be interpreted in relation to the latter's overall objectives, taking account of the Parties' intentions. Quite tellingly, the system of safeguards and the mechanism for resolving disputes set out in the WTO agreements have been interpreted in the light of the importance given to negotiation between the parties,[25] i.e. to their subject-matter and purpose or, to use the jargon of the Court, the "nature and structure" of the bi-multilateral complex systems of the WTO Agreements.[26] The issue concerning the direct effect of a conventional provision concluded by the Union before a national judge has been addressed also by taking account of these elements.[27]

The purpose of a given international agreement, stemming from its wording and scope, is often considered a critical additional means to reach the correct interpretation of a treaty provision.[28] For instance, in *Brita*, the Court was asked to interpret the rules of two parallel mixed agreements, the EC-Israel Association Agreement and the EC-PLO Association Agreement.[29] This case was about whether a German customs authority could legitimately refuse to grant the preferential treatment provided to goods by the EC-Israel Agreement when serious doubts had been raised about their geographical origin. The Israeli authorities claimed that the goods in question originated in the territories on which Israel exercised its sovereignty, which did not assuage concerns that the goods may have come from the occupied territories of the West Bank and the Gaza Strip. Since the EC-PLO Agreement was concluded by the Union with the Palestine Liberation Organization for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, the request of the referring judge focused on whether the German administrative authority could decline the requested

[24] Case C-265/03, *Simutenkov*, 12 April 2005, EU:C:2005:213, paras. 22 and 23, in which the Court stated that a provision of the Communities-Russia Partnership Agreement was clear, precise and unconditional, even though the Spanish language version was drafted more ambiguously. The opinion of the Advocate General Stix-Hackl suggested a more in-depth analysis (Conclusion delivered on 11 January 2005, para. 14 ff.).

[25] Opinion 1/91, *cit. supra* note 8, para. 13.

[26] Case C-149/96, *Portugal v. Council*, 23 November 1999, EU:C:1999:574, para. 41; see also *Budějovický Budvar*, *cit. supra* note 22, para. 72. The term "bi-multilateral" defines a multilateral system (WTO) that is articulated in many bilateral agreements between the Contracting Parties.

[27] *Kupferberg*, *cit. supra* note 11, paras. 18 and 45; *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, *cit. supra* note 20, para. 46.

[28] See *Intertanko*, *cit. supra* note 13, para. 58; *Bosphorus*, *cit. supra* note 8, para. 63; *Simutenkov*, *cit. supra* note 24, para. 27.

[29] See Case C-368/08, *Brita*, 25 February 2010, EU:C:2010:91. This ruling has been strongly criticized: Harpaz and Rubinson, "The Interface between Trade, Law and Politics and the Erosion of Normative Power Europe: Comment on Brita", EL Rev., 2010, p. 551 ff.; Kornfeld, "ECJ holds that West Bank Products Are Outside the Scope of the EU-Israel Association Agreement", ASIL Insight, 2010.

preferential treatment. The Court replied by taking account of the "identical objective" of both the EC-Israel and EC-PLO Agreements, which was "to establish and/or reinforce a free trade area between the parties" and to abolish customs duties in relation to trade between the parties.[30] The Court underlined that, having regard to that purpose, the Union system had to ensure that each of the agreements applied to its own geographical scope. *Sic et simpliciter*, Israel could not claim the benefit of its own treaty as regards products originating in the West Bank, for they did not fall within the territorial scope of the EC-Israel agreement and therefore did not qualify for the preferential treatment there established.[31] Additionally, having interpreted the treaty in the light of its object and purpose, the Court reiterated that the conventional obligations of the Contracting Parties had also to be interpreted in line with the general international law principle of the relative effect of treaties, under which a treaty does not create obligations for a third State (or third entities, Palestine in the case at hand) without its consent (*pacta tertiis non nocent*) pursuant to Article 35 VCLT.[32]

5. Contextualism

The context of a treaty is a comprehensive set of criteria for interpreting it, which includes its preamble, other treaty provisions, any other instruments the Parties made in connection with the treaty, such as its annexes, and implementation guides published by the bodies established by the treaty being interpreted.[33] Most importantly, according to the view upheld here, contextualizing a treaty also requires considering the rules of customary international law relevant to the case at hand, as well as the principle of good faith.[34] For example, as discussed, in *Brita*, the Court held that a certain provision of the EC-Israel Association Agreement, which defined its territorial scope, had to be interpreted in a manner that was consistent with the *pacta tertiis* principle, as a treaty is *res inter alios acta* for third-parties and cannot be opposed to them.[35]

Union judges often refer to the overall content and context of a given agreement to assess the correct meaning and effects of its prescriptions.[36] Such was the case in *Sea Watch*, where several provisions of the UN Convention on the Law of the Sea were taken into account to strike a fair balance between the respective (and conflict-

[30] *Brita*, *cit. supra* note 29, para. 48.

[31] *Ibid.*, para. 53.

[32] *Ibid.*, paras. 44 and 52.

[33] As regards the consideration of implementation guides adopted by the bodies of the convention being interpreted, see Case C-619/19, *Land Baden-Württemberg*, 20 January 2021, EU:C:2021:35, para. 51; *Deutsche Umwelthilfe*, *cit. supra* note 20), para. 55). The latter case is illustrative of the Court's attitude to considering a provision not in isolation, but within the context of other provisions (*ibid.*, paras. 59-62).

[34] Contextualism is a matter of both common sense and good faith (Ammann, *cit. supra* note 10, p. 206).

[35] *Brita*, *cit. supra* note 29, paras. 44 and 45.

[36] *Demirel*, *cit. supra* note 9, paras. 15-21.

ing) interests of coastal States and flag States, in order to determine the conditions governing additional inspection powers of the port State, and their extent.[37] In the same vein, the Court has also sometimes considered the preamble of commercial agreements.[38] Moreover, in a case regarding the ICAO Convention, it referred *inter alia* to its recital, field of application and content in order to ascertain whether the Convention, which had not been ratified by the Union, would produce certain effects in the EU legal order, given that the Union had assumed the powers previously exercised by its Member States in the field of air transport.[39]

Even the Court's case law concerning the direct effect of provisions of international agreements shows an inclination to apply international customary rules on the interpretation of treaties. Even though the "Union doctrine of direct effect" as regards international treaties is peculiar, inasmuch as it aims to protect the power of its institutions and thus hardly fits in the internationalist doctrine of direct effect,[40] when assessing the clarity, completeness and unconditionality of a provision, the Court usually considers the terms, the subject-matter, the nature of the treaty and its overall context. For instance, in *Demirel*, the Court paid attention to the wording, purpose and nature of the agreement, as well as the fact that the Contracting Parties had agreed to be guided by the constituent Union Treaties to secure freedom of movement for workers among themselves.[41]

[37] *Sea Watch E.V./*, *cit. supra* note 7, paras. 96 to 105.

[38] *Portugal v. Council*, *cit. supra* note 26, para. 42; *Budějovický Budvar*, *cit. supra* note 22, para. 66.

[39] *Air Transport Association of America* case, *cit. supra* note 4, respectively, paras. 57-59 and 60-62.

[40] It is worth recalling the case law concerning the GATT Agreement of 1947 and the WTO agreements that succeeded it in 1994, which the Court has often refused to recognize as producing direct effect. These rules can be invoked in support of an action for the annulment of an act of secondary law or a plea that such an act is unlawful only where the nature and broad logic of the treaty in question do not preclude this and where the treaty provisions appear, as regards their content, to be unconditional and sufficiently precise (Cases C-401/12 P to C-403/12 P, *Council and Others v. Vereniging Milieudefensie and Stichting Stop Luxhtverontreiniging Utrecht*, 13 January 2015, EU:C:2015:4; Case C-207/17, *Rotho Blaas Srl*, 18 October 2018, EU:C:2018:840, paras. 43-44; see also Joined Cases 21-24/72, *International Fruit Company*, 12 December 1972, EU:C:1972:115; *Portugal v. Council*, *cit. supra* note 26, para. 47; Case C-377/98, *Netherlands v. Parliament and Council*, 9 October 2001, EU:C:2001:523). Exceptionally, direct effect is admitted where the institutions have specifically implemented GATT provisions into Union law (Case 70/87, *Fediol v. Commission*, 22 June 1989, EU:C:1989:254, paras. 19-22; Case C-69/89, *Nakajima v. Council*, 7 May 1991, EU:C:1991:186, para. 31; Case C-377/02, *Van Parys*, 1 March 2005, EU:C:2005:121, paras. 39 ff.; *Portugal v. Council*, *cit. supra* note 26, paras. 43-46; Cases C-120/06 P and C-121/06 P, *FIAMM and Others v. Council and Commission*, 9 September 2008, EU:C:2008:476, para. 119; Case C-306/13, *LVP*, 18 December 2014, EU:C:2014:2465, para. 46). As to this case law see, amongst others, Jacobs, "Direct Effect and Interpretation of International Agreements in the Recent Case Law of the European Court of Justice", in Dashwood and Maresceau (eds.), *Law and Practice of EU External Relations*, Cambridge, 2008, p. 13 ff.; Cremona, "External Relations and External Competence of the European Union: The Emergence of an Integrated Policy", in Craig and De Búrca (eds.), *The Evolution of EU Law*, 2nd ed., Oxford, 2011, p. 236 ff.

[41] *Demirel*, *cit. supra* note 9, para. 14 ff.

A treaty must be interpreted in a way that gives effect to its provisions, unless such an interpretation is not reconcilable with rules of customary international law and *a fortiori* with *jus cogens* rules. This approach to treaty interpretation is justifiable on the basis of Article 31(3)(c) VCLT, for a treaty is to be viewed within its overall legal context, object and purpose, including "any relevant rules of international law applicable in the relations between the parties". It is here suggested that, in general, treaty interpretation necessarily has to take any other rule of international law as a fundamental criterion of orientation for the interpreter. In other words, treaty interpretation is to be characterized as being *internationally oriented* or *open* to the consideration of international law and *a fortiori* of *jus cogens* rules relevant to the case at hand.[42]

In this context, *Front Polisario* is illustrative, in the opinion of the current writer. As known, the case concerned the partial annulment of a Council decision approving an international agreement concluded in the form of an exchange of letters between the EU and Morocco.[43] This agreement had established reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fisheries products (Liberalization Agreement).[44] The applicant was the Front Polisario, the main exponent of the Sahrawi People's Liberation Movement, that has legitimately represented the Sahrawi people's rights since the cessation of Spanish colonial rule.[45] The Western Sahara is a non-self-governing region for the purposes of Article 73 of the United Nations Charter.

Ruling on the appeal, the Court of Justice overturned the General Court judgment that had annulled the Council decision. Basically, the General Court rejected the plea to the effect that the Union is subject to an absolute prohibition on concluding an agreement that may be applicable within the disputed territory, as it recognized that the Council enjoyed a wide discretion as regards whether it is appropriate to conclude it. However, in the General Court's eyes, the Council failed to exercise this power correctly, as it could not ignore whether or not the exploitation of the resources of Western Sahara, a disputed territory, was carried out to the detriment of the local population.[46]

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[42] See *supra* Section 2 and note 10.

[43] Case C-104/16 P, *Council v. Front Populaire pour la libération de la Saguia el-Hamra et du Rio de oro* (*Front Polisario*), 21 December 2016, EU:C:2016:973; for strong criticisms, see Kassoti, "The Council v. Front Polisario Case: The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation (Second Part)", European Papers, 2017, p. 23 ff., who points out "the Court's unfamiliarity with the operation of Art. 31 VCLT" (p. 31).

[44] As is known, under the Union legal framework, Union courts cannot review the validity of an international agreement entered into by the Council, but only the internal decision authorizing the ratification of the treaty (Case C-122/95, *Germany v. Council*, 10 March 1998, EU:C:1998:94). Should the action be successful, it will be up to the Commission to renegotiate the agreement or to terminate it in accordance with international law.

[45] For a historical analysis of the Front Polisario's rights, see Correale, "Les origines de la 'question du Sahara occidental': enjeux historiques, défis politiques", in Balboni and Laschi (eds.), *The European Approach towards Western Sahara, Bruxelles, 2017, supra* note 21, p. 33 ff.

[46] Case T-512/12, *Front Populaire pour la Libération de la Saguia El-Hamra et du Rio de Oro* (*Front Polisario*) *v. Council*, General Court, 10 December 2015, EU:T:2015:953, paras. 228 and 215-248. On this judgment and on the appeal ruling, see Kassoti, "The Front Polisario v. Council Case: The General

The Court of Justice construed the international personality of the Movement in accordance with customary principles of international law by referring to International Court of Justice case law and the practice of the UN General Assembly.[47] The Court's own case law also considered that the Front Polisario is a national liberation movement, created in 1973, that has supported decades of resistance of the Sahrawi People against Morocco's claims that Western Sahara is an integral part of its sovereign territory. In fact, Morocco has never obtained any mandate from the UN to administer Western Sahara, capable of justifying its presence in (part of) the territory, and nor does Morocco transmit information relating to the territory to the UN, such as that required by Article 73(e) of the UN Charter. Basically, Morocco fulfils none of the obligations incumbent upon any State administering non-self-governing territories in accordance with the UN Charter.

Despite the fact that it is an internationally recognized liberation movement, Front Polisario was deemed to fall within the general category of natural or legal persons pursuant to Article 263 TFEU as far as its *locus standi* was concerned.[48] Accordingly, the Court declared the action to be inadmissible because the requirements of Article 263 TFEU (i.e. the challenged act must be of direct and individual concern for the claimant) were not fulfilled.[49] Yet it did so only after having joined the international consensus about the Front Polisario's legitimacy to pursue the right of self-determination of the Sahrawi People.[50]

Consequently, while the Court did not annul the Union Agreement, contrary to the applicant's request, the judgment was nonetheless balanced by the interpretation of the Liberalization Agreement in accordance with the right to self-determination, a *jus cogens* rule. The Court held that the contested international Agreement (*recte*, the Council's decision incorporating it into the Union system) should be interpreted consistently with the right to self-determination of the People of the Western Sahara. It hence overturned the General Court decision since any tacit interpretation including

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Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part)", European Papers, 2017, p. 348 ff.; Cannizzaro, "In defence of Front Polisario: The ECJ as a global jus cogens maker", CML Rev., 2018, p. 569 ff.

[47] *Front Polisario*, *cit. supra* note 43, paras. 21-37. Cf. Baratta, "L'acces aux juges de l'Union par un sujet de droit international", in *Liber Amicorum Antonio Tizzano, De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne*, Torino, 2018, p. 45 ff.

[48] Even a third State enjoys standing to bring proceedings as a "legal person" within the meaning of Art. 263(4) TFEU if the other conditions laid down in that provision are satisfied. The standing of a third State is not subject to a condition of reciprocity, given the Union's obligation to ensure respect for the rule of law (Case C-872/19 P, *Venezuela v. Council*, 22 June 2021, EU:C:2021:507; Case T-246/19, *Cambodia and CFR v. Commission*, Order 10 September 2020, EU:T:2022:694). Certainly, in this respect, the Treaties contribute to making the system of judicial remedies more effective and complete.

[49] *Front Polisario*, *cit. supra* note 43, paras. 128-134.

[50] Not surprisingly, Front Polisario hailed the judgment as a "momentous victory" for the Sahrawi people. It also called for "immediate discussions" in the hope that "the conditions will be met, in order to turn the page, and to finally act in respect of the rights of the Sahrawi people" (Front Polisario, "Court of Justice of the European Union: EU-Morocco Agreements do not apply to Western Sahara", Preliminary Statement ahead of the Press Conference of 22 December 2016, <www.wsrw.org>).

the territory of Western Sahara in the words "territory of the Kingdom of Morocco" (Article 94 of the Agreement), or any *de facto* application of the Agreement to such territory was an error of law.[51] When interpreting a treaty, Union judges must "observe the rules of good faith interpretation laid down in Article 31(1) Vienna Convention, but also the rule laid down in Article 31(3)(c) of that Convention, pursuant to which the interpretation of a treaty must be carried out by taking account of any relevant rules of international law applicable in the relations between the parties"[52]. The Court is evidently referring to the customary principle of self-determination,[53] which forms part of the rules of international law applicable to the relationship between the Union and Morocco,[54] in combination with the UN practice.[55]

The Court added that the *pacta tertiis* principle, setting the relative effect of treaties, was also relevant in the context of the interpretation of the Liberalization Agreement, "since the application to Western Sahara of the Association Agreement, concluded between the European Union and the Kingdom of Morocco, would have led to that agreement affecting a 'third party'".[56] Again, in the Court's eyes, the Liberalization Agreement could not ever be understood as including the territory of Western Sahara.[57] Yet the most convincing reason for this outcome is that any application of the Liberalization Agreement beyond the territory over which the Kingdom

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[51] *Front Polisario*, *cit. supra* note 43, para. 82. For this reason, contrary to the General Court, the Court of Justice set aside any possible interpretation of the Liberalization Agreement that would lead to applying the Agreement to the territory of Western Sahara, which is legitimately claimed by Front Polisario (*ibid.*, para. 92).

[52] *Ibid.*, para. 86.

[53] *Ibid.*, para. 88.

[54] *Ibid.*, para. 89.

[55] *Ibid.*, paras 90 and 91.

[56] *Ibid.*, para. 103; see also para. 106 i,n which the Court extended the principle *pacta tertiis* to non-State actors, as it did in the *Brita* case, *cit. supra* note 29, para. 52. It is debatable whether Art. 34 VCLT may be applied beyond State actors and international organizations when they enjoy international subjectivity. Indeed, that principle was "derived from Roman law in the form of the well-known maxim *pacta tertiis nec nocent nec prosunt* – agreements neither impose obligations nor confer rights upon third parties. In international law, however, the justification for the rule does not rest simply on this general concept of the law of contracts but on the sovereignty and independence of States", that is, State entities (Draft Articles on the Law of Treaties with Commentaries, *cit. supra* note 10, p. 226). The Court could have used this argument more cautiously (see for strong criticism in this respect Kassoti, "The Council v. Front Polisario Case", *cit. supra* note 43, p. 36). See, however, Villani, "La Cour the justice de l'Union européene et le droit à l'autodétermination du peuple sahraoui", in *Liber Amicorum Antonio Tizzano*, *cit. supra* note 47, p. 1007 ff., p. 1011. Lastly, it seems clear that if a treaty is interpreted as applying in general to the "territory of Morocco" including Western Sahara, it is breaching a rule of *jus cogens*. In the Court's eyes, the principle of relative effect of treaties was an additional argument for excluding such a result under a contextual interpretation of the Agreement in issue.

[57] As the Court stated, "the General Court erred in holding, in paragraph 103 of the judgment under appeal, that the Liberalisation Agreement was to be interpreted as applying to the territory of Western Sahara, and more specifically to that part of the territory controlled by the Kingdom of Morocco, since such an interpretation could not be justified either by the wording of the Association Agreement or by that of the Liberalisation Agreement, nor, finally, by the circumstances surrounding the conclusion of those two agreements, as set out in paragraphs 101 and 102 of the judgment under appeal" (*Front Polisario*, *cit. supra* note 43, para. 116).

of Morocco legitimately exerts sovereignty would imply that the Union intended to implement those agreements in a manner incompatible with the principle of self-determination.[58] This argument is tantamount to admitting the primacy of customary international law over the Union institutions' internal acts and denying any discretion of the Council in that respect.

Front Polisario is not only significant for demonstrating the Court's adherence to contextualism, but also from the point of view of the *ut res* principle. In the first respect, the ruling admits that the Union institutions must abide by the customary principle of self-determination of peoples who have not yet achieved independence. In the second respect, it is true that *Front Polisario* does not expressly refer to the *ut res* principle, yet the entire reasoning of the Court is aimed at preserving the agreement, once interpreted in conformity with self-determination.

Interestingly, the Court also rejected any interpretation of the Agreement concluded with Morocco as *de jure* or *de facto* applicable to Western Sahara (as even the Commission and the Council acknowledged during the hearings before both Union Courts).[59] As the Court stated, the General Court ruling was set aside due to the fact that it permitted the interpretation and application of the contested agreement in a manner contrary to a peremptory principle of international law.[60]

From the standpoint of international rules on treaty interpretation, there was no need to annul the decision of the Council approving the conclusion of the Liberalization Agreement: both the principle of treaty integrity and of coherence between the Union legal order and customary international law is here ensured through the doctrine of consistent interpretation.[61] Even though this may be considered as a judicial avoidance technique, it is also a technique of treaty interpretation imposed by customary international law. Could the Court declare the invalidity of the Union instruments? For one thing, this approach would not consider the key role that the *effet utile* principle plays in treaty interpretation and treaty law in general; second, it would move from the unproved assumption that international rules on treaty invalidity have a higher rank than rules on treaty interpretation; third, a declaration of invalidity would bear consequences in terms of international responsibility, likely also under the category of EU non-contractual liability. It is plausible that the Union constituencies prefer to circumvent the unwelcome side-effects of these scenarios.

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[58] Under this constraint, it may be argued that the Union is complying also with the international law principle that prohibits States from negotiating an agreement covering occupied territory once the process of decolonization has begun (Passos, "Legal Aspects of the European Union's Approach towards Western Sahara", in Balboni and Laschi (eds.), *cit. supra* note 45, p. 137 ff).

[59] *Front Polisario*, *cit. supra* note 43, para. 80.

[60] *Ibid.*, paras. 123-127. Indeed, the General Court judgment interpreted the territorial scope of the Liberalization Agreement as meaning that it "also appl[ied] to Western Sahara" (*Front Polisario* (General Court), *cit. supra* note 46, para. 123). This assessment makes it clear why the General Court stated that Front Polisario had *locus standi* according to Art. 263 TFEU, as the applicant was automatically directly and individually concerned by the decision to conclude that Agreement.

[61] For a different approach, see Cannizzaro, *cit. supra* note 46, p. 578 ff., who, however, does not consider the effect of the *ut res* principle.

In a more recent preliminary ruling delivered in the *Western Sahara Campaign* case,[62] the EU Court of Justice again did not mention the *ut res* principle for ensuring the integrity of treaties but dealt with the case using its rationale. Here, Western Sahara Campaign UK (WSC), an independent organization established in the UK, challenged the validity of a Union act incorporating several connected agreements concluded between the Union and Morocco. On the premise that the scope of the disputed agreements also covered Western Sahara and the waters adjacent thereto, WSC contended that the agreements were in violation of a number of international law rules, namely (i) the right of the people of Western Sahara to self-determination, (ii) Article 73 of the Charter of the United Nations, (iii) the principle of permanent sovereignty over natural resources, and (iv) the rules of international humanitarian law applicable to military occupation.[63]

The Court rejected all the claims of invalidity.[64] The reasoning was in essence based on the same pattern as *Front Polisario*, that is, any interpretative outcome that resulted in a breach of international law could not be upheld. Instead, the contested agreements had to be construed as referring only to the geographical areas and fishing zone over which Morocco may legitimately exercise its sovereignty in accordance with international law. Therefore, the territory of Western Sahara, as well as the waters adjacent to it, were necessarily excluded from the scope of the agreements. Again, the principles of coherence and *effet utile* of a treaty are useful keys for understanding this ruling. As a matter of international law, the Union may "not properly support any intention of the Kingdom of Morocco to include, by such means, the waters in question"[65] within the scope of the agreements without infringing general rules of international law and, as a result, Union primary law, namely Article 3(5) TEU. A foundational rule on consistent interpretation governs the activity of Union judges, as the Court made clear when it held that the international agreements at issue "must be interpreted in accordance with the rules of international law that are binding on the European Union".[66] Interpreting a treaty in a manner that is consistent with a *jus cogens* rule, whenever that is possible, is not only demanded by the rules on treaty interpretation, but also appears as a logical consequence of the *ut res* principle, as it allows the effects of the treaty to be preserved. The opposite view, according to which the Union agreements with Morocco were invalid, falls short of proving that the mere conclusion of the same was *per se* a violation of international law. In any case, by constantly reaffirming the need to comply with the principle of self-determination, the Union institutions have never endorsed Morocco's claim to exercise sovereign rights over the occupied territories. A disagreement over this issue has persisted to this day.[67]

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[62] *Western Sahara Campaign UK*, *cit. supra* note 7. See Kassoti, "The ECJ and the Art of Treaty Interpretation: Western Sahara Campaign UK", CML Rev., 2019, p. 209 ff.

[63] *Ibid.*, para. 32.

[64] *Ibid.*, paras 42-51. That plea was correctly dismissed, if only because upholding it would have caused a serious lacuna in the internal system of judicial review over acts approving the conclusion of international agreements.

[65] *Ibid.* para. 71.

[66] *Ibid.*, para. 83.

[67] According to Advocate General Wathelet, these irreconcilable views of the Union, on one hand, and Morocco, on the other hand, had been settled through a mutual disagreement, as the

Front Polisario and *Western Sahara Campaign* have set the scene of the future relationship of the Union with Morocco, constraining the behaviours of the Commission and the Council.[68] Given the *erga omnes* structure of the principle of self-determination, Union institutions must, first, not cooperate in the exploitation of resources of a non-self-governing territory, and, second, must respect the obligation not to recognize illegal situations resulting from the breach of the right of the Saharawi people to self-determination. In addition, the Union may not render any form of indirect assistance in maintaining that situation.[69] Therefore, should a future amendment agreement with Morocco aim at including the waters adjacent to the territory of Western Sahara within the scope of existing treaties, this would amount to a clear violation of customary international law. [70] This is so from the perspective of international law, irrespective of whether future amendments will entail recognition of Morocco's sovereignty over Western Sahara and the adjacent waters, or whether the Union will continue to uphold the process, under the auspices of the United Nations, to peacefully resolve the dispute concerning the Saharawi People's right to self-determination. Such an amendment agreement would be a poor way to circumvent the ruling of the EU Court and to hide actual violations of international law that are internationally and internally forbidden. Seemingly, none of these international law constraints have been fully understood by the Council and the Commission, as shown by a recent General Court ruling declaring the invalidity of a Council decision amending the pre-existing agreement in its entirety, having assessed that the Exchange of Letters (i)

Parties "agreed to disagree" (Case C-104/16 P, Conclusions delivered on 13 September 2016, para. 67).

[68] Predictably, the General Court has followed the approach taken to Front Polisario and Western Sahara and dismissed Front Polisario's actions against acts of the Council relating to the conclusion or amendment of various international agreements between the European Union and Morocco (Case T-180/14, *Front Polisario v. Council*, Order of 19 July 2018, EU:T:2018:496; Case T-275/18, *Front Polisario v. Council*, Order of 30 November 2018, EU:T:2018:869; Case T-376/18, *Front Polisario v. Council*, Order of 8 February 2019, EU:T:2019:77).

[69] See, to this effect, the conclusions of Advocate General Wathelet in Case C-266/16, Conclusions delivered on 10 January 2018, para. 146, suggesting that the Court find the acts concluding the Agreement with Morocco invalid.

[70] Following the judgment in *Western Sahara Campaign UK*, the Council, by decision of 16 April 2018, authorized the Commission to enter into negotiations with the Kingdom of Morocco with a view to including the waters adjacent to the territory of Western Sahara within the scope of that agreement. This agreement was approved on 4 March 2019 by the Council adopted Decision (EU) 2019/441 (OJ 2019 L 77, p. 4). This is hardly comprehensible, given that the *Western Sahara Campaign UK* ruling plainly held that neither the Agreement nor the Implementation Protocol thereto could apply to the waters adjacent to the territory of Western Sahara; moreover, it found that Front Polisario did not agree to take part in the consultation process. Certainly, the disagreement between the Parties as regards the international situation of the Sahara region is still standing (the new para. 2 of the Exchange of Letter states that for the Union the treaty is without prejudice to its position concerning the status of the non-self-governing territory of Western Sahara, and its right to self-determination, whereas for Morocco the "Sahara region is an integral part of the national territory"). It seems, however, that such disagreement is immaterial in terms of complying with general international law. It is the conclusion of that agreement itself, without the consent of the Saharawi people, that breaches Union and international law inasmuch as the same agreement is implicitly applicable to the Western Sahara region.

applied to Western Sahara and the adjacent waters;[71] (ii) as regards the admissibility of the action, that Front Polisario was directly and individually concerned by the contested decision;[72] and (iii) that the institutions did not obtain any consent of the people of Western Sahara regarding the "new" Exchange of Letters.[73]

6. Subsequent Practice

Treaty interpretation (even for the purpose of excluding the direct effect of its provisions) may be linked to the subsequent practice of the Contracting Parties.[74] Under international law, "consensualism" is conclusive in this respect, since the Parties' subsequent practice – which may also stem from the decisions taken by a dispute settlement body set up in the agreement – or a subsequent agreement among them, entails that the Parties have reached a *consensus* or acquiescence on the meaning or effect (including direct effect) of a certain provision.[75]

In several cases, the Court has taken subsequent practice into consideration as one of the interpretative criteria of an international agreement, even if it has not always been a decisive one.[76] For example, the seminal *Kupferberg* case concerned the inter-

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[71] Cases T-344/19 and T-356/19, *Front Polisario v. Council*, General Court, 29 September 2021, EU:T:2021:640, para. 107 ff. (at the time of writing, an appeal brought by the Commission against that decision is pending: see Case C-778/21 P). The General Court noted that "the purpose of the agreement at issue is, in particular, to provide a legal framework for the inclusion of the waters adjacent to Western Sahara in the fishing zone authorised for EU vessels and, consequently, for the application to the territory of Western Sahara of the financial contribution granted by the European Union in proportion to the activities of those vessels, it must necessarily be concluded that, by that agreement, the parties intended to derogate from Article 94 of the Association Agreement in so far as the territorial scope of the legal regime applicable to those activities and that contribution is concerned. That article limits, as regards the Kingdom of Morocco, the scope of the Association Agreement to the territory of the latter" (para. 122).

[72] *Ibid.*, paras. 153 and 171 ff.

[73] *Ibid.*, para. 322 ff.

[74] On this specific issue, see the Reports produced by Georg Nolte for the International Law Commission Study Group on treaties over time, reproduced in Nolte (ed.), *Treaties and Subsequent Practice*, Oxford, 2013, p. 169 ff.

[75] Capotorti, "Sul valore della prassi applicativa dei trattati secondo la Convenzione di Vienna", in *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago*, Milano, 1987, p. 196 ff., pointing out that the provisions set out in Art. 31(3)(b) and (c) "hanno in comune il fattore essenziale della volontà comune delle parti del trattato" (p. 198; see also p. 208); likewise, the position taken by the ILC Commission Rapporteur Nolte, Second Report on Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation, UN Doc. A/CN.4/671, 26 March 2014, paras. 42-48; Crawford, "A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties", in Nolte (ed.), *cit. supra* note 74, p. 28 ff., remarking that subsequent practice is not necessarily the practice agreed by all the Parties, but is at least "opposable to all the parties" (p. 30); Boisson de Chazournes, "Subsequent Practice, Practices, and 'Family-Resemblance': Towards Embedding Subsequent Practice in its Operative Milieu", *ibid.*, p. 53 ff.; ILC, Annual Reports, Report on the work of the seventieth session, Un Doc. A/73/10 (2018), Conclusion No. 10 and the Commentary of ILC, p. 75 ff. For a different perspective, see Crema, "Subsequent Agreements and Subsequent Practice within and outside the Vienna Convention", in Nolte (ed.), *cit. supra* note 74, p. 13 ff.

[76] *Demirel*, *cit. supra* note 9, para. 22.

pretation of a bilateral free trade agreement concluded with Portugal prohibiting *inter alia* discriminatory taxation of imported goods, through a provision drafted in terms similar to Union law. In this case, the Court made a thorough and systemic examination of the issue of the direct effect of international agreements before Union judges and national courts. The Court first highlighted that general rules of international law require the "bona fide performance of every agreement",[77] and that the Contracting Parties are at liberty to decide what effects an agreement shall have in their respective domestic legal orders,[78] even implicitly if this outcome fits the interpretation of the treaty in the light of its subject-matter and purpose.[79] Further, it considered the subsequent practice of the Contracting Parties with regard to direct effect of the treaty prescriptions. However, the divergent practice of national courts – namely the fact that "the courts of one of the parties consider that certain of the stipulations in the agreement are of direct application whereas the courts of the other party do not recognize such direct application" – was not a decisive ground to conclude that a lack of reciprocity characterized the implementation of the agreement.[80]

Likewise, in some cases concerning the interpretation of the WTO Agreements, the Court has taken due account of the panels and Appellate Body practice. In *Anheuser*, the Court interpreted the effect of Articles 16 and 70(1) of the TRIPs Agreement by considering their clear wording and the related consistent practice of the international body in charge of resolving disputes between the Contracting Parties.[81]

The Court approached the interpretation of the terms "substantial processing or working" in Article 24 of the Union Customs Code in the same vein. In *HEKO Industrieerzeugnisse*, it held that, even if relevant acts of secondary legislation must be interpreted in the light of agreements adopted in the context of the WTO system, the Agreement on Rules of Origin established only a harmonization work programme for a transitional period, leaving the Contracting Parties leeway to adapt their respective internal laws. In this respect, a Panel Report was considered as an additional ground supporting the conclusive interpretation of Article 24 in the sense that the members of the WTO are free to determine the criteria conferring origin on a good, to alter them over time or to apply different ones.[82]

7. Concluding Remarks

Union judges, expressly or implicitly, make frequent recourse to international principles governing treaty interpretation. Articles 31 to 33 VCLT apply as they are commonly recognized as customary international law and, as such, they become an "integral part" of the Union legal order, whatever the *Haegeman* judgment means

[77] *Kupferberg*, *cit. supra* note 11, para. 18.
[78] *Ibid.*, para. 17.
[79] *Ibid.*, para. 18.
[80] *Ibid.*
[81] *Budějovický Budvar*, *cit. supra* note 22, paras. 49 and 67.
[82] Case C-260/08, *HEKO Industrieerzeugnisse*, 10 December 2009, EU:C:2009:768, para. 22.

with these words[83] – that, however, in no way implies that the relationship of the Union legal order with international law is based on monism.[84]

The numerous occasions on which such principles of interpretation have been applied does not mean that misapplication has never occurred – for example, as previously noted, *Simutenkov* "forgot" to apply Article 33 VCLT. Nonetheless, the judicial practice of the EU Court of Justice does not raise concerns when it comes to the observance of principles governing the interpretation of international agreements. Compliance with such principles is not a real issue for the Court, perhaps because of the open-ended character of rules on treaty interpretation, leaving ample latitude for the interpreter.

This said, the case law of the Court deserves attention; in particular, those decisions whose underlying rationale is aimed at harmonizing interpretative outcomes with customary rules of a peremptory nature. The *Western Sahara* saga concerning the principle of self-determination of peoples is illustrative, albeit *Brita* also points in the same direction. From an international law perspective, it seems worth highlighting that, in the EU Court's view, treaty interpretation necessarily must take any customary rule of a peremptory nature as a fundamental argumentative criterion that it associates with the need to preserve the effectiveness of a treaty – as long as it can be interpreted consistently with such rule. This expresses a bona fide and a contextualizing approach, which implies that treaty interpretation is necessarily oriented by *jus cogens* rules so as to preserve the effectiveness of the treaty at hand. The result is a process according to which treaty interpretation in the Union system is complemented by *jus cogens* rules. Any theoretical aporias between the two sets of rules (treaties concluded by the Union and *jus cogens*) are to be resolved, to the fullest extent possible, through an interpretative approach that ensures that treaty engagements are to be maintained, to the extent that they do not collide with general rules of international law of a peremptory nature.[85] Under this perspective, the fundamental

[83] On the significance of the *Haegeman* case law, see Mendez, *The Legal Effects of EU Agreements*, Oxford, 2013, p. 61 ff.

[84] The Court has rather endorsed the doctrine of dualism, as its case law shows. In any case, monism and dualism are immaterial insofar as respect for international law is concerned. The problem is whether the Court, as the supreme interpreter of the EU legal system, intends to ensure respect for international law, including *pacta sunt servanda*, when it comes to treaty interpretation. The VCLT principles are "international rules" and prevail over the judge-made rules applicable to the EU *acquis*, as the Court usually acknowledges. Yet again this is no concession to monism. Even if customary international law applies in the Union through the lens of dualism, its automatic incorporation into the Union system is a theoretical construct that is well-equipped to ensure respect for international law. As dualism does not conceptually require any transformation of international law into internal law, the former keeps its nature after having been inserted into the latter (Baratta, "L'effetto diretto delle disposizioni internazionali *self-executing*", RDI, 2020, p. 5 ff., p. 32). Besides, it may be worth recalling that monism is not necessarily best suited to ensuring compliance with international law, as national supreme courts can and do devise limits to the duty to respect international obligations even when international law is considered the "law of the land".

[85] Of course, it might be argued that contextualism or systematic interpretation open to rules of customary law leaves some space for indeterminacy and a room for discretion (for example, Art. 31(3)(c) VCLT has been defined as the "passe-partout" of international law (McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention", ICLQ, 2005, p. 279

values of the international community are brought into the process of interpretation of international treaties within the EU legal order, and all efforts to solve inconsistencies must be made. The practical goal may also be to prevent the international responsibility of the Union and its Member States from arising, an objective that is also inherent in the Union system pursuant to Article 3(5) TEU. Unfortunately, looking at the latest developments in the practice concerning Western Sahara, one may wonder whether the political institutions of the Union are fully aware of the constraints that customary international law imposes on their external activity.

In conclusion, under the conceptual scheme of the Union judges, treaty interpretation considered through the lens of *jus cogens* operates at two levels. First, it influences the prescriptive content of the agreement. The underlying rationale is that the Union judges are to avoid any outcomes that contravene the overriding peremptory rules of international customary law, while preserving to the fullest extent admissible the effect of the treaty: so much so that they should prefer in principle interpretative solutions ensuring the persistence of a treaty that can be interpreted as valid, instead of declaring the invalidity of (the Council's decision that concludes) a treaty.[86] Second, the Union judicature here serves as a "problem-solver" should any discrepancy arise between the external conduct of the Commission and Council and *jus cogens*.

ff., pp. 279-281). Yet, contextualism has its own merit and lies at the centre of the VCLT principles governing treaty interpretation.

[86] It is plausible that Union courts and institutions are not free to determine how they deal with customary international law. For a different perspective, see Odermatt, "The Court of Justice of the European Union: International or Domestic Court?", Cambridge Journal of International and Comparative Law, 2014, p. 696 ff., p. 701.