

# TERRITORIAL DISPUTES BY PROXY: THE INDIRECT INVOLVEMENT OF INTERNATIONAL COURTS IN THE MEGA-POLITICS OF TERRITORY

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## I

### INTRODUCTION

International Courts (ICs) are increasingly called to rule upon mega-political disputes. These are legal issues concerning social, economic, and political conflicts that create cleavages at the national and international levels across or between societies.<sup>1</sup> Defined as such, mega-political disputes concern issues that divide societies, with the result that, whatever the outcome of an IC ruling on such matters, important and sizable social or political groups will be antagonized.<sup>2</sup> This makes the involvement of ICs in mega-political disputes extremely risky, especially in terms of backlash. This article explores whether, and under which conditions, ICs can serve as suitable venues for resolving mega-political territorial disputes. It focuses on a set of specific ICs—regional economic and human rights ICs—dealing with a specific type of mega-political disputes that we label Territorial Disputes by Proxy (TDbP). Concisely, regional ICs deal with TDbP when they do not directly decide on who should lawfully exercise sovereignty over a particular territory or whether a people have the right to independence. Instead, they are called to address specific legal questions only indirectly related to the territorial dispute, such as the property rights of ethnic minorities or free movement of goods within contested territories. More specifically, the article addresses three overarching questions. Can regional ICs avoid the mega-political nature of a dispute when they address it by proxy? What challenges do mega-political TDbP pose for the authority of regional ICs with a mandate in human rights and economic integration? And how can ICs contribute to the protection of civilians during territorial conflicts?

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1. Karen J. Alter & Mikael Rask Madsen, *The International Adjudication of Mega-Politics*, 84 *LAW & CONTEMP. PROBS.* no. 4, 2021, at 1.

2. *Id.*

The first question is specifically targeted to explore which type of territorial disputes that end up in the docket of a regional IC are actually mega-political and whether the international courts can adjudicate on some aspects of those without inflaming the mega-political dimensions. The adjudication of territorial disputes is one of the archetypical functions of ICs.<sup>3</sup> However, not all disputes concerning territorial boundaries are automatically mega-political. More often than not, such disputes relate to a question of the exact delimitation of maritime borders or parts of a territory that are of interest to stakeholders but not of particular relevance to society more widely. Territorial disputes can, however, be mega-political in at least two ways.<sup>4</sup> The extraordinarily polarizing character is most likely due to the inter-state nature of the territorial dispute and the clashing national interests surrounding the claim at a national level. But the politics may also be inflamed because of sovereignty-driven reasons if the decisions of ICs are seen as impinging on a state's sovereignty.<sup>5</sup> Sometimes, however, territorial disputes end up involving issues related to national identity, historical narratives, and access to resources; sometimes, they even cover cases of independence claims and of contested statehood, where the resolution of the dispute relates to claims of sovereignty. As a result, these disputes become central to political and public debates at the national level, at which point they can turn into mega-political controversies.

Our second question concerns what happens to the authority of regional ICs when dealing with mega-political territorial disputes. It is particularly important here to underline that these regional ICs have compulsory jurisdiction and provide for access by private parties to initiate litigation. Moreover, even if these ICs have the procedural possibility to hear inter-state cases, because of the substantive limits of their formally delegated powers, cases relating to damages for citizens or companies and violation of free trade rule form the core part of their dockets. As a result, the international judges are likely to stick to the narrower definition of their jurisdiction and not rule directly on the winners and losers of the territorial dispute. Nonetheless, an IC's adjudication may have concrete effects on the ground, which can shift power relations, international discourse, and recognition, as well as domestic political debates regarding the conflict. Where an issue rises to the level of being mega-political, the regional specialized ICs are exposed to criticism of judicial activism and political backlash, including lack of respect for their rulings and challenges to their broader authority to get involved. This article unpacks how these ICs adopt an incremental, domain-specific, and arms-length approach to deal with mega-political issues.

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3. Armin Von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, 25 LEIDEN J. INT'L L. 49, 53–54 (2013).

4. We rely here on the three-prong typology developed in Alter and Madsen's work. Alter & Madsen, *supra* note 1, at 4.

5. *Id.* at 10–11 (explaining that social-cleavage mega-politics seems rarely to be the factor making a territorial dispute extraordinary).

The third question is about the potential role of ICs in resolving mega-political territorial disputes. Territorial conflicts in the international arena are multifaceted. They may involve not only clashing claims of territorial sovereignty, but also significant economic, environmental, and social concerns. These concerns reflect a broader understanding of security, namely the idea of human security. Human security refers to an approach focused on “identifying and addressing widespread and cross-cutting challenges to the survival, livelihood and dignity of . . . people”.<sup>6</sup> Human security is usually foregrounded in periods of a conflict when there is no direct violence and no risk to the lives of civilians. When it comes to regional ICs dealing with TDbP, we posit that adjudication might lead to a greater protection of the civilian population’s economic, political, and human rights, even if it does not directly contribute to the resolution of the territorial conflicts. If ICs contribute to stabilizing the situation on the ground by protecting human security, they will have intervened, upheld the law, and contributed directly to ameliorating the situation of the directly impacted stakeholders and perhaps indirectly to keeping the conflict from becoming even more heated.

The empirical focus is on three regional courts that thus far have been particularly active in adjudicating TDbP: two economic courts, the Central American Court of Justice (CACJ) and the Court of Justice of the European Union (CJEU), and a human rights court, the European Court of Human Rights (ECtHR). These ICs were selected because they demonstrate how regional ICs with compulsory jurisdiction and access for non-state actors to initiate litigation may become embroiled in mega-political inter-state disputes. The remainder of the article proceeds as follows. Part II provides a conceptual framework for TDbP before ICs and their mega-political nature. Part III deals with commercial and institutional TDbP before economic ICs, such as the Central American Court of Justice (CACJ) and the Court of Justice of the European Union (CJEU). Here, the analysis focuses on a number of trade and institutional issues triggered by long-standing territorial conflicts between Nicaragua, Honduras, and Costa Rica in Central America, as well as those related to the Northern Cyprus conflict and the territorial disputes in the EU’s Mediterranean neighborhood (Palestine and Western Sahara). Part IV explores rights based and institutional TDbP before human rights courts. It focuses particularly on property rights violated in the context of contested territories, drawing on the case law of the European Court of Human Rights (ECtHR) in the cases dealing with the occupation of Northern Cyprus by Turkey. Part V concludes the article with a discussion of the further implications of the analysis.

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6. G.A. Res. 66/290, at 1 (Sept. 10, 2012).

## II

## TERRITORIAL DISPUTES BY PROXY AND THE MEGA-POLITICS OF TERRITORY

Not all territorial disputes are litigated by proxy, and not all controversies involving contested territories are mega-political. Disputes become mega-political before they reach an international bench, if political divisions emerge in the societies driven by three main types of controversies—inter-state conflict, social cleavages, or sovereignty concerns.<sup>7</sup> Territorial disputes become political mostly due to inter-state driven politics. When two states have competing claims to a territory, the diplomatic and international dispute often escalates to permeate the social and public debates.<sup>8</sup> This can happen for national security reasons—when the states involved are willing to use (or threaten to use) force and military action—or when a territorial dispute is also linked to broader issues concerning ethnic minorities who inhabit the contested territories. This willingness to escalate violence should not be equated with active conflicts. In 2020, we saw an Azerbaijani military offensive against Armenian forces, even though the conflict in Nagorno-Karabakh has been often described as dormant. National mobilization can also occur for historical reasons, such as the case of Bolivia litigating against Chile about access to the ocean which it had lost in 1883 after the War of the Pacific.<sup>9</sup>

There can also be economic reasons for the public to have a strong stake in the outcome of a territorial dispute. For example, Western Sahara is a sparsely populated territory, and the export of phosphate and fisheries are a big part of the economy, so being able to label exports as Sahrawi, and not Moroccan products is also a relevant cause for the local population. A territorial dispute can also qualify as mega-political due to domestic politics that frames the issue as a divisive line in national electoral campaigns. Such developments can mobilize at least one of the national societies of the parties to the conflict and turn the issue into a question of extraordinary politics. More rarely, territorial disputes can also become mega-political due to sovereignty concerns,<sup>10</sup> but due to the potential for EU member states to perceive a decision on the right of separatist movements to self-determination as a limitation of their own sovereignty. This is particularly true of states like Spain who are dealing with separatist regions within their official borders. In sum, the cases of territorial disputes within the ICs represent mostly inter-state driven mega-politics, but can also represent sovereignty-driven mega-politics, or a mixture of both.

Ruling on territorial controversies was for a long time—and to a certain extent still is today—the province of international arbitrators and of ICs with a global reach, such as the International Court of Justice (ICJ) and the

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7. Alter & Madsen, *supra* note 1, at 4.

8. *Id.*

9. Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment, 2018 I.C.J. 570, 509 (Oct. 1).

10. Alter & Madsen, *supra* note 1, at 12.

International Tribunal of the Law of the Sea (ITLOS). Regional economic and human rights ICs generally do not have jurisdiction over territorial matters. They may have jurisdiction over inter-state complaints, for instance those arising within the scope of their regional treaties on human rights or economic integration. This may also be the reason that existing studies on ICs and territorial disputes have been almost entirely dedicated to global ICs and arbitral panels. In this regard, scholars generally argue that global ICs and arbitral panels are increasingly seized to reach a peaceful settlement of disputes relating to territory.<sup>11</sup> Other studies focus on ICs' high compliance with these rulings.<sup>12</sup> This might suggest that ICs enjoy broad authority over territorial disputes, even over the mega-political ones.<sup>13</sup> Or, perhaps, that territorial disputes hardly reach the mega-political stage, making it easy for international adjudicators to resolve them. This article, however, argues that a limited focus on inter-state arbitral and global courts provides only a partial view of how contemporary ICs engage the mega-politics of territory in their practices. This is because arbitration and inter-state ICs share important institutional features that may well be key to explaining the positive findings of the above-mentioned literature, but in the end say little about the capacity of ICs to concretely and effectively deal with the mega-politics of territory. Global ICs and international arbitral mechanisms, in fact, lack compulsory jurisdiction and private access, while they are strongly dependent on the litigating states' consent to establish their jurisdiction over a territorial boundary dispute.

In cases of contested statehood, ICs more often revert to their advisory jurisdiction, like the ICJ did in the cases concerning Western Sahara and Kosovo. The ICJ has also increasingly been dealing with TDbP in cases where the applicants relied on specific norms of international law ratified by both parties. This has been true, for instance, in the pending case brought by Ukraine against Russia, resulting from the occupation and territorial conflict in Eastern Ukraine, but invoking the International Convention for the Suppression of the Financing

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11. See Beth A. Simmons, *See You in 'Court'? The Appeal to Quasi-Judicial Legal Processes in the Settlement of Territorial Disputes*, in A ROADMAP TO WAR: TERRITORIAL DIMENSIONS OF INTERNATIONAL CONFLICT, 205 (Paul F. Diehl ed., 1999) (stating that over the past 100 years, governments have used a legalized form of dispute resolution in over 40 cases linked to territory); see also Beth A. Simmons, *Capacity, Commitment, and Compliance: International Institutions and Territorial Disputes*, 46 JOURNAL OF CONFLICT RESOLUTION (2002).

12. Sara McLaughlin Mitchell & Paul R. Hensel, *International Institutions and Compliance with Agreements*, 51 AM. J. POL. SCI. 721, 734 (2007) (some authors have even argued that states have complied with virtually every territorial dispute ruling made by the International Court of Justice (ICJ) and its predecessor, the Permanent Court of International Justice (PCIJ)).

13. Existing studies provide several explanations for this high level of compliance with ICs' rulings on territorial disputes. For Allee and Huth, this occurs because ICs provide "domestic political cover"; meaning that they constitute an avenue for state leaders that face anticipated political costs at the national level should they attempt to settle a dispute through bilateral negotiations. Todd L. Allee & Paul K. Huth, *The Pursuit of Legal Settlements to Territorial Disputes*, 23 CONFLICT MANAGEMENT AND PEACE SCIENCE (2006). Simmons reaches similar conclusions arguing that international institutions are used strategically to achieve results that cannot be realized through negotiations and domestic decision making alone. Simmons, JOURNAL OF CONFLICT RESOLUTION (2002).

of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>14</sup> In traditional territorial boundaries cases with consent from both parties, however, what gets exported to the international judicial realm is a watered-down version of potentially more contentious disputes; a version that asks international adjudicators to only grapple with the interests of governments that have already agreed to submit such a dispute to international adjudication.<sup>15</sup>

For this reason, this article focuses on what can be called international adjudication of TDbP. As mentioned before, TDbP occurs when regional economic and human rights ICs with compulsory jurisdiction, private access, and a lack of direct jurisdiction over territorial matters adjudicate economic and human rights disputes that arise from an underlying territorial controversy. In order to fall under the TDbP category, the actual disputes presented before the courts must be substantively de-linked from the territorial issue per se. This means that the litigants do not ask the ICs to actually solve the territorial dispute. Rather, they want the courts to address certain underlying legal issues that are only indirectly linked to a territorial dispute in the sense that they have arisen as a consequence of a dispute over territory. Such disputes can be about the tariffs applicable to products crossing a contested border or the property rights of people displaced due to a territorial conflict.

This article argues that regional economic and human rights courts are well placed to serve as fora to indirectly address territorial disputes without deciding on the victorious party in the broader conflicts. Due to their narrowly defined jurisdiction and stronger enforcement mechanisms, they are in a better position to avoid harsh criticism, depending on how they concretely rule in the cases at hand. As a result, they might have the potential to retain the image of impartiality to the conflict while securing enforcement of their rulings relating to the stabilization of the conflict and human security.

With this in mind, we identify three main types of mega-political TDbP often adjudicated by economic and human rights ICs: commercial, rights-based, and institutional. The definition depends on the type of proxy deployed before or by the ICs to distinguish the dispute at hand from territorial mega-political disputes. Although in reality these three ideal types may overlap, we believe it is still of analytical value to differentiate them as they capture different aspects of the phenomenon in question. *Commercial TDbP* are highly divisive economic issues arising out of an ongoing or past territorial dispute. They create inter-state tensions, end up marginalizing given minorities from economic privileges, or both. This type of dispute occurs, for instance, when one state imposes additional—often illegal—tariffs against another state that belongs to the same

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14. Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Judgment, 2019 I.C.J., 565 (Nov. 8).

15. This is not to say that such disputes are not contentious at all. However, when framed before arbitral panels and old-style ICs, the disputes often lose their mega-political aspect, at least in the way in which the editors of this special issue intended.

regional economic organization as a countermeasure for an alleged violation of territorial boundaries with the clear intent of isolating the state in the regional bloc. Another instance is concerned with the regulation of commerce with extraterritorial or contested territorial entities, especially in cases in which there is the risk of excluding ethnic or other minorities from enjoying their economic rights. There are various types of *Rights-Based TDbP*, including the violation of the right to property of certain ethnic minorities, the limitation or suspension of the free movement of peoples or, more generally, the violation of basic rights of the citizens inhabiting contested territories. In addition to these two categories, we also identify a third, transversal category of TDbP, which we label *Institutional TDbP*. This occurs when a territorial dispute gives rise to legal disputes before economic and human rights ICs concerning the broader functioning, responsibilities, and nature of the regional organizations in which the various courts adjudicating such a dispute are entrenched. This category allows us to grasp the consequences of IC involvement in such disputes, for instance, in terms of their operations or power, as well as consequences of regional organizations in the overall task of dealing with the mega-politics of territory. The following part explores some of the most known and controversial rulings of regional economic and human rights ICs in TDbP, how these have been received in the ICs' socio-political contexts, and the strategies that the ICs in point have used to tackle them.

### III

#### COMMERCIAL AND INSTITUTIONAL TERRITORIAL DISPUTES BY PROXY IN THE PRACTICE OF REGIONAL ECONOMIC COURTS

A number of commercial and institutional TDbP have been adjudicated by the CACJ and the CJEU, two courts that are part of regional economic regimes, the Central American System of Integration (SICA) and the European Union (EU), respectively. The CACJ has been particularly active in this regard, having ruled upon several community law disputes arising out of a territorial conflict between Nicaragua and Honduras over the maritime boundaries of the Caribbean Sea. More recently, the CACJ also ventured into ruling upon an environmental and community law case arising from a territorial dispute between Nicaragua and Costa Rica on the protected area of the Rio San Juan. For its part, the CJEU has been called upon to address issues related to the import of products from the Turkish controlled area of Northern Cyprus into the EU and on issues regarding the import of products from occupied territories in the EU's Mediterranean neighborhood. The following part presents these cases and describes how the two ICs have dealt with them in their rulings.

### A. The Mega-Politics of Territory in the Practice of the Central American Court of Justice

In 1999, the CACJ was called to rule upon two disputes linked to a politically heated, long-standing dispute between Nicaragua and Honduras over the maritime boundaries of the Caribbean Sea.<sup>16</sup> The conflict was mega-political, involving notable disagreements between the two countries over their territorial and maritime boundaries, at times almost leading to military confrontations between the two countries. The conflict was also deeply rooted in the post-colonial history of the region, dating back to the second half of the nineteenth century.<sup>17</sup> In 1986, Honduras and Colombia began negotiations to draft the *Lopez-Ramirez Treaty*, through which they redrew the maritime boundaries in the Caribbean Sea against the will of Nicaragua.<sup>18</sup> Although the latter repeatedly expressed discontent with the situation, the conflict did not escalate until 1999, the year in which Honduras—basically overnight—ratified the Treaty.

The Nicaraguan reaction was forceful. First, Nicaragua filed a case before the CACJ, asking it to suspend the ratification of the Treaty. The Nicaraguan allegations were the origin of the first TDbP of the CACJ, one that can be considered more institutional than commercial, even though it was initially framed as a community law—and thus commercial—dispute. More specifically, Nicaragua argued that the ratification of the Lopez-Ramirez Treaty by Honduras violated SICA law, and that both Nicaragua and the SICA were entitled to reparations.<sup>19</sup> In particular, Nicaragua alleged that by ratifying the Lopez-Ramirez Treaty, Honduras had appropriated large maritime areas and important natural resources from the Central American region in favor of a state (Colombia) that did not belong to the region, thereby damaging the socio-economic development of the region, the Central American territorial patrimony, and the Central American nationality.<sup>20</sup> The position of Nicaragua was that Central American community law was characterized by the principles of progressivity and irreversibility and that, accordingly, the Central American states' power to conclude international treaties had to be exercised in compatibility with the purposes of the integrationist enterprise. These, according to Nicaragua, included the integrity of the collective regional territorial patrimony and the solidarity between the Member States, and the Honduran

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16. CACJ 25-05-29-11-1999 and 26-06-03-12-1999.

17. The conflict was initially resolved in 1904, when the dispute was submitted to the arbitration of the King of Spain. In 1912, however, Nicaragua refused to implement the arbitration award, thus jeopardising the already precarious state of peace between the two states. The tensions between the two countries endured until the 1960s, when the diplomatic mediation of the Organization of American States persuaded the two states to submit the dispute to the ICJ, which eventually decided in favour of Honduras. See Johnny Joel Ruiz, *Conflictos Territoriales Honduras Y Nicaragua*, <https://www.monografias.com/trabajos96/conflictos-territoriales-honduras-y-nicaragua/conflictos-territoriales-honduras-y-nicaragua.shtml> [https://perma.cc/E4EF-H447].

18. Christian Diemer and Amalija Šeparovi, *Territorial Questions and Maritime Delimitation with Regard to Nicaragua's Claims to the San Andrés Archipelago*, 66 *Heidelb. J. Int. Law* 168 (2006).

19. CACJ 25-05-29-11-1999, at I and VIII.

20. *Id.* at VIII.

decision to cede parts of its territory to Colombia therefore violated these basic principles of the Central American integration.<sup>21</sup> The institutional implications of the disputes can also be grasped from the fact that even the Central American regional Parliament (the PARLACEN) pronounced itself on the matter, soliciting Honduras to not proceed to the approval and ratification of the Lopez-Ramirez Treaty.<sup>22</sup>

Despite the heated protests of the Honduran government, the CACJ declared itself to have jurisdiction to hear the case, basing its conclusion on a disposition of the Preamble to its Statute, which explicitly attributes to the Court the role of transforming the Central American isthmus into a unified and pacified nation.<sup>23</sup> In this early stage, the CACJ also released a precautionary measure to stall the ratification of the Treaty. The implementation of such a measure was, however, officially rejected by Honduras by means of a note sent from the Ministry of Foreign Affairs to the CACJ.<sup>24</sup> As to the merits of the case, the Court ruled that the SICA was not a mere economic community, it being, among other things, tasked to: “[r]eaffirm and consolidate the Central American self-determination,”<sup>25</sup> and “promote, in an harmonic and equilibrated way, the economic, social, cultural, and political development of the Member States and of the region.”<sup>26</sup> In other words, the Court sought to overcome the limitations of its formally delegated jurisdiction by providing a teleological interpretation of the SICA founding Treaties that would expand its role as international adjudicator. Accordingly, the CACJ—with the significant dissenting opinions of the two Honduran judges<sup>27</sup>—ruled that the Lopez-Ramirez Treaty infringed upon the principles and obligations of SICA law and that Honduras was responsible for the violations.<sup>28</sup>

A second, mega-political TDbP linked to the same Nicaraguan-Honduran conflict was filed by Honduras. This dispute originated from when, in response to the ratification of the Lopez-Ramirez Treaty, Nicaragua had imposed additional taxes on Honduran and Colombian import goods, and suspended all commercial activities with Honduras; all behaviors that Honduras deemed in violation of SICA law.<sup>29</sup> In this case, the CACJ ruled that the Treaties of the Central American economic integration obliged the SICA Member States to respect free commerce between the Members of the Community and to treat the goods coming from other SICA Member States as though they were national

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21. *Id.* at L letter p and q.

22. *Id.* at VIII letter a.

23. *Id.* at considerando IX.

24. *Id.* at VIII.

25. *Id.* at Art. II(f).

26. *Id.* at Art. III(h).

27. CACJ 25-05-29-11-1999 (dissenting opinions of Justice Adolfo Leon Gomez and of Justice Eduardo Gauggel Rivas).

28. *Id.* at resuelve I, II, and III.

29. CACJ 26-05-29-11-1999, at resulta I and II.

goods.<sup>30</sup> Accordingly, the CACJ declared that the Nicaraguan law imposing additional taxes on Honduran goods constituted a violation of SICA law and, as such, needed to be suspended.<sup>31</sup>

Finally, in 2011 the CACJ got involved in another mega-political TDbP. This time, it was linked to a dispute between Costa Rica and Nicaragua concerning the protected natural area of the Rio San Juan. The mega-political nature of this case is revealed by the long history prior to the 2011 case. This case is directly linked to the century-old construction of the Panama Canal by the United States and to the Nicaraguan alternative project of dredging a second inter-oceanic canal in the area; a project that has been recently resurrected by the new Sandinista populist government in power in Nicaragua. Interestingly, a similar case was already decided by the first incarnation of the CACJ in 1917.<sup>32</sup> That older case between Costa Rica and Nicaragua concerned the validity of the *Bryan-Chamorro Treaty* by means of which Nicaragua—at that time an American protectorate—had granted to the United States the exclusive right to build an inter-oceanic canal in the Rio San Juan area. This case was presented jointly with another one filed by El Salvador before the same Court, in which the validity of the same Bryan-Chamorro Treaty was challenged for the part in which it had granted the United States the right to build a naval base in the Gulf of Fonseca.<sup>33</sup> In the two rulings, the Court sided with both Costa Rica and El Salvador, arguing that the alienation of the regional territory to a foreign entity disturbed the “transcendental interest” of the region’s unity.<sup>34</sup>

In 2011, the CACJ dealt with issues strikingly similar to those dealt with by the first CACJ about a hundred years earlier. In the early 2000s, in fact, Nicaragua had initiated operations to dredge 33 kilometers of the San Juan River to build a new inter-oceanic canal in the area. In response, Costa Rica started constructing a highway in the contested area and sent several police officers to protect its borders, as did Nicaragua. Costa Rica then brought Nicaragua before the ICJ, alleging that the Nicaraguan military activities in the area constituted an occupation and misuse of Costa Rican territory.<sup>35</sup> Costa Rica also filed a request for provisional measures including the withdrawal of all Nicaraguan troops from the area, and the cessation of the construction of a canal across Costa Rican territory.<sup>36</sup> In 2011, the ICJ provisionally ruled that both Costa Rica and

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30. *Id.* at considerando X and XI.

31. *Id.* at resuelve I and II.

32. The first CACJ was established under the auspices of the United States by the Treaty of Washington in 1907. The first CACJ remained active until 1918, when the Court was declared expired under its initial sunset clause. Freya Baetens, *First to Rise and First to Fall: The Court of Cartago (1907–1918)*, in *EXPERIMENTS IN INTERNATIONAL ADJUDICATION: HISTORICAL ACCOUNTS* (I. de la Rasilla & Viñuales J.E. eds., 2019).

33. CARLOS JOSE GUTIERREZ G., *LA CORTE DE CARTAGO* (Jorge Ramon Hernandez Alcerro ed., Corte Centroamericana de Justicia. 2009).

34. *Id.* at 115 & ss.

35. See Request for the Indication of Provisional Measures Submitted by the Republic of Costa Rica, 2010 I.C.J. (November 18).

36. *Id.*

Nicaragua must refrain from sending or maintaining the presence of civilians, security forces, or police officers in this disputed border area. It added, however, that the Nicaraguan dredging of the designated section of the San Juan River was permitted since it was occurring in an area under Nicaraguan sovereignty.<sup>37</sup>

In this already tense situation, two environmental NGOs—FONARE and the Nicaraguan Foundation for Sustainable Development—filed a case against Costa Rica at the CACJ. The NGOs asked the CACJ to stop Costa Rica from constructing a highway in the protected area of the Rio San Juan because the project arguably violated Central American legislation on the protection of the environment.<sup>38</sup> The fact that the case was against Costa Rica added an additional layer of complexity and tension as, for a long time, Costa Rica had refused to be submitted to the jurisdiction of the CACJ on the grounds that it had not ratified the Statute of the Court.<sup>39</sup> In its decision, the CACJ initially declared itself competent to rule against Costa Rica regardless of whether that state had failed to fully ratify the Court's Statute.<sup>40</sup> As to the merits of the case, the CACJ, after visiting the area of the Rio San Juan to examine the concrete effects of the construction of the highway on the ecosystem of the protected area of the Rio San Juan, condemned Costa Rica for the damages to the environment that was protected by several international and regional Treaties of which Costa Rica was a signatory.

The societal and political responses to the TDbP cases of the CACJ are interlocutory at best. Ultimately, it could be argued that the Court's interventions exacerbated the conflicts, rather than channeling them toward a solution. As to the cases between Honduras and Nicaragua, the former refused to implement the precautionary measure dictated by the CACJ, and even bolstered its commercial relationship with Colombia in order to compensate for Nicaragua's economic countermeasures.<sup>41</sup> After the judgments, Honduras also suspended their contributions to the payment of judges' wages as a sign of discontent with the Court's activity.<sup>42</sup> Furthermore, as mentioned above, during and after the CACJ's rulings, the two states moved troops to their respective borders in preparation for military actions, with Honduras going so far as to declare a state of alert.<sup>43</sup> According to several commentators, the whole Central American integration project was in peril at this time, and the CACJ's intervention did not lessen the tension.<sup>44</sup> Only the diplomatic mediation of the Organization of American States

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37. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order, 2011 I.C.J. 6 (March 8).

38. CACJ 12-06-12-2011.

39. For a detailed discussion of the CACJ's incomplete institutionalization, see SALVATORE CASERTA, *INTERNATIONAL COURTS IN LATIN AMERICA AND THE CARIBBEAN: FOUNDATIONS AND AUTHORITY* (Oxford University Press, 2020).

40. CACJ 12-06-12-2011, at considerando IV.

41. Augusto Zamora, *Conflicto Honduras-Nicaragua: Claves Necesarias* Envío (2000).

42. CASERTA, *supra* note 39, at 203.

43. CACJ 26-05-29-11-1999, at considerando VI.

44. See generally Zamora, *supra* note 41.

proved to be decisive in decreasing tensions and, after several diplomatic meetings in Miami, Washington, and El Salvador, the border zone was demilitarized.<sup>45</sup>

The case against Costa Rica also had a limited impact on the ground. Although the Government of Nicaragua openly claimed an incontestable victory,<sup>46</sup> the Costa Rican Government officially rejected the implementation of the Court's ruling and denounced the judges' alleged partiality in favor of Nicaragua.<sup>47</sup> As a consequence of the ruling, the sitting Costa Rican President of the Republic—Laura Chinchilla—suspended her participation in the Meetings of the Heads of Government of the SICA, expressing in an official note that the decision of the CACJ over the Rio San Juan controversy was subordinated to the interests of Nicaragua, from a Court located in Nicaragua and with a Nicaraguan president.<sup>48</sup>

There are many reasons for the CACJ's struggle to handle these TDbP meaningfully and effectively, ranging from the nature of national politics of many of the Court's Member States, the controversies linked to the Court's actual jurisdiction over such disputes, the lack of substantial legal mobilization around the Court, and other similar contextual socio-political issues. This article, however, looks more directly to the Court's framing of the disputes in the rulings and considers whether such framing has had an impact on the Court's capacity to deal with the mega-politics of territory. Particularly important is the fact that, although all these cases were brought to the Court as commercial or community law cases, or both, the Court has often, and rather boldly, used these decisions to expand its judicial outreach to the actual underlying territorial dispute. This is evident especially in those institutional statements of the CACJ, which repeatedly argued that the SICA is not just a mere economic community and that the main task of the Court is to pacify and democratize the region through judicial means. In other words, in deciding its TDbP, the CACJ has refrained from bringing them into the realm of economic community law and has directly engaged with the underlying mega-political nature of the territorial disputes at hand. Perhaps one could argue that this approach was inevitable due to the institutional and political setting in which the Court is entrenched. Yet, a more nuanced, balanced, commercial, and rights-oriented approach would have enabled the Court to avoid the widespread criticism it received in the aftermath of its involvement in TDbP, as demonstrated by the CJEU's experience discussed in the next sub-part.

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45. *Id.*

46. *Id.*

47. *Corte Centroamericana condena a Costa Rica por daños a río San Juan*, LA NACIÓN (July 2, 2012), [http://www.nacion.com/archivo/Corte-Centroamericana-Costa-Rica-Juan\\_0\\_1278272475.html](http://www.nacion.com/archivo/Corte-Centroamericana-Costa-Rica-Juan_0_1278272475.html) [https://perma.cc/HQD8-4KS2].

48. *Costa Rica se distanciará del SICA después de sentencia de Corte Centroamericana*, EL FARO (July 4, 2012), <http://www.elfaro.net/es/201207/internacionales/9024/> [https://perma.cc/FFX9-DCA8].

## B. Commercial and Institutional Territorial Disputes by Proxy in the Practice of the Court of Justice of the European Union

The CJEU has only extremely rarely dealt with cases in which two states face each other as parties.<sup>49</sup> The majority of the CJEU's case-law, in fact, arises through the preliminary ruling procedure, triggered by private actors and referred to the CJEU by national courts.<sup>50</sup> National courts can, however, only refer questions which are relevant to a case pending before them. Hypothetical questions are not admissible. As a result, the framing of the cases tends to be narrow and deal only incidentally with the territorial disputes in the EU and its neighborhood.

Only one inter-state case before the CJEU has dealt directly with a maritime boundary dispute. In 2018, Slovenia brought a case against Croatia, asking the CJEU to use EU law to force Croatia into compliance with a contested arbitration decision issued within the framework of the Permanent Court of Arbitration.<sup>51</sup> In its defense, Slovenia relied both on general objectives of EU law related to guaranteeing peace and the rule of law, and on economic cooperation rules, especially those concerning the EU fisheries policy.<sup>52</sup> In its ruling, the CJEU concluded that deciding territorial disputes and determining the boundaries of territories of EU member states was beyond the scope of EU law. Advocate General Pikamäe referred to the fact that the EU's territory is only indirectly determined, by the territory of its member states. He highlighted that the EU's territory is "an objective fact that [the EU] has to accept."<sup>53</sup> The CJEU aligned with this opinion and decided that it lacked jurisdiction to rule on the action brought by Slovenia.<sup>54</sup> The lack of express jurisdiction on territorial disputes puts the CJEU in a different position than the old-style international courts that were expressly foreseen to adjudicate such cases.

This, however, did not prevent the Court's involvement in a number of megapolitical TDbP. In particular, the procedural arrangements, the lack of express jurisdiction on EU's territorial boundaries, and the CJEU's commitment to further supranational integration in the EU<sup>55</sup> made the CJEU particularly likely to deal with TDbP. This sub-part focuses on two cases, one located officially within the borders of the EU—the Northern Cyprus case—and the other in its

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49. Graham Butler, *The Court of Justice as an Inter-State Court*, Y.B. OF EUR. L. 179, 179–80 (2017).

50. See Allan Rosas, *The Interaction Between the European Court of Justice and National Courts in Preliminary Ruling Proceedings: Some Institutional and Procedural Observations*, in INTERNATIONAL LAW AND LITIGATION: A LOOK INTO PROCEDURE 621–23 (Hélène Ruiz Fabri ed. 2019) (discussing how the ECJ has recently emphasized the obligation of national courts to follow the preliminary ruling procedure and treat such rules "as a normative act binding also on the national courts").

51. Case C-457/18, *Slovenia v. Croatia*, 2020.

52. *Id.* at ¶ 1.

53. Case C-457/18, *Slovenia v. Croatia*, 2019, ¶ 111.

54. Case C-457/18, *supra* note 51, at ¶ 108.

55. RENAUD DEHOUSSE, *THE EUROPEAN COURT OF JUSTICE: THE POLITICS OF JUDICIAL INTEGRATION* 78–79 (1998).

southern neighborhood—the Western Sahara case.<sup>56</sup> Both cases illustrate what factors can be crucial in balancing the mega-political nature of a territorial dispute with commercial questions of import and labelling of products in the EU internal market.

The Republic of Cyprus joined the EU on 1 May 2004 with an ongoing territorial dispute about the northern part of the island.<sup>57</sup> Formally, the whole island joined the EU. But a territorial exception was put in place for the territory of Northern Cyprus, controlled by Turkey.<sup>58</sup> This means that EU Treaties do not apply to the northern Cypriot territory, but only to its population. According to the so-called Protocol No. 10 on Cyprus, the application of EU law shall be suspended in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control.<sup>59</sup> This situation gave rise to a number of cases before the CJEU, concerned either with the import of products or the recognition of judgments from Northern Cyprus. The series of three *Anastasiou* cases dealt with the status of products stemming from Northern Cyprus.<sup>60</sup>

In *Anastasiou* (1994) a British court asked the CJEU whether goods originating in the northern part of Cyprus were excluded from the preferential treatment granted by the 1972 Agreement establishing an association between the European Economic Community and the Republic of Cyprus. In this case, the CJEU ruled that these goods were indeed excluded and, accordingly, did not award the authorities from southern Cyprus the competence to issue certificates for products from the northern part.<sup>61</sup> Scholars have criticized the CJEU for establishing a *de facto* embargo on Northern Cyprus as well as for being inconsistent in its approach towards produce imported from territories occupied by Turkey as opposed to goods from the Palestinian territories occupied by Israel.<sup>62</sup> The *Anastasiou* cases are an example of how the CJEU adopted a

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56. A similar line of case law was developed in the context of the Palestinian territories. Case C-386/08, *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen*, 2010; Case C-363/18, *Organisation juive européenne and Vignoble Psagot Ltd v. Ministre de l'Économie et des Finances*, 2019.

57. For context on the conflict, see generally *DIVIDED CYPRUS: MODERNITY, HISTORY, AND AN ISLAND IN CONFLICT* (Yiannis Papadakis, Nicos Peristianis & Gisela Welz eds., 2006).

58. *Id.*

59. Protocol No. 10 on Cyprus to the Act Concerning the Conditions of Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the Adjustments to the Treaties on which the European Union is Founded, 2003 O.J. (L 236) 955.

60. Case C-432/92, *The Queen v. Minister of Agric., Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd. and others*, 1994; Case C-219/98, *Regina v. Minister of Agric., Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd. and others*, 2000; Case C-140/02, *Regina on the application of S.P. Anastasiou (Pissouri) Ltd and others v. Minister of Agric., Fisheries and Food*, 2003.

61. Case C-432/92, *Anastasiou*, 1994, ¶ 42.

62. Stefan Talmon, *The Cyprus Question before the European Court of Justice*, 12(4) EUR. J. OF INT'L L. 727 (2001); Pieter Jan Kuijper, *Case C-386/08, Brita GmbH v Hauptzollamt Hamburg-Hafen Judgment of the European Court of Justice of 25 February 2010*, LEGAL ISSUES OF ECON. INTEGRATION 250 (2010).

complex and legally technical reasoning, while avoiding the mega-politics dispute, when dealing with commercial TDbP.<sup>63</sup> This approach is perhaps best revealed by the fact that, in deciding these cases, the Court relied on one of the exceptions to the recognition of export certificates as part of a system of mutual recognition instituted by an international agreement of the EU. This applies to situations in which, if certain authorities are not capable of ensuring the functioning of “administrative cooperation”, non-recognition of export certificates seemed justified,<sup>64</sup> and this was the case in Northern Cyprus.

Another instance in which the CJEU had to indirectly touch upon the Cypriot dispute is the *Apostolides* case decided in 2009.<sup>65</sup> This case concerned the enforcement of a judgment rendered by a Cypriot court about property in Northern Cyprus before British courts. In this preliminary ruling procedure, the CJEU was asked to decide whether EU Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters applied to judgments issued by a Cypriot court sitting in the government-controlled area, which concerned land situated in the northern area. The CJEU relied on one of the most conservative and least controversial techniques of legal interpretation. Following a literal interpretation of Art.1 of Protocol 10, the CJEU ruled that EU legislation applied to decisions of Cypriot courts based in the south of the island, even if those decisions concerned the territories in the northern part.<sup>66</sup> The Court also emphasized that, in principle, EU law applied to the whole territory of an acceding Member State and that exceptions to that rule have to be interpreted narrowly.<sup>67</sup> Further, the CJEU stated that the judgment could be enforceable in the UK, even if, in practice, there might be serious obstacles to enforcing it in the northern Cypriot territories. The Court clearly drew a distinction between the practicalities on the ground and the *de jure* situation by stating that “Regulation No 44/2001 merely regulates the procedure for obtaining an order for the enforcement of foreign enforceable instruments and does not deal with execution itself.”<sup>68</sup>

From the above it emerges that the CJEU deliberately decided to not address the political context of the Cyprus dispute. Moreover, the Court neither referred to the UN Security Council Resolutions nor to the judgments of the ECtHR on that matter. As commentators put it, the Court “looked studiously the other way, framing the dispute in as dispassionately legal terms as possible.”<sup>69</sup> This highlights not only the Court’s self-contained understanding of EU law, but also its lack of

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63. Kuijper, *supra* note 62, at 250.

64. Opinion of AG Bot, Case C-386/08, *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*, 2009, I-1305.

65. Case C-420/07, *Meletis Apostolides v. David Charles Orams & Linda Elizabeth Orams*, 2009.

66. *Id.* at ¶ 37.

67. *Id.* at ¶¶ 33–34.

68. *Id.* at ¶ 69.

69. Geert De Baere, *Case C-420/07, Meletis Apostolides v. David Charles Orams, Linda Elizabeth Orams, Judgment of the Grand Chamber of 28 April 2009, [2009] ECR I-3571*, 47 COMMON MKT. L. REV. 1123 (2010).

direct involvement in territorial disputes. Although the CJEU avoided the megapolitical nature of the dispute, its rulings about exporting products from Northern Cyprus into the EU have had significant effects for economic realities and the welfare of the civilian population in the region. The comparisons with other internationally contested territories show that the CJEU's rulings are also considered as an indirect political message of support (or lack thereof) for the independence struggles concerned.<sup>70</sup>

A second case study concerns the CJEU adjudication regarding the import of products from occupied territories in the EU's Mediterranean neighborhood. Within the Euro-Mediterranean Partnerships (Euromed), the EU has concluded Association Agreements with several partners—the Palestinian Authority (1997), Tunisia (1998), Morocco (2000), Israel (2000), Egypt (2004), Algeria (2005), and Lebanon (2006). However, no such agreement exists with the authorities of Western Sahara. The territorial disputes in the EU's Mediterranean neighborhood arose before the CJEU in the context of the import of products from occupied territories into the EU.

In the landmark case *Brita* (2010), a controversy arose around the treatment of products originating in Israeli settlements in the West Bank, Gaza Strip, East Jerusalem, and the Golan Heights—areas that have been placed under Israeli administration since 1967.<sup>71</sup> Israeli authorities issued a movement certificate for home water-carbonators. Although the products were produced in the West Bank, the certificates attested to the Israeli origin of these products. Upon import to the EU, the German authorities refused to acknowledge this origin as a basis for entitlement to preferential treatment under the EU-Israel Agreement. The company Brita challenged this decision in German courts and eventually obtained a preliminary ruling referring the case to the CJEU.

In this case, the CJEU had to decide whether the EU-Israel Agreement or the EU-Palestinian Authority Agreement would be applicable to products originating in the occupied territories.<sup>72</sup> As both Agreements provide for the same preferential treatment, the national judges could have also just decided not to apply tariffs to the products in question, without specifying which Agreement to apply.<sup>73</sup> This would have allowed the CJEU to avoid a politically controversial topic of delimitation between the scopes of the EU-Israel Agreement and the EU-Palestinian Authority Agreement. The CJEU, however, did not choose this

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70. THE LEGALITY OF ECONOMIC ACTIVITIES IN OCCUPIED TERRITORIES: INTERNATIONAL, EU LAW AND BUSINESS AND HUMAN RIGHTS PERSPECTIVES (Antoine Duval and Eva Kassoti eds., Routledge Research in International Economic Law, pub. 2020); François Dubuisson and Ghislain Poissonnier, *Sahara occidental : Entre la diplomatie agressive de Donald Trump et celle, plus policée, de l'Union européenne, la différence n'est pas aussi grande*, LE MONDE (Dec. 28, 2020), [https://www.lemonde.fr/idees/article/2020/12/28/sahara-occidental-entre-la-diplomatie-agressive-de-donald-trump-et-celle-plus-policee-de-l-union-europeenne-la-difference-n-est-pas-aussi-grande\\_6064655\\_3232.html](https://www.lemonde.fr/idees/article/2020/12/28/sahara-occidental-entre-la-diplomatie-agressive-de-donald-trump-et-celle-plus-policee-de-l-union-europeenne-la-difference-n-est-pas-aussi-grande_6064655_3232.html).

71. For more recent rulings on the topic, see, e.g., Case C-363/18, *Organisation Juive Européenne & Vignoble Psagot Ltd v. Ministre de l'Économie et des Finances*, 2019.

72. Opinion of AG Bot, *supra* note 64, at ¶ 5.

73. *Id.* at ¶¶ 105–06.

path.<sup>74</sup> This shows that, within its technical limits of jurisdiction, the CJEU does not shy away from addressing the effects of occupation on the economic rights of the civilian population.

The CJEU ruled that products from the West Bank fall outside of the scope of application of the EU-Israel Agreement.<sup>75</sup> Advocate General Bot submitted that choosing the “pragmatic” solution would have the consequence of practically voiding the EU-Palestinian Authorities Agreement.<sup>76</sup> Both the Advocate General and the CJEU relied upon the aims pursued by the external action of the EU vis-à-vis the PLO in order to determine the importance of the EU-PLO Agreement. AG refers to Art. 1 of the EU-PLO Agreement, which states its objectives.<sup>77</sup> It shall inter alia contribute to “social and economic development of the West Bank and Gaza Strip and to encourage regional cooperation with a view to the consolidation of peaceful coexistence and economic and political stability”.<sup>78</sup> He also relied on a communication by the Commission stating that the EU-PLO Agreement is supposed to rectify the “anomaly” which means that the occupied territories do not enjoy the same preferential treatment for their goods as their neighboring states.<sup>79</sup> In its judgment, the Court even expressly stated the EU’s (Commission’s) position with regard to the goods stemming from the occupied territories:

The European Union takes the view that products obtained in locations which have been placed under Israeli administration since 1967 do not qualify for the preferential treatment provided for under that agreement.<sup>80</sup>

This approach shows that the Court can harvest political support for its rulings already at the moment of their issuing.

Similar issues arose in the cases concerning products from Western Sahara—a non-self-governing territory occupied by Morocco. The EU–Morocco Association Agreement has been *de facto* applied to products imported from Western Sahara. Representatives of Western Sahara have brought several cases to the CJEU challenging this practice.<sup>81</sup> In December 2016, the Court ruled that the EU-Morocco Association Agreement was not applicable to Western Sahara, and hence denied Front Polisario (recognized as representatives of Western Sahara) standing to bring an annulment case. In this decision, the CJEU relied on its own interpretation of international law to determine that the Moroccan occupation is not in conformity with the principle of self-determination.<sup>82</sup> This

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74. CJEU, C-386/08, *Brita*, 25.02.2010, ¶ 53.

75. *Id.*

76. Opinion of AG Bot, C-386/08, *Brita*, 20.10.2009, ¶ 125.

77. *Id.* at ¶ 123.

78. *Id.*

79. *Id.* at ¶ 124.

80. *Brita*, *supra* note 76, at ¶ 64.

81. See Case T-512/12, *Front Polisario v. Council*, 2015; Case C-104/16, *Council v. Front Polisario*, 2016; Case C-266/16 *Western Sahara Campaign UK v. Comm’rs for Her Majesty’s Revenue and Customs & Sec’y of State for Env’t, Food, and Rural Affs.*

82. Jed Odermatt, *Council of the European Union v. Front Populaire Pour La Libération De La*

reasoning, however, presumes that the EU could have not violated international law, and therefore that Front Polisario could not be concerned by the EU-Morocco Agreement. In February 2018, the Court repeated this interpretation of the scope of application of the agreement in a case concerning the import of products to the UK. It also admitted that it could review the legality of an international agreement in the course of a preliminary ruling procedure.

Contrary to *Brita* (2010), the rulings regarding Western Sahara were not in line with the political will of the majority of the EU member states in the Council who wished to apply the economic cooperation with Morocco also to the territory of Western Sahara. On March 3rd, 2019, the Council concluded a new Sustainable Fisheries Partnership Agreement (SFPA) that expressly foresees application to the waters of Western Sahara.<sup>83</sup> The new SFPA could be considered as a challenge to the authority of the CJEU's rulings on the issue. The understanding of the CJEU's approach to the matter of importing products from Western Sahara by the Commission and the Council seems rather instrumental. The new agreement clarified the intention that it should apply to the waters of Western Sahara. Clearly, the Council does not perceive the application of a preferential tariff regime to products from Western Sahara as a violation of international law nor as a *de facto* recognition of Morocco's sovereignty over Western Sahara. The General Court, which in this case serves as a first-instance EU court, has decided to annul the SFPA as the Council has infringed the obligation to comply with the case-law of the CJEU concerning the rules of international law applicable to the agreements at issue.<sup>84</sup> The case will be appealed to the CJEU. Following the judgment, the EU and Morocco issued a joint statement emphasizing that they "will take the necessary measures to ensure the legal framework which guarantees the continuity and stability of trade relations between" them.<sup>85</sup> This potential stand-off between the CJEU and the EU's political institutions illustrates the mega-political nature of this TDbP.

When analyzing the impact of the framing adopted by the CJEU when dealing with these commercial TDbP, this analysis so far has shown that decisions were largely determined by the scope of jurisdiction assigned in EU law. The CJEU has been careful in staying within the narrowly defined limits of its

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*Saguia-El-Hamra Et Du Rio De Oro (Front Polisario)*, 3 AM. J. INT'L L. 731, 735 (2017).

83. *EU-Morocco: Council Adopts Sustainable Fisheries Partnership Agreement*, COUNCIL OF THE EU PRESS RELEASE, <https://www.consilium.europa.eu/en/press/press-releases/2019/03/04/eu-morocco-council-adopts-sustainable-fisheries-partnership-agreement/> [<https://perma.cc/2GHZ-7CM6>] (Mar. 4, 2019). See also Council Decision on the Conclusion of the Sustainable Fisheries Partnership Agreement Between the European Union and the Kingdom of Morocco, Council of the European Union (Nov. 27, 2018) <https://data.consilium.europa.eu/doc/document/ST-14367-2018-INIT/en/pdf>.

84. Case T-279/19, *Front Polisario v. Council*, 2021; Joined Cases T-344/19 and T-356/19, *Front Polisario v Council*, 2021.

85. *Joint Statement by Minister of Foreign Affairs, Nasser Bourita and Mr. Josep Borrell, High Representative of the EU for Foreign Affairs and Security Policy*, KINGDOM OF MOROCCO MINISTRY OF FOREIGN AFFAIRS (Sept. 29, 2021), <https://www.diplomatie.ma/en/joint-statement-mfa-nasser-bourita-and-mr-josep-borrell-high-representative-eu-foreign-affairs-and-security-policy> [<https://perma.cc/W367-6R93>].

jurisdiction and underlining those limits. Contrary to the CACJ, it did not use those politically sensitive cases to expand the scope of its powers. The CJEU did, however, rule on commercial disputes arising from the background of territorial disputes. Those usually arose in procedural contexts excluding the parties to the actual territorial disputes. The CJEU rulings did have a significant effect on the trade and economic rights of the population residing in the contested areas. As a result, the CJEU rulings were subject rather to academic criticisms, but did not trigger wider political backlash. A significant exception is the case of Western Sahara, where the CJEU's ruling applying international law was not aligned with the political view represented by the EU member states in the Council. In this context, we might be witnessing a struggle between the political and judicial institutions over how to determine the treatment of products imported to the EU from Western Sahara. This might even lead to some institutional disputes dealing by proxy with the Western Sahara conflict in the future, if one of the EU member states or institutions decided to challenge the legality of such an international agreement.

#### IV

#### Rights-Based and Institutional Territorial Disputes by Proxy in the Practice of the European Court of Human Rights

The ECtHR can be expected to be dealing with the rights-based type of proxy for territorial disputes. The ECtHR clearly does not have jurisdiction to decide over the territorial boundaries of the High Contracting parties to the Convention. As a human-rights court, it does, however, provide broad access for individual complaints regarding political and economic rights of the civilian population residing in the area concerned by an international territorial conflict. The ECtHR, in its vast case law, has dealt with many territorial and armed conflicts and developed its own doctrine about extra-territorial application of human rights and effective control.<sup>86</sup> The focus of this analysis lies with the rights-based cases arising in the context of the territorial conflict in Cyprus. This makes it possible to examine to what extent the rights-based framing can be an effective proxy for avoiding the mega-political nature of the dispute, on the one hand, and stabilizing the situation of the civilian population, on the other hand.

An important procedural aspect of the ECtHR jurisdiction is the fact that the court in Strasbourg deals mostly with individual human-rights complaints brought by the victims after they have exhausted all the national remedies. The ECtHR can, however, also adjudicate inter-state disputes, which tend to address broader questions and more systemic violations.<sup>87</sup> This part showcases how in the case of Northern Cyprus, such inter-state proceedings are more likely to place

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86. See generally Marko Milanovi and Tatjana Papić, *The Applicability of the ECHR in Contested Territories*, 67 INT'L & COMPAR. L. Q. 779 (2018).

87. See generally ISABELLA RISINI, *THE INTER-STATE APPLICATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS: BETWEEN COLLECTIVE ENFORCEMENT OF HUMAN RIGHTS AND INTERNATIONAL DISPUTE SETTLEMENT* (2018).

the court on the thin ice of mega-politics due to the setting involving the highest representatives of both parties to a territorial dispute. While these cases still represent a very small portion of the ECtHR's docket, we have experienced a rise in such applications in the recent years, leading some commentators to talk about a "golden age" of inter-state complaints."<sup>88</sup>

#### A. Property Rights and Institutional Disputes Arising from the Cyprus Cases

The territorial dispute in Cyprus discussed above in Part III.B., gave rise to a number of mega-political, rights-based TDbP before the ECtHR. The cases can be broadly divided into two categories: individual complaints focusing on the violation of the human right to enjoy private property, and the inter-state cases raising a broader scope of human rights violations. Turkey has perceived both type of cases as a "political attack" and, in its responses to the judgments, continued to emphasize the ongoing inter-communal negotiations, questioning the ECtHR's legitimacy to intervene in the territorial dispute.<sup>89</sup>

The analysis here focuses on the key contentious cases before the ECtHR. These were brought to the Court as leading cases on new questions of law. This first relevant case to discuss in this context is the *Loizidou* case, in which the Court was asked to rule on the compatibility with the Convention of the deprivation of the applicant, Mrs. Titina Loizidou, of access to her property in Northern Cyprus as a consequence of the Turkish occupation and to grant compensation for the lost access to their property.<sup>90</sup> Property is protected in the ECHR under Art.1 of Protocol 1 of the Convention, which has been ratified by Turkey. The specific legal question, however, reveals the politically fraught nature of the dispute as expressed by Justice Bernhard in its dissenting opinion. According to her: "A unique feature of the present case is that it is impossible to separate the situation of the individual victim from a complex historical development and a no less complex current situation."<sup>91</sup> The *Loizidou* case, in fact, pushed the ECtHR to provide an answer as to whether Turkey was exercising extraterritorial jurisdiction with regard to Northern Cyprus; a question which is perhaps the most contentious and debated issue of admissibility before the Strasbourg Court.<sup>92</sup>

The ECtHR ruled separately on the substance of the legal dispute, in 1996, confirming that Turkey had violated the right to private property by refusing Mrs.

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88. Justine Batura & Lukas Kleinert, *A 'Golden Age' of Inter-State Complaints?: An Interview with Isabella Risini*, VÖLKERRECHTSBLOG (Sept. 9, 2020).

89. Kudret Özersay & Ayla Gürel, *The Cyprus Problem at the European Court of Human Rights*, in *CYPRUS: A CONFLICT AT THE CROSSROADS* 273 (Thomas Diez & Nathalie Tocci eds., 2013).

90. *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995); *Loizidou v. Turkey*, 23 Eur. Ct. H.R. 513 (1996).

91. *Loizidou v. Turkey*, 23 Eur. Ct. H.R. 513 (1996) (Bernhard, J. dissenting).

92. In this regard, the ECtHR developed a test of "effective control" applied to establish when states are responsible for violations happening outside of their territory. See *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. H.R. Rep. 589 (2011) (the Court argued that Turkey exercised direct effective control over Northern Cyprus through its occupation by Turkish military troops).

Loizidou and other refugees from Northern Cyprus access to their property. The Turkish side has been critical of the Court's engagement in the process, pointing to the ongoing inter-communal negotiations under the auspices of the UK. They pointed to the fact that the Turkish community of Cyprus has no standing before the ECtHR in a case where Turkey was the respondent state.<sup>93</sup> Such criticism already signaled the long path to the full enforcement of the Court's unfavorable ruling.

The enforcement of this case is often cited as an example of the limited success of the ECtHR.<sup>94</sup> At first, the Turkish government was opposed to paying the damages as a matter of principle. As published in 1999 on the website of the Turkish Ministry of Foreign Affairs, the main concerns of the Turkish government revolved around the effects of the ruling on the *de facto* dormant bilateral peace negotiations led by the UN.<sup>95</sup> The organ responsible for enforcement of ECtHR's judgments is not the court itself, but the Committee of Ministers of the Council of Europe. This Committee has called several times on Turkey to comply with the *Loizidou* ruling, exercising all the political pressure that it has at its disposal.<sup>96</sup> Eventually, in 2003, seven years after the judgment, Turkey paid Loizidou compensation for temporary deprivation of access to property, amounting to over \$1 million.<sup>97</sup> However, Loizidou did not regain access to her property in Northern Cyprus. The actual violation of her fundamental right to enjoy her property persisted. In 2005, the Committee of Ministers resumed the supervision of the implementation of the merits of the case by Turkey. In June and October 2007, the Committee "noted with concern that to date the Turkish authorities had not made any concrete proposal to the applicant" and urged them to adopt measures allowing the applicant to have her property again at her disposal.<sup>98</sup> This situation in which the respondent state pays the compensation but does not actually cease the substantive violation of human rights, showcases systemic problems in the enforcement of ECtHR's judgments.<sup>99</sup>

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93. Özersay, *supra* note 89.

94. Rick Lawson, *How to Maintain and Improve Mutual Trust amongst EU Member States in Police and Judicial Cooperation in Criminal Matters? Lessons from the Functioning of Monitoring Mechanisms in the Council of Europe*, <http://hdl.handle.net/10900/66771> [<https://perma.cc/XYE8-DS2Q>] (2009).

95. Zaim M. Necatigil, *The Loizidou Case: A Critical Examination*, SAM PAPERS (Nov. 1999), [http://www.mfa.gov.tr/the-loizidou-case\\_a-critical-examination-by-zaim-m\\_necatigil\\_november-1999.en.mfa](http://www.mfa.gov.tr/the-loizidou-case_a-critical-examination-by-zaim-m_necatigil_november-1999.en.mfa) [<https://perma.cc/FEG3-76PJ>].

96. Council of Europe Committee of Ministers, *H54-1 Loizidou Against Turkey – Judgments of 18/12/96 (merits) and 28/07/98 (just satisfaction): Interim Resolutions DH(99)680, DH(2000)105 and ResDH(2001)80* (Oct. 15, 2003), <https://rm.coe.int/16805decda> [<https://perma.cc/Z979-QMBL>].

97. *Turkey Compensates Cyprus Refugee*, BBC NEWS, (Dec. 2, 2003), <http://news.bbc.co.uk/2/hi/europe/3257880.stm> [<https://perma.cc/685E-P4KY>].

98. *Annual Report on the Supervision of the Execution of Judgments of the European Court of Human Rights* (2007), <https://static1.squarespace.com/static/55815c4fe4b077ee5306577f/t/5a380ca99140b764371bc0f7/1513622722276/CM-annual-report-2007-en.pdf.pdf> [<https://perma.cc/CL9B-JVCH>] [hereinafter *Report*].

99. Fiona de Londras & Kanstantsin Dzehtsiarou, *Mission Impossible? Addressing Non-Execution Through Infringement Proceedings in the European Court of Human Rights*, 66 INT'L & COMPAR. L. Q. 472, 474 (2017).

The *Loizidou* judgment was followed by a series of similar complaints, brought by groups of applicants deprived of access to their properties in Northern Cyprus.<sup>100</sup> The ECtHR has relied on the same legal framing, assuming the responsibility of Turkish authorities for the human rights violations happening on the ground in Northern Cyprus. The pattern of compliance was also comparable; although the victims could obtain compensation as a result of political pressure within the Council of Europe, the violations were not actually ceased.<sup>101</sup>

The broadest engagement of the ECtHR with the Cyprus dispute, however, took place in the inter-state case decided by the Strasbourg Court in 2001, *Cyprus v. Turkey*.<sup>102</sup> In this case, the Cypriot government brought a case against Turkey for human rights violations resulting from the 1974 territorial conflict. The alleged violations can be summarized under four groups:

1. rights of Greek-Cypriot missing persons and their relatives;
2. home and property rights of displaced persons;
3. rights of enclaved Greek Cypriots in Northern Cyprus;
4. rights of Turkish Cypriots and the Gypsy community in Northern Cyprus.

The human rights violations raised in this case clearly show that the questions that the ECtHR was facing related not only to state sovereignty in the form of territorial integrity and exercise of authority over certain territories, but also to highly controversial divisions and minorities within the island's population. The island population included groups of different ethnicities. Part of the Cypriot government's allegations was that the ethnically Turkish population in the northern part of the island occupied by Turkey was deprived of their human rights and even human dignity due to their treatment by the occupying forces and increased resettlement of Turkish population from the mainland.<sup>103</sup> The fact that the Cypriot government was standing up for the rights of not only the Greek-Cypriot population, but also for the Turkish population created a direct link to internal political debates. Even though this procedure was technically an inter-state dispute, the scope of arguments raised before the Court goes beyond a dispute on the international plane. The human rights arguments involve also taking a stance on issues highly contested on the domestic political and social planes.

The high volume of contestation amongst the judges hearing the case shows the political salience of the *Cyprus v. Turkey* case. Five personal changes occurred on the judicial bench during this procedure. Four judges were removed due to objections raised by the parties.<sup>104</sup> Three Turkish judges had to be

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100. See *Yasa v. Turkey*, App. No. 44827/08, Eur. Ct. H.R. (1998); *Djavir An v. Turkey*, App. No. 20652/92, Eur. Ct. H.R. (2003); *Xenides-Arestis v. Turkey*, App. No. 46347/99, Eur. Ct. H.R. (2005).

101. *Report, supra* note 98.

102. App. No. 25781/94, Eur. Ct. H.R. (2001).

103. *Id.* at ¶¶49–55.

104. *Id.* at ¶8.

replaced. First, Mr. R. Türmen withdrew. Second, his replacement, Mr. S. Dayioglu was challenged by the Cypriot government, in 1999, noting that “Mr Dayioglu had communicated to the President his intention to withdraw from the case.” Third, Mrs. N. Ferdi was also challenged by the Cypriot government. Two Cypriot judges were also replaced. First, Turkey objected to Mr. L. Loucaides. The second change was not due to the politically contested nature of the case, as Mr. Hamilton passed away on 29 November 2000, and the Cypriot government appointed Mr. S. Marcus-Helmons instead. In the end, the *ad hoc* judges appointed in respect of Turkey and Cyprus (K. Fuad and S. Marcus-Helmons) both wrote dissenting opinions in the case.

The highly contentious nature of the dispute was also confirmed by the fact that the written and oral procedure before the Court happened without the participation of the defendant state – Turkey. The arrangements for the procedure were made by the Court’s President in consultation with the parties.<sup>105</sup> The deadline for the submission of written memorials was set for 31 March 2000. With a delayed letter the Turkish government requested an extension of the deadline until 24 July 2000. In response, the President, having consulted the Grand Chamber, extended the deadline but only until 5 June 2000. The Turkish authorities did not submit any memorial by that deadline and did not appear at the oral hearings in Strasbourg.<sup>106</sup>

In its 2001 decision, the ECtHR condemned Turkey for a plethora of human rights violations relating to the situation that had existed in Cyprus since the start of Turkey’s military operations in Northern Cyprus in July 1974. These included the right to life and prohibition of inhumane and degrading treatment with regard to missing persons, the right to private life and property with regard to displaced persons, and violation of freedom of religion in respect of Maronites living in Northern Cyprus.<sup>107</sup> Importantly, the ECtHR did not confirm any of the alleged violations in respect of the rights of Turkish Cypriots in Northern Cyprus. As a result, the Court did not touch on the question that was more divisive on the internal domestic rather than the international plane. The ruling was not received well by the Turkish Government, which expressed its discontent in a press release which claimed that the Court’s decision “is contrary to the realities in Cyprus, devoid of legal basis, unjust and impossible to be implemented by Turkey.”<sup>108</sup>

As a follow up to this first ruling, in 2010 the Cypriot government submitted an additional claim asking for damages in the name of the groups of its citizens that had suffered from the human rights violations. This led to the 2014 judgment of the ECtHR, by means of which the Court awarded Cyprus 30 million EUR for

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105. *Id.* at ¶9.

106. *Id.* at ¶12. In its final judgment, the Court took into account the arguments that the Turkish government had presented in its earlier pleadings before the Commission.

107. *Id.*

108. *Press Release on the Cyprus v. Turkey Decision of the ECHR*, TURKISH MINISTRY OF FOREIGN AFFAIRS (May 10, 2001) [http://www.mfa.gov.tr/press-release-on-the-cyprus-v\\_-turkey-decision-of-the-echr\\_br\\_may-10\\_-2001.en.mfa](http://www.mfa.gov.tr/press-release-on-the-cyprus-v_-turkey-decision-of-the-echr_br_may-10_-2001.en.mfa) [<https://perma.cc/S32C-DW5V>].

non-pecuniary damage suffered by the relatives of the missing persons and 60 million EUR for the Greek Cypriots enclaved in the Karpas peninsula.<sup>109</sup> The joint concurring opinion of judges Zupan i, Gyulumyan, David Thór Björgvinsson, Nicolaou, Sajó, Lazarova Trajkovska, Power Forde, Vu ini , and Pinto de Albuquerque emphasizes the innovative nature of this ruling in terms of enforcement of judgments of human rights courts. Although the enforcement of ECtHR judgments is generally still in the hands of the Committee of Ministers of the Council of Europe, in this case the Court took a proactive role in guaranteeing that its ruling could not be ignored on the ground. The judgment ends, however, with a distressed note: “The Court has spoken: it remains for it to be heard.”

The follow-up was also ensured indirectly, through individual applications. The ECtHR has been consistent in ruling upon human rights violations resulting from the Cyprus conflict. In its judgment on the *Güzelyurtlu and others v. Cyprus and Turkey* case of January 2019, the ECtHR has found, for the first time, a violation of Article 2 ECHR on the sole basis of Turkey’s failure to cooperate with the Republic of Cyprus on criminal matters. This was a case brought by individual applicants against both Cypriot and Turkish authorities.

The *Loizidou v. Turkey* and *Cyprus v. Turkey* rulings have not been fully implemented by Turkey. The Committee of Ministers has not closed their procedure with regard to those two judgments, which means that full implementation has not taken place. The Committee of Ministers deals with each of the violations separately. It has declared satisfactory certain reforms implemented by the Turkish authorities, in particular with regard the right to education and religious freedom of the Greek Cypriots in Northern Cyprus.<sup>110</sup> The EU has also been contributing to the pressure on Turkey to comply with the Strasbourg judgments. The European Commission issues a yearly round of reports on progress of candidate countries to the EU. In its 2019 report on Turkey, the Commission points out the non-implementation of judgments of ECtHR as one of the serious problems in Turkey-EU relations.<sup>111</sup> The Council, composed of ministers from the EU member states, followed up on this criticism in its yearly round on enlargement package, stating: “The Council notes that Turkey continues to move further away from the European Union . . . the Council notes that Turkey’s accession negotiations have therefore effectively come to a standstill.”<sup>112</sup>

The analysis of the cases related to the territorial dispute about Northern Cyprus before the ECtHR illustrates the possible escalation of rights-based

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109. *Cyprus v. Tukey*, App. No. 25781/94, Eur. Ct. H.R. (Dec. 12, 2014).

110. Resolution Concerning the Judgment of the European Court of Human Rights in the Case of Cyprus Against Turkey, CM/ResDH (2007).

111. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM (2019) 260 final (May 29, 2019).

112. *Council Conclusions on Enlargement and Stabilization and Association Process*, COUNCIL OF THE EU (June 18, 2019), <https://www.consilium.europa.eu/en/press/press-releases/2019/06/18/council-conclusions-on-enlargement-and-stabilisation-and-association-process/> [<https://perma.cc/R8PF-FP6Z>].

territorial disputes by proxy into a mega-political dispute. This can happen due to several factors. The inter-state procedure provides a forum for a high-level exchange between the two parties of the conflict. The mega-politics leads the states to directly oppose the implementation of any judgments from the courts relating to a particular territorial conflict. The gradual development of the case law amounts to systemic judgments about the illegality of the occupation by one side of the conflict, which stretches the jurisdiction competences of the ECtHR. The ECtHR is, however, also an important case study for the strategies that courts can deploy to avoid or slow down such an escalation. The ECtHR has interpreted its standing rules restrictively. It has been consistent in a human-rights framing of the disputes before it and has focused on stabilizing rather than solving the conflict.

## V

### THE INTERNATIONAL COURTS' DILEMMA

The analysis conducted above provides several elements of interest to understand what happens when ICs address mega-political issues linked to territory. First, it underlines the important tension inherent to the ICs adjudicating territorial disputes by proxy, perhaps more than in other instances of ICs dealing with mega-political issues. Although the cases brought before these ICs are, in point of law, not concerned with territory, their nature is such that the courts cannot avoid pronouncing themselves on some aspects, if not on the merit, of the underlying territorial dispute. This inherent tension, in turn, allows the parties to the disputes, especially the governments on the losing side, to de-legitimize the Courts' intervention in regional and national political arenas, claiming that the ICs have operated beyond their formally delegated powers. This happened both in Central America and in Europe and constitutes an important aspect of the adjudication of mega-political TDbP. In Central America, both the Honduran and the Costa Rican Governments alleged that the CACJ acted *ultra vires* when pronouncing on the disputes concerning the Caribbean Sea and the Rio San Juan. In addition to this, the two Governments—especially the Costa Rican one—have campaigned against the CACJ at the national level, using the Court's decisions to influence the public against the Court. Similarly, the Turkish Government has been framing the ECtHR as an actor impeding the peace process through inter-communal negotiations under international auspices. In short, the case of regional courts adjudicating TDbP reveals how their engagement is per se problematic and may be a necessary condition for exacerbating, rather than solving, the mega-political conflict.

Beyond the jurisdictional problem, the analysis here shows that an IC's way of engaging with TDbP is important for avoiding negative repercussions. In particular, the involvement of ICs in the mega-politics of territory requires the judges to strike a balance between universal justice and the potential political consequences of their ruling if they want to avoid triggering a backlash that exacerbates the mega-political nature of the disputes submitted to them. This is

revealed particularly by the comparative analysis between the Central American and the European experiences. As described above, the two Central American ICs did not hesitate to provide bold rulings in almost all the TDbP presented to them. The cases between Honduras and Nicaragua largely failed to lower the tension between the two States and the CACJ's intervention neither stopped the two States from threatening each other with military actions nor provided a solution to the contested borders. The Costa Rican reaction to the CACJ's ruling in the case against Nicaragua also reveals the limited authority of the Court on this matter. If the Government of Nicaragua claimed an incontestable victory, Costa Rica refused to implement the ruling of the Court, even denouncing the CACJ for its alleged partiality.<sup>113</sup>

In contrast, the two European courts took a more moderate path by reframing the issues to fall squarely within their competences. The CJEU decided mostly on the recognition of judgments and products coming from the contested territories. The rulings on those questions provided possibilities for states to comply with the core of the judicial rulings without “losing face” in terms of concessions in the territorial dispute. At the same time, the rulings do stabilize the situation and affect the state of affairs on the ground, allowing the contested entities to export products in their own rights and benefit from the economic profits of those exports. We can observe that most of the challenges to the CJEU's adjudication on the matter come from the academic debates on its approach to the import of products from contested territories. They do become more politically relevant as the CJEU starts developing a line of jurisprudence applying to various territorial conflicts in one region – Palestine, Western Sahara, and Northern Cyprus. This is one of the underlying reasons for the current stand-off between the judicial and political institutions in the EU regarding import of products from Western Sahara. Although the political institutions prefer to differentiate their approach on a case-by-case basis, the CJEU takes more of a principled position. It remains to be seen whether and how this institutional confrontation will unfold, but the present case study does show how the mega-political nature of a dispute can also evolve over time and over several cases that have a political connection. Similar considerations can be made in relation to the ECtHR, whose jurisprudence in the Northern-Cyprus cases showcases one of the key avoidance mechanisms that regional courts can deploy to avoid ruling on controversial cases and limit their involvement in mega-politics, namely, a restrictive interpretation of their admissibility requirements. The court has also showed judicial restraint. When faced with arguments about the situation on the ground in the conflict, the ECtHR recalls that questions of fact are to be settled by the Commission and relies strictly on its findings.<sup>114</sup>

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113. *Corte Centroamericana reta a Costa Rica a probar favoritismo por Nicaragua*, LA NACIÓN (Jan. 11, 2012), <https://www.nacion.com/archivo/corte-centroamericana-reta-a-costa-rica-a-probar-favoritismo-por-nicaragua/O44LEMK35ZFEXLJD55WSJQ6Z6Q/story/> [<https://perma.cc/RAZ3-4FMR>].

114. *Loizidou v. Turkey*, App. No. 15318/89, ¶56 Eur. Ct. H. R. (1996).

All of the above, in our view, shows that while it is true that the counter-majoritarian role of ICs becomes extremely contested when these are seized with issues of mega-politics, judicial intervention can still play a decisive, meaningful role. What the case studies show is that certain ways of intervening in the mega-politics of territory are more fruitful than others. For instance, the experience of the CACJ shows that a bold intervention, often directed to the core of the territorial conflict, is not advisable. Like other mega-political conflicts, TDbP are concerned with polycentric problems with many layers of complexity—social, political, and even historical—and involving several actors with opposing interests. Hence, a linear, bold, and frontal ruling cutting across the core of the sensitive issues at stake may result in more harm than good. Another way to put this is that when getting involved in mega-political TDbP, ICs would benefit from deploying a number of judicial and extrajudicial strategies.<sup>115</sup> These can either be linked to the overall framing of the dispute adjudicated or aimed at containing or slowing down the process of a judicial dispute becoming mega-political. An obvious candidate is the well-known strategy of legal diplomacy, by means of which ICs rule upon politically loaded cases by stating bold legal principles, but simultaneously and carefully weigh the costs that their decisions may incur for other actors.<sup>116</sup> A particularly helpful form of legal diplomacy deployed by both the CJEU and the ECtHR while ruling on TDbP consisted of giving restrictive interpretations of the rules of standing and jurisdiction to limit the salience of the cases brought before them. A further, and somewhat similar, technique entails focusing on the discrete legal aspects of the broader disputes to avoid direct embroilment with the core aspects of the case. Another crucial technique is that of reaching out extrajudicially for relevant audiences to develop the court's support. This may take the form of an inter-institutional dialogue between various regional and national organs of the organization in which the IC is entrenched or seek to spark public deliberation around the issue to bring the actual matter at stake to the forefront. Although this may not always be possible due to the political and legal contexts in which the adjudication of TDbP takes place, our comparative study of Europe and Central America points to the fact that some form of judicial compromise must be struck when dealing with the mega-politics of territory. For instance, this article has shown how the CJEU has repeatedly harvested the political support for its rulings already at the moment of their issuing by calling into cause the European Commission and, more generally, the other institutions of the EU when facing extremely complex and heated questions related to territory. Likewise, the CACJ has sought the support of its regional Parliament when it foresaw that its rulings could trigger negative governmental responses. In short, the involvement of ICs in the mega-politics of

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115. See Salvatore Caserta & Pola Cebulak, *Resilience Techniques of Regional Economic Courts in Times of Crisis*, 70 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 737 (2021).

116. Mikael Rask Madsen, *Legal Diplomacy: Law, Politics and the Genesis of Postwar European Human Rights*, in HUMAN RIGHTS IN THE TWENTIETH CENTURY: A CRITICAL HISTORY (S.L. Hoffmann ed. 2011).

territory reveals once again the ICs' dilemma when adjudicating highly polarizing and controversial issues. Although tempting, bold and direct intervention is not always recommended, as this may lead to actually worsening the cleavages underlying the conflict that the IC was called upon to solve. At the same time, however, ICs cannot always avoid engaging with the disputes when the stakes are high. In this respect, it is crucial that ICs provide something that stakeholders value and that would give them leverage to support the IC regardless of the national or international polarization around the specific issue in point.

## VI

### CONCLUSION

In the twenty-first century, the global governance architecture has grown such that a multiplicity of judicial actors can be engaged with the same territorial dispute. They include regional economic courts, regional human rights courts, the ICJ, and bilateral arbitration. This article has focused on regional courts, which do not have the jurisdiction to directly decide on the territorial boundaries of the states but deal with TDbP. The analysis focused in particular on three types of disputes before regional courts. First, commercial disputes regarding trade and branding of products from the contested territories are crucial for the economic viability of any separatists' projects. Second, rights-based disputes focusing on individual rights are crucial for guaranteeing that the civilian population can live in human conditions, despite the conflict. Third, institutional disputes raise the question of delegating political responsibility of dealing with the conflict.

The territorial disputes by proxy are linked with particular procedural arrangements before the regional courts, where cases are brought by individual applicants or national courts. As a result, it often happens that a court would deal with a question regarding a territorial conflict without one or both parties to that conflict being represented in the judicial proceedings. Although it might seem that this would negatively affect the legitimacy of such an adjudication, in practice this arrangement allows the courts to maneuver around the potentially mega-political nature of a dispute, which would otherwise prevent them from being effective. It appears that what triggers the backlash is the presence of the highest diplomatic representative of a state before an international court and the adversary nature of proceedings. Regional courts can also adjudicate inter-state disputes and those tend to be mega-political, even if handled by legal proxy. It is only in those disputes that the legitimacy concern resulting from the lack of jurisdiction of those courts over territorial disputes becomes relevant.

We conclude that it is an extremely difficult task for the regional courts to have influence over stabilizing the civilian situation around a territorial dispute. International adjudication has proven effective in avoiding armed conflicts and settling territorial disputes on the international plane. International adjudication directly dealing with territorial disputes, however, involves inter-state judicial bodies with express competences to adjudicate upon such disputes and guarantee both parties influence over the appointments and the procedure. Importantly,

such inter-state adjudication is also very time consuming. Therefore, while the territorial disputes remain unsolved, irreparable harm can happen to the economic development and rights of the civilian population in the region. TDbP create a possibility for international courts to affect the commercial, institutional and human-rights situation in such conflict regions. If they manage to avoid the mega-political framing of a dispute and guarantee the implementation of their rulings relating to commercial issues, human rights, and institutional competences, they could effectively improve the human security situation in a conflict zone without directly deciding upon a territorial dispute. The analysis of the selected case studies from the CACJ, CJEU and ECtHR, shows how difficult this task is for regional courts. Those new-generation international courts appear to still trigger backlash, even if they deal with the territorial disputes only by proxy. The irreconcilable nature of a conflict can be brought up either more immediately, by the regional court's strategy of using highly sensitive cases as opportunities to extend their own jurisdiction, or by the adversary nature of inter-state cases. Alternatively, it can be brought up over time, as a court deals with series of cases regarding various conflicts, which subject its jurisprudence to political debates. Those cases of regional courts dealing with territorial disputes by proxy show how the mega-political nature of a question is related to its substance, and the institutional and procedural strategies of avoiding and de-politicizing those questions are clearly limited, but not entirely ineffective at times.