ASSER INSTITUTE
Centre for International & European Law

Founded in 2008, the Centre for the Law of EU External Relations (CLEER) is the first authoritative research interface between academia and practice in the field of the Union's external relations. CLEER serves as a leading forum for debate on the role of the EU in the world, but its most distinguishing feature lies in its in-house research capacity, complemented by an extensive network of partner institutes throughout Europe.

Goals

- To carry out state-of-the-art research leading to offer solutions to the challenges facing the EU in the world today.
- To achieve high standards of academic excellence and maintain unqualified independence.
- To provide a forum for discussion among all stakeholders in the EU external policy process.
- To build a collaborative network of researchers and practitioners across the whole of Europe.
- To disseminate our findings and views through a regular flow of publications and public events.

Assets

- Complete independence to set its own research priorities and freedom from any outside influence.
- A growing pan-European network, comprising research institutes and individual experts and practitioners who extend CLEER's outreach, provide knowledge and practical experience and act as a sounding board for the utility and feasibility of CLEER's findings and proposals.

Research programme

CLEER's research programme centres on the EU's contribution in enhancing global stability and prosperity and is carried out along the following transversal topics:

- the reception of international norms in the EU legal order;
- the projection of EU norms and impact on the development of international law;
- coherence in EU foreign and security policies;
- consistency and effectiveness of EU external policies.

CLEER's research focuses primarily on four cross-cutting issues:

- the fight against illegal immigration and crime;
- the protection and promotion of economic and financial interests;
- the protection of the environment, climate and energy;
- the ability to provide military security.

Network

CLEER carries out its research via the T.M.C. Asser Institute's own in-house research programme and through a collaborative research network centred around the active participation of all Dutch universities and involving an expanding group of other highly reputable institutes and specialists in Europe.

Activities

CLEER organises a variety of activities and special events, involving its members, partners and other stakeholders in the debate at national, EU- and international level.

CLEER's funding is obtained from a variety of sources, including the T.M.C. Asser Instituut, project research, foundation grants, conferences fees, publication sales and grants from the European Commission.

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS
T.M.C. Asser Instituut inter-university research centre

CLEER is hosted by the T.M.C. Asser Instituut,
Schimmelpennincklaan 20-22
2517 JN, The Hague, The Netherlands

CLEER

E-mail: info@cleer.eu
Website: http://www.cleer.eu

EU Trade Agreements and the Duty to Respect Human Rights Abroad

CLEER PAPERS 2020/1

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

CLEER

EU Trade Agreements and the Duty to Respect Human Rights Abroad

Eva Kassoti and Ramses A. Wessel (eds.)

CLEER PAPERS **2020/1**

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

EU TRADE AGREEMENTS AND THE DUTY TO RESPECT HUMAN RIGHTS ABROAD

EVA KASSOTI AND RAMSES A. WESSEL
(EDS.)

CLEER PAPERS **2020/1**

Editorial policy

The governing board of CLEER, in its capacity as board of editors, welcomes the submission of legal papers and commentaries (max. 40,000 resp. 4.000 words, incl. footnotes, accompanied by keywords and short abstracts) at E.Kassoti@asser.nl. CLEER applies a double blind peer review system. When accepted, papers are published on the website of CLEER.

ISSN 1878-9587 (print)
ISSN 1878-9595 (online)

Printed in The Netherlands
T.M.C. Asser Institute
P.O. Box 30461
2500 GL The Hague
The Netherlands
www.cleer.eu

CONTENTS

EU TRADE AGREEMENTS AND THE DUTY TO RESPECT HUMAN RIGHTS ABROAD: INTRODUCTION TO THE THEME

Eva Kassoti and Ramses A. Wessel[1]

1. INTRODUCTION: THE ROLE OF THE EU HUMAN RIGHTS CHARTER IN EXTERNAL SITUATIONS

With EU trade agreements – or in fact global trade in general – being more and more under attack in the context of debates on their (real or perceived) lack of attention for non-trade aspects such as human rights, social standards or environmental considerations,[2] this collection of contributions aims to assess one specific aspect: the duty for the EU to respect human rights outside the territory of its Member States[3] when it concludes trade agreements with third countries. In the literature, even though the broader issue of the EU's human rights obligations in its external trade policies has received some (limited) attention, [4]

---

[1] Eva Kassoti is Senior Researcher in International and EU Law, T.M.C. Asser Institute; Ramses A. Wessel is Professor of European Law at the University of Groningen. Both authors are members of the Governing Board of the Centre for the Law of European External Relations (CLEER).

[2] See the many references in the contributions to this issue.

[3] For the territory of the Member states to which the EU treaties apply, see Art. 52 TEU and Art. 355 TFEU. See also Dimitry Kochenov, 'European Union Territory from a Legal Perspective: A Commentary on Art. 52 TEU, 355, 349, and 198-204 TFEU' (2017) University of Groningen Faculty of Law Working Paper 2017-05 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2956011> accessed 20 January 2020.

[4] The seminal work on the topic is Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Steven Peers et al. (eds), *The EU Charter of Fundamental Rights: A Commentary*, (Hart/Beck 2014) p 657. See also more generally Lorand Bartels, 'The EU's Human Rights Obligations in relation to Policies with Extraterritorial Effects' (2014) 25 *EJIL* 1071. Enzo Cannizzaro, 'The EU's Human Rights Obligations in relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels' (2014) 25 *EJIL* 1093. Aravind Ganesh, 'The European Union's Human Rights Obligations Towards Distant Strangers' (2015) 37 *Mich. J. Intl' L.* 475. By way of contrast, the question of the EU's complicity in internationally wrongful acts committed by a third State, namely the violation of a number of human rights of individuals located in that third State, through the conclusion of trade agreements with that third State under the law of international responsibility has gained considerable traction over the last few years. See for example: Eva Kassoti, 'The Legality under International Law of the EU's Trade Agreements covering Occupied Territories: A Comparative Study of Palestine and Western Sahara' (2017) CLEER Paper Series 2017/3, <https://www.asser.nl/media/3934/cleer17-3_web.pdf> accessed 20 January 2020. Francois Dubuisson, 'The International Obligations of the European Union and its Member States with regard to Economic Relations with Israeli Settlements' (2014) <http://www.madeinillegality.org/IMG/pdf/etude_def_ang.pdf> accessed 20 January 2020. For the procedural and evidentiary difficulties of proving complicity in international law, see Olivier Corten and Pierre Klein, 'The Limits of Complicity as a Ground for Responsibility: Lessons Learned from the Corfu Channel case' in Karine Bannelier, Theodore Christakis, and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case*, (Routledge 2012) pp 315 –

this question has remained largely unexplored. Recent developments have rekindled interest in the topic.[5] More particularly, recent judgments of the Court of Justice of the European Union (CJEU) in cases such as *Front Polisario*, *Western Sahara*, or *Psagot*,[6] have provided a more solid basis for engagement with the issue of the EU's duty to protect human rights outside the territory of its Member States.

The EU Charter of Fundamental Rights is the logical starting point to assess the Union's duty to protect human rights. In contrast with some human rights instruments, the Charter does not contain a clause defining its territorial scope. Articles 52 TEU and 355 TFEU are of little avail in establishing the territorial scope of the Charter since they merely define the Member States' territory to which the TEU and the TFEU apply.[7] In a similar vein, the Charter's applicability has not been conditioned upon the threshold criterion of jurisdiction.[8]

In lieu of a jurisdictional clause, the Charter only contains a provision stipulating its field of application. Article 51(1) of the Charter specifies that the provisions of the Charter "are addressed to the institutions of the Union … and to the Member States only when they are implementing Union law."[9] The wording of

---

334; Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart Publishing 2016) pp 101-103, 218-234.

[5] Cedric Ryngaert, 'EU Trade Agreements and Human rights: From Extraterritorial to Territorial Obligations' (2018) 20 *ICLR* 374. Antal Berkes, 'The Extraterritorial Human Rights Obligations of the EU in its External Trade and Investment Policies' (2018) 5 *Europe and the World: A Law Review* 1. Sandra Hummelbrunner, 'Beyond Extraterritoriality: Towards an EU Obligation to Ensure Human Rights Abroad' (2019) CLEER Paper Series 19/02, p 23 <https://www.asser.nl/media/679407/cleer_19-02_web.pdf> accessed 20 January 2020.

[6] Respectively Case C-104/16 P, *Council of the European Union v. Front Polisario*, ECLI:EU:C:2016:973; Case 266/16, *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, ECLI:EU:C:2018:118; Case C-363/18, *Organisation juive européenne and Vignoble Psagot*, ECLI:EU:C:2019:954. For more insights into these cases, see Eva Kassoti, 'The *Council v. Front Polisario* Case: The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation (Second Part)', (2017) 2 *European Papers* 23; Eva Kassoti, 'The ECJ and the Art of Treaty Interpretation', (2019) *CMLR* 209. Eva Kassoti, Stefano Saluzzo (eds.), 'What's in a Name? The *Psagot* Judgment and Questions of Labelling of Settlement Products', (2019) 4 *European Papers* 753.

[7] Moreno-Lax and Costello, *op.cit.*, at 1664. For analysis of arts 52 and 355 TFEU, see Kochenov, *op.cit.*

[8] See for example Art. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'): "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." European Convention of Human Rights (adopted 4 November 1950, entered into force 3 September 1953) <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 20 January 2020. Art 2 of the International Covenant on Civil and Political Rights ('ICCPR'): "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant…" International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed 20 January 2020. See also generally Cedric Ryngaert, *Jurisdiction in International Law* (2nd ed, Oxford University Press 2015) pp 22-26.

[9] In the Explanations to the Charter it is also stressed that Art. 51 of the Charter "seeks to clearly establish that the Charter applies primarily to the institutions and bodies of the Union", whereas Member States are only bound by the Charter "when they act in the scope of Union law."

Article 51(1) of the Charter suggests that the application of the Charter has been defined exclusively *rationae materiae*:[10] since the Charter applies to acts of the institutions of the Union and to national acts implementing EU law,[11] the crux of the matter is whether a situation is covered by an EU competence.[12]

In this sense, Article 51(1) of the Charter envisages a parallelism between EU action and application of the Charter.[13] The only limitation contained in the relevant provision pertains to the material scope of the Charter – which has been limited in so far as action by Member States is concerned.[14] As the Court explained in its seminal judgment in *Akerberg Fransson*: "[S]ituations cannot exist which are covered … by European Union law without those fundamental rights being applicable. The applicability of European Union law entails the applicability of the fundamental rights guaranteed by the Charter."[15]

This construction suggests that territorial criteria bear no relevance in the context of determining the applicability of the Charter.[16] In this light, the model propounded by Moreno-Lax and Costello in 2014 still holds great explanatory force. According to them: "The scope of application *ratione loci* of the Charter is … to be determined by reference to the general scope of application of EU law, following autonomous requirements. The Charter applies to a particular situation once EU law governs it. There is no additional criterion, of a territorial character or otherwise, that needs to be fulfilled in this context."[17] As the con-

---

Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17, p 32. For commentary on Art. 51, see Ward, 'Article 51', in Peers et al. (eds), op.cit., 1413 at pp. 1413-1454.

[10] Thomas Van Danwitz and Katerina Paraschas, 'A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights', (2017) 35 *Fordham Int'l L. J.* 1396 at 1399. According to Tridimas: "The Charter does not apply unless a situation is governed by Union law by virtue of a connecting factor other than the Charter … Nonetheless, within the ambit of EU law, there is no limitation *rationae materiae* in the scope of application of the Charter." Takis Tridimas, 'Fundamental Rights, General Principles of EU law, and the Charter', (2014) 16 *Cambridge Yearbook of European Legal Studies* 361 at 381.

[11] On what constitutes 'implementation of Union law' by the Member States, see generally Benedikt Pirker, 'Mapping the Scope of Application of EU Fundamental Rights: A Typology', (2018) 3 *European Papers* 133.

[12] Vivian Kube, *EU Human Rights, International Investment Law and Participation: Operationalizing the EU Foreign Policy Objective to Global Human Rights Protection* (Springer 2019), at 34. For the relevance of a competence-based reading of the scope of the Charter, see the Opinion of Advocate General Bot in Opinion 1/17, ECLI:EU:C:2019:72, para 195:"[I]t is necessary to clarify that it follows from the second sentence of Article 207(1) TFEU, read in conjunction with Article 21 TEU, that the European Union must, when exercising the competences conferred on it by the EU and FEU Treaties, including those relating to the common commercial policy, respect fundamental rights, of which the principle of equal treatment forms part. The European Union is a union based on the rule of law in which all acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental rights."

[13] Case C-638/16 PPU *X and X v Belgium* Case, Opinion of AG Mengozzi, EU:C:2017:173, para 91.

[14] *Ibid*., para 97. Joined cases C-8/15 P, C-9/15P and C-10/15P *Ledra Advertising Ltd et al v European Commission and European Central Bank*, EU:C:2016:701, Opinion of AG Wahl, para 85.

[15] Case C-617/10 *Aklagaren v. Akerberg Fransson*, ECLI:EU:C:2013:105, para 21. See also Case C-390/12 *Robert Pfleger and Others*, ECLI:EU:C:2014:281, para 34.

[16] Vivian Kube, (n 12), at 34-36.

[17] Moreno-Lax and Costello, *op.cit.*, at 1679-1680. See also the Opinion of AG Mengozzi in the *X and X v Belgium* Case, *op.cit*.

tributions to this special testify, recent case law of the Court still supports this starting point.

Furthermore, different EU instruments show that Union institutions remain bound by the Charter even when they act outside the territory of EU Member States. A prime example here is Regulation 2016/1624 on the European Border and Coast Guard.[18] According to the Regulation, in performing its tasks, which, *inter alia*, expressly include training[19] and co-ordination of border management activities on the territory of third States,[20] the European Border and Coast Guard Agency "shall guarantee the protection of fundamental rights … in accordance with relevant Union law" and "in particular the Charter."[21] More interestingly for present purposes, the Commission's Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy measures[22] lend further support to the argument advanced here. The Guidelines highlight that the purpose of identifying human rights impacts is to assess "how trade measures which might be included in a proposed trade-related policy initiative are likely to impact: *either on the human rights of individuals in the countries or territories concerned*; or on the ability of the EU and the partner country/ies to fulfil or progressively realise their human rights obligations."[23] De Schutter stressed, in a 2016 study commissioned by the European Parliament, that this "confirms the understanding (illustrated by the *Front Polisario* case …) that fundamental rights that are binding in the EU legal order should be complied with also for the benefit of individuals situated outside the territories of the Member States: such fundamental rights have in other terms, an 'extraterritorial' scope…".[24] In this context, it is also worthwhile noting that the Guidelines explicitly provide that: "Respect for the Charter of fundamental rights in Commission acts and initiatives is a binding legal requirement in relation to both internal policies and external action."[25]

Overall, the existing case-law on the extraterritorial application of the Charter as well as several EU instruments support the conclusion reached above on the basis of a textual analysis of Article 51(1). Whether or not the EU institutions exercise their powers within the territory of the Member States is immaterial; what matters in the context of triggering the applicability of the Charter is whether the situation at hand is covered by an EU competence.

---

[18] Regulation 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard amending Regulation 2016/399 of the European Parliament and of the Council and repealing Regulation No 863/2007 of the European Parliament and of the Council, Council Regulation No 2007/2004 and Council Decision 2005/267/EC, OJ[2016] L251/1.

[19] *Ibid*., Art. 36(7).

[20] *Ibid*., Art. 54(1) – (3).

[21] *Ibid.,* Art. 34(1).

[22] European Commission, Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy measures, 2 July 2015, available at <https://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf> accessed 20 January 2020.

[23] *Ibid*., 2 (emphasis added).

[24] De Schutter, op.cit., at 2.

[25] *Ibid*. at 5. (emphasis in the original).

2. THE DIFFERENT DIMENSIONS OF THE DUTY TO PROTECT HUMAN RIGHTS ABROAD

The conclusion that the Charter equally applies to *external* action[26] by the Union raises a number of new questions. Many of these questions have been addressed in a workshop that was organised jointly by the Centre for the Law of EU External Relations (CLEER) at the T.M.C. Asser Institute in The Hague, and the Interest Group 'The EU as Global Actor' of the European Society of International Law (ESIL).[27]

A first question – addressed by Chloé Brière and Areg Navasartian in this issue[28] – is how the CJEU relies on the principle of primacy of EU law and the general requirement to comply with EU primary law, including the EU Charter of Fundamental rights, to develop a new standard of review for the EU's international agreements. After all, once concluded, international agreements become 'an integral part' of EU law (to quote the Court in the classic *Haegeman* case[29]). A first way to ensure fundamental rights protection therefore is to use the procedure in Article 218(11) TFEU for an *a priori* check of the compatibility of the envisaged agreement with EU primary law. That this may, and in fact should, include a check with the compatibility of Charter provisions was recently confirmed by the Court in its Opinion on the EU-Canada PNR Agreement.[30] Questions of discrimination also emerged in relation to the CETA agreement between the EU and Canada.[31] But not only through Article 218(11), also through other procedures the Court aimed to ensure a direct or indirect compatibility of EU external actions with the Charter. Examples revealing an increased attention of the Court in the application of fundamental rights in external relations include the Common Commercial Policy (by giving more attention to for instance sustainable development and labour protection standards), and sanctions policy.

So, what does all of this mean for the extraterritorial application of EU fundamental rights? As we have seen, *internally*, the Court has ample opportunities to apply EU fundamental rights standards to concluded (or to be concluded) international agreements. *Externally*, however, the question is to what extent the Charter can be applied in the context of the EU's trade agreements. As analysed by Katarzyna Szepelak,[32] it has not been so easy to define the scope

[26] These days, the external dimension of the Union is visible not only in in its foreign policy and external action, but also in almost all internal policy fields. See for a recent overview of the main rules and principles: R.A. Wessel and J. Larik (Eds.), *EU External Relations Law: Text, Cases and Materials* (2nd edition), Oxford: Hart Publishing, 2020.

[27] The workshop took place on 11 December 2019 at the Asser Institute in The Hague. This CLEER Paper contains a selection of the papers that were presented there and that have further been developed on the basis of a review and discussion process.

[28] Chloé Brière and Areg Navasartian, 'Lex Generalis and the Primacy of EU Law as a Source of the EU's Duty to Respect Human Rights Abroad: Lessons Learned from The Case-Law of the CJEU', in this issue.

[29] Case 181/73, *Haegeman v Belgian State*, ECLI:EU:C:1974:41.

[30] Opinion 1/15 (*EU-Canada PNR Agreement*) [2017] ECLI:EU:C:2017:592, par. 70.

[31] Opinion 1/17 (*EU-Canada CET Agreement*) [2019] ECLI:EU:C:2019:341.

[32] Katarzyna Szepelak, 'Judicial Extraterritorial Application of the EU Charter of Fundamental Rights and EU Trade Relations – Where Do We Stand Today?', in this issue.

of the extraterritorial application of the EU's Fundamental Rights Charter, even if we, in principle, accept that the Charter's rules are applicable to relations and situations beyond the EU's borders. The Court seems reluctant to enter into in-depth analyses of fundamental rights elements in extraterritorial trade situations and arguments derived from the case law of the European Court of Human Rights do not seem to suit the specificity of the review of EU trade agreements.

A next question then concerns to what extent trade agreements are actually fit to deal with fundamental rights. How does the EU understand its obligation to include fundamental rights in, in particular, the so-called 'new generation' of EU free trade agreements (FTAs)? The current – post-Lisbon – version of the Treaty does indeed offer a new normative impetus by linking the Common Commercial Policy to the realisation of the values that are fundamental to the EU's development. As argued by Isabella Mancini in her contribution to this issue,[33] a combined reading of Articles 207 TFEU and 21(1) and 3(5) TEU reveals a shift from the traditional understanding of the EU as a global trade actor that is expected to *promote* fundamental rights globally 'through' its trade agreement, to the protection of fundamental rights by the Union 'in' trade. While the new FTA's as such do not contain a chapter on fundamental rights, they do provide a series of mechanisms aimed at their protection. Labour rights feature most prominently among the fundamental rights to be protected, with data privacy rights being referred to less frequently. Yet, overall, the FTAs largely remain what they are: trade agreements. For Mancini this is a reason to argue that they are fundamentally flawed and that there is a compelling need to better understand how trade agreements could intensify negative effects upon fundamental rights in the context of new technologies and business practices that underlie the dynamics of production and trade in goods and services.

A final question concerns the actual possibilities of individuals, living outside the EU, to directly challenge the legality of EU measures approving trade agreements. In other words, how should the *locus standi* requirements, contained in Article 263(4) TFEU, be interpreted in that context? On the basis of, above all, the above-mentioned *Front Polisario* case, Stephen Allen's contribution aims to answer that question.[34] Irrespective of a consensus on the extraterritorial effects of EU fundamental rights, the proof of the pudding, one could argue, is in the actual possibilities of non-EU applicants to enforce these rights. The *Front Polisario* case revealed additional complications as here the Court was not confronted with an 'individual' and partly had to rely on international law arguments to settle the legal status of the Polisario. While the Court in the end did not directly address the *locus standi* criteria in this situation, Stephen Allen argues that accepting admissibility would be in line with the Union's commitment to contributing to the protection of human rights and the strict observance of international law. This implies that the EU courts must broaden their interpretation of the procedural prerequisites through which the legality of the EU's external

[33] Isabella Mancini, 'Fundamental Rights in the EU's External Trade Relations: From Promotion 'Through' Trade Agreements to Protection 'in' Trade Agreements', in this issue.

[34] Stephen Allen, 'Direct Challenges to EU Measures Adopting Trade Agreements: *Locus Standi* and the Front Polisario's Western Sahara Claims in the EU Courts', in this issue.

actions can be challenged by affected individuals, especially those who are located beyond the combined territory of its Member States.

While these four dimensions of the EU's duty to respect human rights in external situations do not do justice to the many complexities underlying the notion, we hope they may serve as contributions to a debate that is far from over, and in fact, may just be starting considering the increasing number of external activities the Union is engaged in.

LEX GENERALIS AND THE PRIMACY OF EU LAW AS A SOURCE OF THE EU'S DUTY TO RESPECT HUMAN RIGHTS ABROAD: LESSONS LEARNED FROM THE CASE-LAW OF THE CJEU.

Chloé Brière* and Areg Navasartian**

With the deepening of European integration, the European Union has evolved into a key player on the global scene, aiming to project certain standards internationally, including concerning the protection of human rights.[1] The promotion of human rights, which traditionally refers to the promotion of international law standards, notably enshrined in the Universal Declaration of Human Rights, has been proclaimed as an objective of the EU's external action since the Treaty of Maastricht. Furthermore, the EU has introduced several decades ago human rights considerations in its relations with its external partners, whether being third countries, regional or international organisations.[2]

The entry into force of the Lisbon Treaty has introduced a series of changes in the EU's external relations, and it has impacted the norms that the EU promotes externally. The entry into force of the EU Charter of Fundamental Rights (hereafter "the Charter") as part of EU primary law has boosted the references made to this instrument in EU legislative instruments and policy documents.[3] It also impacted the conduct of the EU's external activities, as the promotion of human rights became more complex, potentially encompassing or being complemented by the promotion of fundamental rights, which could be defined as the promotion of the EU's internal values and rights.[4] The Court of justice of the EU (hereafter the CJEU or the Court) played an instrumental role in this shift: through its case law, it turned the Charter into a standard for the judicial review of the EU's external activities.

The present contribution proposes to conduct an appraisal of this new dimension of the EU's external action, through a detailed analysis of the recent case

* Professor of EU law, and Post-doctoral researcher F.R.S. -F.N.R.S, Centre for European Law, Université libre de Bruxelles.

** Researcher, Centre for European Law, Université libre de Bruxelles.

[1] See, for instance, the continuous reference to respect for human rights and fundamental freedoms in the objectives of the EU's external relations, Art. J.1 (2) TEU (Maastricht); Art. 11 (1) TEU (Amsterdam) and Art. 21 (1) TEU (Lisbon).

[2] Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, COM(95)216 final and the Council Conclusions of 29 May 1995, PRES/95/152.

[3] Communication from the Commission on the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573 final.

[4] For a discussion of such distinction, see, e.g., R. Tinière, 'L'influence croissante de la Charte des droits fondamentaux sur la politique extérieure de l'Union européenne', *Revue des droits et libertés fondamentaux*, 2018, chron. n°02, available at: <http://www.revuedlf.com/droit-ue/linfluence-croissante-de-la-charte-des-droits-fondamentaux-sur-la-politique-exterieure-de-lunion-europeenne/>.

law of the CJEU addressing both the EU's external relations and the duty to respect human rights abroad. It aims at unveiling how the CJEU relies on the principle of primacy of EU law and the general requirement to comply with EU primary law, including the Charter, to develop a new standard of review for the EU's international agreements. The consequences the Court derives from potential conflicts are also partially addressed.

It is divided in two main parts, starting with a short reminder of the jurisdiction of the Court in external relations matters (part 1.), and followed by an analysis of the various scenarios in which the Court has relied on the Charter for reviewing the international activities of the EU (part 2.). In conclusion, it argues for the emergence of the Charter as a new standard of protection of fundamental rights in the EU's external relations (part 3.).

1. AVENUES ALLOWING THE CJEU TO REVIEW THE COMPATIBILITY OF INTERNATIONAL AGREEMENTS WITH THE TREATIES

In general, the CJEU has an important role in the development of EU law, and it has – without surprise – also played this role in the field of EU external relations law. In addition to its important case law on the external competences of the EU, and their relations with the external competences of the Member States,[5] the Court has also been called upon to assess the compatibility of international agreements with EU law.

To carry out such assessments, the CJEU has generally relied on diverse mechanisms of judicial review: the mechanism of advisory opinions (currently provided for by Article 218 (11) TFEU) and a system of legal remedies of general application (annulment proceedings, infringements proceedings or requests for preliminary references originating from national courts). These mechanisms have generated a rich line of case law through which the CJEU greatly contributed to shaping the competences and role of the EU as an international actor.

The first mechanism, specific to the EU's external activities, gives the Court the power to review 'envisaged international agreements' before they become legally binding and examine their compatibility with the Treaties. This procedure allows the Court to consider, *in abstracto* and without being limited by the facts of any specific case, the constitutional legality of envisaged international agreements.[6] The Court itself stressed its preventive dimension.[7] Complications would

[5] On this issue, see for instance I. Govaere, 'External competence: what's in a Name? The Difficult Conciliation between Dynamism of the ECJ and Dynamics of European Integration', in P. Demaret, I. Govaere, and D. Hanf (eds.), *European Legal Dynamics/Dynamiques juridiques européennes* (Peter Lang: 2007) at 461.

[6] C. Eckes, *EU Powers Under External Pressure. How the EU's External Actions Alter Its Internal Structures* (Oxford: Oxford University Press 2019) at 158.

[7] ECJ, Opinion 2/00 (Cartagena Protocol) [2001] ECLI:EU:C:2001:664, para. 6 and the case law referred to therein: 'Invalidation of the measure concluding the agreement because of an error as to its legal basis is liable to create, both at Community level and in the international legal order, complications which the special procedure of a prior reference to the Court, laid down in Article 300(6) EC, is specifically designed to forestall (see Opinion 1/75, pp. 1360 and 1361, and Opinion 2/94 [1996] ECR I-1759, paragraphs 3 to 6).'

indeed arise if, after the conclusion of the international agreement, the measure by which the EU ratified it would be declared invalid; the advisory procedure aims specifically at avoiding such complications.

This competence has been recognised to the Court from an early stage. Already in the Treaty establishing the European Economic Community of 1957, a specific provision foresaw that the Council, the Commission or a Member State could request the opinion of the Court on the compatibility of an envisaged international agreement with the Treaty (Art. 228 2nd indent EEC, Art. 300 (6) EEC after Amsterdam). The power of the Court was already important as it was provided that in case of a negative opinion, the agreement could not enter in force without a treaty revision (Art. 236 EEC). This procedure has allowed the Court to identify key aspects of EU external relations law, especially regarding the protection of human rights. It was for instance in Opinion 2/94[8] that the judges ruled out the competence of the Community to accede to the European Convention on Human Rights on the basis of Article 235 EEC. They considered that it would entail a modification of constitutional significance of the fundamental rights protection system in the Community, which could only be brought about by way of Treaty amendment.[9] Throughout the successive treaty revisions, this prerogative of the Court has not been questioned and new actors obtained the right to request such opinion, including the European Parliament (Art. 218 (11) TFEU), which they used regularly over the last decade.[10]

The second mechanism for the CJEU to review the EU's external activities is embedded in the architecture of the Treaties and the complete system of legal remedies it provides to ensure full respect and implementation of EU law. This system is composed of various legal proceedings, namely infringement proceedings, when a Member State fails to respect its obligations under EU law (Art. 258 to 260 TFEU); annulment proceedings, when an EU action is allegedly in violation of the Treaties (Art. 263 and 264 TFEU) and the mechanism of preliminary references, which gives the Court the competence to answer questions regarding the validity and the interpretation of EU law arising in the context of disputes brought before national judges (Art. 267 TFEU). The combination of these legal remedies usually allows the CJEU to appreciate *in concreto,* and sometimes within the limits of the facts of the case, the compatibility of international agreements with EU law. These remedies have offered numerous opportunities to the CJEU to shape the scope of the EU's external competences, starting with the *AETR* judgment of 31 March 1971,[11] following an annulment

[8] ECJ, Opinion 2/94 (accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms) [1996] ECLI:EU:C:1996:140.

[9] *Ibid.*, para. 35.

[10] For a recent analysis of the procedural dimension of this provision, an issue not covered by the present contribution, see, e.g., J. Helikoski, 'The Procedural Law of International Agreements: A Thematic Journey through Article 218 TFEU', 57 *Common Market Law Review* 2020, 79-118. See also C. Flaesch-Mougin, 'La Cour de Justice, acteur de l'ombre des négociations commerciales internationales de l'Union européenne', in J. Lebullenger and C. Debrock (eds), *Generation TAFTA, Les nouveaux partenariats de la mondialisation* (PUR: 2018), at 165.

[11] ECJ, Case 22/70, *Commission of the European Communities* v. *Council of the European Communities (European Agreement on Road Transport)* [1971] ECLI:EU:C:1971:32.

proceeding initiated by the European Commission, in which the Court introduced the existence of implied external competences at the benefit of the EU. Similarly, infringement proceedings initiated by the European Commission allowed the Court, in the *Open Skies* judgments, to clarify the distribution of competences between the European Economic Community and the Member States in concluding international air transport agreements.[12] Preliminary references have also allowed the Court to review the compatibility of EU norms with international agreements, or to rule on the direct effect of the provisions of such agreements.[13] These legal remedies are particularly interesting as they allow interested parties, being EU institutions or other actors, to challenge the validity and/or compatibility of an international agreement with EU law after its ratification and entry into force, often via a challenge of an implementing act. Such remedies are thus essential that compliance with EU law can be ensured in the long term.

The combination of these mechanisms enabled the CJEU to play an essential role in the development of the EU as an international actor, and in shaping the rules governing its external activities. With the Lisbon Treaty, most of the legal rules identified in its case law have been codified in the EU treaties, such as the different possibilities for the recognition of an implied external competence to the EU.[14]

Furthermore, the CJEU continues to play the role of a constitutional court in the field of EU external relations, reviewing the compatibility of international agreements with EU primary law and sanctioning those who are incompatible with it. Since the entry into force of the Treaty of Lisbon, the work of the CJEU in the field of external relations has been particularly dense and important. In the past decade, the CJEU has notably introduced new standards to review the compatibility of the EU's external activities with EU primary law. In this regard, the increasing use of the Charter as a tool to conduct such a review is particularly noticeable.

The Charter is a rather unique instrument, and it occupies a specific place in the array of EU norms. Not fully integrated in the Treaties – as was envisaged in the Treaty establishing a Constitution for Europe – the Charter has still been granted the same legal value as the Treaties (Article 6 TEU) and forms an integral part of EU primary law. Although the Charter is of a complex substance, distinguishing between principles and rights, the CJEU has been increasingly called upon to interpret its provisions. Since the entry into force of the Treaty of

[12] ECJ, Joined cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, *Commission* v. *United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, Germany (Open Skies)* [2002] ECLI:EU:C:2002:624 to EU:C:2002:631.

[13] See, e.g., ECJ, Case 181/73, *R. & V. Haegeman,* [1974] ECLI:EU:C:1974:41 (EEC international agreements forming an integral part of the EEC legal order); or ECJ, Case 12/86, *Meryem Demirel* [1987] ECLI:EU:C:1987:400 (direct effect of a provision of the Association Agreement with Turkey and incompetence of the Court to review the compatibility of national legislation with the ECHR).

[14] See for instance Art. 3 (2) TEU, or Art. 216 (1) TFEU.

Lisbon, the Luxembourg judges have begun – albeit with some mishaps[15] – to rely on it as a source of rights and obligations binding on the EU institutions, agencies, bodies and offices, and the EU Member States when they implement EU law.[16] This increased reliance of the Court on the Charter as a standard for judicial review is also noticeable in the field of EU's external relations law. We will explore in the next part how in this specific field the CJEU is making more and more references to the Charter.

2. THE VARIETY OF THE CJEU'S USES OF THE CHARTER AS A STANDARD FOR REVIEWING THE EU'S EXTERNAL RELATIONS

The protection of fundamental rights is not a novelty within the EU legal order. It has been established firstly via their recognition as general principles of EU law, and the Court developed a well-established case-law according to which international agreements, even prior to the entry into force of the Charter, have to be reviewed in light of fundamental rights, guaranteed as general principles of EU law.[17] Their protection has obtained a new dimension first with the redaction of the Charter and its proclamation in 2000, and then with its consecration as a binding instrument, with the same force as the Treaties (Art. 6 TEU), in 2009.

As a result of its consecration, it is somewhat unsurprising that the CJEU integrated the Charter among the standards it uses to review the compatibility of international agreements with EU treaties. Reflecting in a certain way the wide array of judicial avenues through which the EU's external activities may be brought before it, the CJEU has mobilized various legal bases to assess and carry out in-depth reviews of the compatibility of international agreements with the Charter, thus formalizing the importance taken by the Charter, including the EU's external activities.

The next paragraphs will be devoted to the analysis of the CJEU's case law in this field. It will start with an examination of the way CJEU relied on the classical scenario of Article 218(11) TFEU, in which the Court exercises a direct compatibility control of international agreements, and made it evolve to include the Charter in its control (a.). Will then follow more atypical scenarios, in which the CJEU has been led to carry out an indirect compatibility control, in which the CJEU relied on other means than Article 218(11) TFEU to examine the EU's external actions (b.). Finally, we will address the ambiguous use of the principle of autonomy of the EU legal order, which has played a key role in the reasoning

[15] As examples of the reserves of the judges to refer to and rely on the Charter, see ECJ, Case C-370/12, *Pringle* v. *Ireland* [2012] ECLI:EU:C:2012:756 or ECJ, Case C-176/12, *Association de médiation sociale* [2014] ECLI:EU:C:2014:2.

[16] See S. Peers *et. al.* (eds.), *The EU Charter of Fundamental Rights. A Commentary* (Oxford: Hart Publishing 2014), or F. Picod *et. al.* (eds.), *Charte des droits fondamentaux d l'Union européenne. Commentaire article par article* (Brussels: Bruylant 2019).

[17] See, among others, ECJ, Joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation* v. *Council and Commission* [2008] ECLI:EU:C:2008:461, paras 283-285.

of the Court in various advisory Opinions on the conclusion of envisaged international agreements (c.).

a. The "classical scenario": direct compatibility control under Article 218 (11) TFEU

As previously stated, the Treaty of Lisbon did not alter the prerogative of the Court to be requested to review *a priori* the compatibility of an envisaged international agreement with EU law on the basis of Article 218 (11) TFEU. Like in the past, this procedure is not exercised lightly, and a few years of patience were required before the Court was given the opportunity to examine the substantial compatibility of an envisaged international agreement with EU primary law, as amended by the entry into force of the Lisbon Treaty.

One of the first occasions the Court had the possibility to clarify whether the Charter counted among the standards to be complied with by an envisaged international agreement arose in its Opinion 1/15 on the draft Passenger Name Record ('PNR') Agreement between the EU and Canada.[18] This Opinion has received wide-spread attention, firstly due to the fact that it was the first time the European Parliament made use of its new capacity to request an advisory Opinion from the CJEU, and secondly due to the topic of the envisaged international agreement. It concerned the exchange of passenger name records, including sensitive personal data, a topic on which the European Parliament had already had the opportunity to voice its concerns regarding the compatibility of such transfer to external partners with fundamental rights.[19] The European Parliament requested an Opinion from the Court referring precisely to the question of the compatibility of the envisaged agreement with the provisions of the Treaty and the Charter.[20] After recalling its "traditional position" on the role and importance of such advisory procedure for the international relations of the EU,[21] and when examining the admissibility of the request, the CJEU very openly stated that:

> 'A judgment on the compatibility of an agreement with the Treaties may in that regard depend, inter alia, not only on provisions concerning the powers, procedure or organisation of the institutions of the European Union, but also on provisions of substantive law […]. *The same is true of a question relating to the compatibility of an international agreement with the first subparagraph of Article 6(1) TEU and, conse-*

[18] ECJ, Opinion 1/15 (*EU-Canada PNR Agreement*) [2017] ECLI:EU:C:2017:592.

[19] See in particular the proceedings it brought against an adequacy decision of the Commission concerning the U.S.A.: ECJ, joined cases C-317 and 318/04, *European Parliament* v. *Council and Commission* [2006] ECLI:EU:C:2006:346.

[20] Opinion 1/15, *supra* note 18, para. 1: 'Is the [envisaged agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data] compatible with the provisions of the Treaties (Article 16 TFEU) and the Charter of Fundamental Rights of the European Union (Articles 7, 8 and Article 52(1)) as regards the right of individuals to the protection of personal data?'.

[21] Opinion 1/15, *supra* note 18, para. 69.

quently, with the guarantees enshrined in the Charter, since the Charter has the same legal status as the Treaties.'[22] [emphasis added].

With such reasoning, the Court rightly introduced the Charter among the standards through which it would examine the envisaged agreement, reflecting the new place this instrument received in the Treaties. As a consequence of such inclusion, the CJEU proceeded to a thorough examination of the compatibility of the envisaged agreement with the provisions of the Charter on the protection of personal data.

The reasoning applied here is very similar to the reasoning it applies when reviewing the compatibility of internal instruments with the Charter, and also very 'traditional' as regards the control of human rights by supranational and national courts.[23] The Court indeed firstly considered that the processing of personal data constitutes an interference with the fundamental right to the protection of personal data guaranteed in Article 8 of the Charter,[24] which still continues to apply where personal data is transferred from the European Union to a non-member country.[25] When examining the proportionality and adequacy of the processing of personal data in the PNR agreement between Canada and the EU, the Court insists on the importance that the agreement contains clear and precise rules limited to what is strictly necessary, defining the degree of seriousness of the offences concerned,[26] the authorities responsible for receiving and processing data,[27] the person concerned[28] and the retention and use of data,[29] as well as the rights of the data subjects and the oversight of data protection safeguards.[30] The Court carried out a meticulous review of each of the relevant provisions, pronouncing itself on their compatibility with the Charter (i.e. not exceeding what is strictly necessary to attain the objective pursued by that agreement, or strengthening certain rights[31]), or their incompatibility with the Charter.[32]

The Court concluded that the draft agreement could not be concluded in its current form, and based its decision on two grounds: its adoption of the wrong

[22] Opinion 1/15, *supra* note 18, para. 70.

[23] C. Brière, 'Cooperation of Europol and Eurojust with External Partners in the Fight Against Crime: What are the Challenges Ahead?', *DCU Brexit Institute Working Paper* 2018, at 26.

[24] Opinion 1/15, *supra* note 18, para. 126.

[25] Opinion 1/15, *supra* note 18, para. 134.

[26] Opinion 1/15, *supra* note 18, paras 175-177.

[27] Opinion 1/15, *supra* note 18, paras 182 ff.

[28] Opinion 1/15, *supra* note 18, paras 186 ff.

[29] Opinion 1/15, *supra* note 18, paras 190 ff.

[30] Opinion 1/15, *supra* note 18, paras 228 ff.

[31] On the individual rights of air passengers and the compatibility of the provisions regarding their rights in accordance with Article 47 of the Charter, protecting the right to an effective remedy before a tribunal, see Opinion 1/15, para. 227: 'The fact that Article 14(2) of the envisaged agreement provides that the 'effective judicial redress' may also take the form of an action for compensation does not, contrary to what the Parliament claims, have the effect of depriving air passengers of such an effective remedy, but rather strengthens, as the Advocate General has observed in point 324 of his Opinion, judicial protection for the persons concerned'.

[32] See especially Opinion 1/15, *supra* note 18, para. 203, 211, 215.

legal basis[33] and the incompatibility of several of its provisions with the Charter.[34] Regarding the second point, the Court detailed a series of amendments to be made to correct the incompatibilities identified, which almost resemble new negotiations guidelines.[35] As a follow-up, the Council amended in December 2017 the authorisation[36] it gave to the Commission to negotiate the agreement with Canada. New negotiations, launched in June 2018, were concluded in 2019, and the finalisation of the agreement is now pending.[37]

Beyond the specificities of the envisaged agreement, the Court reaffirmed the importance of fundamental rights in reviewing the compatibility of envisaged international agreements with the EU treaties, and especially rights enshrined in the Charter. According to M. Cremona, this Opinion provides an example of the way the Court has throughout the last decade detailed 'what a commitment to constitutional and international fundamental rights legality entails'.[38] With Opinion 1/15, the Court asserted the need for substantive compliance, as a failure to comply with constitutional fundamental rights as expressed in the Charter has resulted in a declaration of incompatibility of a projected international agreement.[39] The ruling thus also provided valuable support for European negotiators, and had a practical impact on the cooperation between the EU and third countries in the exchange of PNR data.[40] As an example, the Opinion was notably referred to in the Commission's recommendation for a Council Decision to authorise the opening of negotiations for a new PNR agreement between the EU and Japan,[41] in which the Commission stressed that the

[33] The European Parliament disagreed with the choice of the Council of point (d) of the second subparagraph of Article 82(1) and Article 87(2)(a) TFEU (police and judicial cooperation in criminal matters) as legal bases for the Council decision on the conclusion of the envisaged agreement. For the Court, the decision should be based on both Article 16(2) (protection of personal data) and Article 87(2)(a) TFEU (Opinion 1/15, para. 104 and 118).

[34] For a discussion of Opinion 1/15, see, e.g., C. Kuner, 'International agreements, data protection, and EU fundamental rights on the international stage: Opinion 1/15, EU-Canada PNR', 55 *Common Market Law Review* 2018, 857–882.

[35] Opinion 1/15, *supra* note 18, conclusion, para. 3 (a) to (g).

[36] Council, Council Decision authorising the opening of negotiations for an Agreement between the European Union and Canada for the transfer and use of Passenger Name Record, approved on 7 December 2017, Council Doc. No. 13672/1/17 Rev 1 and Add. 1.

[37] At the recent EU-Canada summit in July, the parties finally presented a new agreement, which is to be adopted by the parliaments after a legal review. An adequacy decision was also taken on Canada. See press release, available at: <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2051>, and for an analysis of the EU's PNR agreements, see M. Monroy, 'New agreements: European Union wants to expand use of passenger data', 22 November 2019, available at: <https://digit.site36.net/2019/11/22/new-agreements-european-union-wants-to-expand-use-of-passenger-data/>.

[38] M. Cremona, 'Extending the Reach of EU Law, The EU as an International Legal Actor', in M. Cremona and J. Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: Oxford University Press 2019), p. 81.

[39] *Ibid*.

[40] C. Docksey, 'Opinion 1/15: Privacy and security, finding the balance' 24 *Maastricht Journal of European and Comparative Law* 2017, at 771.

[41] Commission, Recommendation for a Council Decision to authorise the opening of negotiations for an Agreement between the European Union and Japan for the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime, COM(2019) 420 final.

text took into consideration the applicable EU legal framework on data protection and PNR, including the treaties and the Charter. As a consequence, the text includes references to the Charter's provisions in both the draft Council Decision[42] and the negotiating directives.[43] It illustrates how Opinion 1/15 gave a clear place to the Charter in the development of the EU's external activities, and how the CJEU could eventually be called upon to review its respect. Shortly after, the CJEU had further occasions to rely on it when reviewing envisaged international agreements.

A next opportunity arose with the request for an Opinion made by the Kingdom of Belgium regarding the compatibility of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada in September 2017.[44] This request is particularly notable for a series of reasons. The request was made by the Belgian federal government, after a political deal was sealed with the regional Walloon government, which had refused to ratify the CETA,[45] and the request thus integrates itself in the multi-level structure of governance of the European Union. The request also attracted attention due to the substance of the question asked, referring to the compatibility with EU law of the Investor-State Dispute Settlement (ISDS) Mechanism provided for in the agreement. This type of mechanism is increasingly present in new generation investment treaties,[46] and the ISDS mechanism included in the CETA agreement was the key reform model the EU developed for dispute settlement in international bilateral investment agreements.[47] Such mechanism had also been subject of politically sensitive discussions, in Europe and beyond, with civil society organisations marking their strong opposition to it.[48] Finally, the request for an Opinion on the ISDS foreseen in the agreement integrated itself in a context in which the Court had previously rejected the creation of dispute settlement mechanisms, relying inter alia on the concept of the autonomy of the EU legal order.[49] This topic was furthermore particularly topical and sensitive in the af-

[42] *Ibid.*, p. 3.

[43] Commission, Annex to the Recommendation for a Council Decision to authorise the opening of negotiations for an Agreement between the European Union and Japan for the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime, COM(2019) 420 final Annex, para. 6 and para. 8 e) and h).

[44] ECJ, Opinion 1/17 (*EU-Canada CET Agreement*) [2019] ECLI:EU:C:2019:341.

[45] K. Lenaerts, *Modernising trade whilst safeguarding the EU constitutional framework: an insight into the balanced approach of Opinion 1/17,* 6 September 2019, Belgian Ministry of Foreign Affairs - Brussels Seminar on Opinion 1/17 of the European Court of Justice and on the reform of investment protection, available at: <https://diplomatie.belgium.be/sites/default/files/downloads/presentation_lenaerts_opinion_1_17.pdf>.

[46] Similar dispute settlements mechanisms have notably be included in the agreements with Vietnam and Singapore, see S.W. Schill, 'The European Union's Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization', 46 *Legal Issues of Economic Integration* 2019, at 113.

[47] S.W. Schill, *supra* note 46, at 127.

[48] See for instance, D. De Bièvre, S. Gstöhl and E. Van Ommeren, *Overcoming 'Frankenfoods' and 'secret courts': the resilience of EU trade policy*, CEPOB #9.18, May 2018, available at: <https://www.coleurope.eu/system/files_force/research-paper/de_bievre_gstohl_vanommerencepob_final.pdf?download=1>.

[49] See, e.g., ECJ, Opinion 1/91 (*European Economic Area I)* [1991] ECLI:EU:C:1991:490; ECJ, Opinion1/09 (*Unified Patent Litigation System*) [2011] ECLI:EU:C:2011:123, quoted in S.W. Schill, *supra* note 46, at 126.

termath of Opinion 2/13 on the draft agreement on the EU's accession to the ECHR.[50] For all these reasons, the Opinion of the Court was highly and eagerly expected.[51]

For the purpose of our analysis, its main interest lies in the reference made by the Court to its competence under Article 218 (11) TFEU and the scope of review it exercises. Referring to recent judgments,[52] the Court stressed how the compatibility of an agreement envisaged with the Treaties 'must be construed in the light of that general requirement of compatibility with the EU constitutional framework.'[53] For the Court, this implied that an examination of the compatibility of an agreement envisaged would include:

> "not only on provisions concerning the powers, procedure or organization of the institutions of the European Union, but also on provisions of substantive law. *The same is true of a question relating to the compatibility of an envisaged international agreement with the guarantees enshrined in the Charter, since the Charter has the same legal status as the Treaties*."[54] [emphasis added]

As a consequence, like in Opinion 1/15, the CJEU proceeded to an in-depth review of the compatibility of the ISDS with specific provisions of the Charter.

The first element reviewed concerned a potential difference of treatment between Canadian and EU-based investors, the latter not being able for their investments within Europe to bring a dispute before the CETA Tribunal. The Belgian government inquired whether this could be contrary to Articles 20 and 21 of the Charter protecting equality before the law and prohibiting discrimination, in this case on grounds of nationality. Opinion 1/17 is the first time that the Court addressed directly the issue of discrimination between foreign and EU-based investors, even though the issue was raised but not answered by the Court[55] in the case *Achmea.*[56] The Court considered that Canadian investors that invest within the Union are not in a situation that is comparable to that of EU-based investors that invest in Canada, or within the Union.[57] The Court stressed that Canadian investors, in their capacity as foreign investors, are to have a specific legal remedy against EU measures,[58] something that is considered as a standard practice in investment and trade agreements.[59] The Court

---

[50] See *infra*.

[51] For a discussion of the possible consequences of the Opinion of the Court on the EU's capacity to shape international investment law, see S.W. Schill, *supra* note 46, 127-128.

[52] Opinion 1/17, *supra* note 44, para. 165: 'see, inter alia, Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, paragraph 67, and judgment of 27 February 2018, *Western Sahara Campaign UK*, C-266/16, EU:C:2018:118, paragraph 46)'.

[53] Opinion 1/17, *supra* note 44, para. 166.

[54] Opinion 1/17, *supra* note 44, para. 167.

[55] See e.g. Szilárd Gáspár-Szilágyi, 'It Is not Just About Investor-State Arbitration: A Look at Case C-284/16, *Achmea BV*', 3 *European Papers* 2018, 367-368.

[56] ECJ, Case C-284/16, *Achmea* [2018] ECLI:EU:C:2018:158, para. 23 & 61. The provision invoked was Article 18 TFEU.

[57] Opinion 1/17, *supra* note 44, para. 180.

[58] Opinion 1/17, *supra* note 44, para. 181.

[59] See in this regard, Chapter 21 in the Economic Partnership Agreement between the European Union and Japan (*OJ* L 330, 27.12.2018, p. 3) or Chapter 15, in the Free Trade Agreement

thus rejected the doubts expressed by the Belgian government, and it also did so regarding the alleged discrimination in the access of redress for decisions sanctioning a violation of competition law.[60]

The second element reviewed referred to the potential breach of the right of access to an independent tribunal, protected by Article 47 of the Charter. After recalling principles identified in previous case-law, in particular the case *LM (deficiencies in the judicial system),*[61] the Court conducted an extensive review of the CETA Tribunal and the rules governing them. It firstly considered whether they were compatible with the requirement of accessibility, in particular for small and medium-sized enterprises and natural persons, which might find it difficult to bear the costs of the proceedings. Although the provisions of the CETA do not contain any legally binding commitments relating to financial accessibility, Statement No. 36 foresees the adoption of additional rules on the matter, and – for the Court – it makes the conclusion of the CETA by the Council subject to the premise that financial accessibility will be ensured.[62] The Court then examined the compatibility of the CETA Tribunal with the requirement of independence. The CETA Tribunal was an interesting test for reviewing their compatibility with requirements on independence. The Court itself stressed that if the rules on bringing cases before the CETA Tribunal are largely inspired by traditional ISDS mechanisms, it is not the case with respect to the rules on the composition of that Tribunal and on dealing with those cases.[63] The CETA Tribunal is indeed composed of relatively independent arbitrators, with high-level legal qualifications and who are allocated to a case on the basis of drawing from a rooster, ensuring a random and unpredictable composition of the divisions.[64] Nevertheless, a close scrutiny was required, considering that this Tribunal aims at offering an alternative mechanism of dispute settlement that is neither embedded in the national constitution, nor subject to review by the ordinary judiciary.[65] The Belgian government had raised concerns about the appointment and remuneration of the members of the CETA Tribunal, and the possibility of the Joint Committee to adopt binding decisions on the interpretation of the agreement. However, the Court sets aside each of these elements.[66] The Court also examined the internal aspect of the requirement of independence (i.e. maintenance of an equal distance from the parties in the proceedings and the absence of any personal interest), for which it did not identify any issues.[67] As pinpointed by K. Lenaerts, the ethical rules contained in Article 8.30 CETA require the members of the envisaged tribunals to be independent and impartial both at the time where

between the European Union and the Socialist Republic of Viet Nam (signed)

[60] Opinion 1/17, *supra* note 44, paras 184-186.

[61] ECJ, Case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the judicial system)* [2018] ECLI:EU:C:2018:586.

[62] Opinion 1/17, *supra* note 44, paras 216, 217 and 221.

[63] Opinion 1/17, *supra* note 44, para. 194.

[64] C. Eckes, 'Some Reflections on Achmea's Broader Consequences for Investment Arbitration', 4 *European Papers* 2019 at 83

[65] *Ibid*., p. 84

[66] Opinion 1/17, *supra* note 44, para. 223-237.

[67] Opinion 1/17, *supra* note 44, para. 238-243.

a claim is brought and throughout the proceedings, and preclude them from being affiliated to any government, and any failure to meet these requirements may result in their removal.[68]

As a general conclusion, the Court had not identified incompatibilities with EU law and thus declared the CETA's Chapter on dispute settlement compatible with EU primary law, and in particular with provisions of the Charter.[69]

These two cases show, albeit with a varying outcome in terms of conciliating internationally negotiated agreements with the Charter, that this latter instrument has started to play a pivotal role in the direct compatibility control under Article 218 (11) TFEU. The Court integrates provisions of the Charter among the standards against which it will test the compatibility of envisaged international agreements with EU law, and Luxembourg judges have even pushed for the re-negotiations of certain provisions in order to mitigate their impact on the fundamental rights of individuals protected by the Charter. The Court turned the Charter into one of the parameters in the negotiations of international agreements within the scope of EU law. This goes beyond the role the general principles of EU law played before the entry into force of the Charter.

b. **Atypical scenarios**

Our analysis will now turn to alternative scenarios, in which the Court is called upon to review the compatibility of international agreements with the Charter, albeit in an indirect way. This indirect control has taken two distinct features: on the one hand, the Court has stressed the roles and powers of the European institutions when acting in such capacity, and on the other hand, the CJEU has conditioned the validity of international agreements, by analysing the compatibility of the acts deriving from it with the Charter. Both scenarios will be examined in turn.

i. *Through the roles and powers vested in the European institutions*

The first case presented itself in the wake of the financial and sovereign debt crisis that hit several EU Member States late 2008. In order to safeguard the financial stability of the Union, deficient Member States (Greece, Cyprus, Ireland and Portugal) needed to be bailed out. The Council and the European Council first adopted two temporary bail-out mechanisms[70], which granted punctual aids based on strict conditionality[71].

---

[68] K. Lenaerts, *supra* note 45, p. 14 – 15.

[69] see e.g. the clear and explicit conclusion on the compatibility with Article 47 of the Charter, in Opinion 1/17, *supra* note 44, para. 222.

[70] See, respectively, Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, *OJ* [2010] L 118/1, 12.5.20101; and the framework agreement between the Member States of the Eurozone and the FESF: <http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf>.

[71] Recital 7, Art. 1 and 2 of Regulation 407/2010.

However, due to the gravity of the situation, especially in Greece, a permanent solution had to be found. Due to the constraints of the Treaty, the Member States and the EU institutions had to demonstrate a certain ingenuity in this regard. Indeed, Articles 124 and 125 TFEU provide on the one hand for the prohibition of privileged access to financial institutions, and on the other hand for a "no bail-out clause", which prohibits the Union or Member States to be liable for the decisions of the authorities of other Member States. A permanent bail-out mechanism instituted by the EU would therefore be a violation of the Treaties. The solution was found in a modification of the Treaties through the simplified procedure, adding a paragraph to Article 136 TFEU, that reads as follows:

> '3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.'[72]

Given the fact that the simplified Treaty revision procedure under Article 48(6) TEU is certainly less time-consuming, but also less democratic than the ordinary revision procedure, due to the absence of a ratification procedure at the level of the Member States' parliaments, the Treaties provide for a legal safeguard, which is that simplified revision procedures cannot affect the allocation of powers and the division of competences provided for in the Treaties. However, due to its impact on national budgetary policies, especially given the conditionality, any such stability mechanism as provided for in Article 136(6) would necessarily impact the allocation of powers.[73] The solution therefore found was that the Member States of the Eurozone, reunited in the European Council, created an intergovernmental structure under international law, outside the EU legal order. The European Stability Mechanism Treaty (ESM) was signed in Brussels on 2 February 2012, and entered into force shortly after.[74] Among other provisions, Article 13 of the ESM Treaty provides that the European Commission, and where necessary with the assistance of the European Central Bank, is entrusted with the task to negotiate, on behalf of the Board of Governors of the ESM, with the concerned Member State, a Memorandum of Understanding setting out the conditions of the financial assistance provided.

The conformity of this Treaty with several EU primary law dispositions, including with the Charter, has been challenged a first time in the case *Pringle*[75]. Advocate General Kokott had argued in her View that:

> 'the ESM Treaty would only infringe European Union law if that Treaty required the Commission to perform tasks which the Treaties prohibited. The Commission remains,

[72] European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, *OJ* [2011] L91/1, 6.4.2011.

[73] F. Allemand and F. Martucci, 'La nouvelle gouvernance économique européenne', 47 *Cahiers de droit européen* 2012, at 434.

[74] Full text available at: <https://www.esm.europa.eu/sites/default/files/20150203_-_esm_treaty_-_en.pdf>.

[75] ECJ, Case C-370/12, *Pringle* v. *Ireland* [2012] ECLI:EU:C:2012:756, para. 28.

> even when it acts within the framework of the ESM, an institution of the Union and as such is bound by the full extent of European Union law, including the Charter of Fundamental Rights.'[76]

The Court did not raise this issue in its judgment when assessing the conformity of the ESM Treaty with the Charter. It only took into account the role of the Member States in the framework of the ESM, which, under Article 51(1) of the Charter, are not bound by it when they are not implementing EU law. Since the Member States concluded the ESM Treaty outside the EU legal order, they did not implement EU law and the Court therefore concluded that the ESM Treaty did not fall within the scope of protection of the Charter.[77]

Naturally this strategic oversight has led to criticism[78], and the Court eventually qualified its stance in the case *Ledra Advertising*.[79] This case concerned the financial assistance provided to Cyprus in the framework of the ESM. Contrary to most Memoranda of Understanding concluded with deficient Member States, the Cypriot one included what is commonly called a "hair-cut" or a "bail-in" of bank funds and deposits exceeding a certain amount, resulting in substantial reduction in the value of the funds and deposits. The concerned companies and individuals brought actions for annulment and liability before the General Court against the European Commission and the European Central Bank, requiring compensation for the losses suffered. They argued the European Commission signed the Memorandum of Understanding despite its infringement of Article 17 of the Charter, guaranteeing their right to property. The General Court dismissed the claims as it considered it had no jurisdiction to examine the Memorandum of Understanding, since neither the ESM nor the Republic of Cyprus are among the institutions, bodies, offices or agencies of the European Union, pursuant Article 263 TFEU.[80]

On appeal, the Court set aside this part of the judgment, and added an important nuance to its *Pringle* case-law:

> 'whilst the Member States do not implement EU law in the context of the ESM Treaty, so that the Charter is not addressed to them in that context, *on the other hand the Charter is addressed to the EU institutions, including […] when they act outside the EU legal framework.* Moreover, in the context of the adoption of a memorandum of understanding […] *the Commission is bound*, under both Article 17(1)

---

[76] AG Kokott, Opinion to Case C-370/12, *Pringle* v. *Ireland* [2012] ECLI:EU:C:2012:675, para. 176.

[77] *Pringle*, *supra* note 75, paras 178-182.

[78] It has been argued that at the height of the financial crisis, the Court has willingly made certain sacrifices, among which the protection of fundamental rights, to preserve the delicate solution that had been found for the deficient Member States. See R. Cisotta and D. Gallo, 'The impact of the Troika's austerity measures on the Portuguese labour law system: a general assessment of the scope of social sovereignty in the light of the Constitutional Tribunal Case Law', 4 *European Journal of Social Law* 2014, at 108; F. Fines, 'L'atteinte aux droits fondamentaux était-elle le prix du sauvetage de la zone euro?', , *in* R. Tinière and C. Vial (dir.), *Protection des droits fondamentaux dans l'Union européenne,* (Brussels: Bruylant 2015) 195-211.

[79] ECJ, Joined cases C-8/15 P to C-10/15 P, *Ledra Advertising* v. *Commission and ECB e.a.* [2016] ECLI:EU:C:2016:701.

[80] GC, Case T-289/13, *Ledra Advertising v European Commission and ECB* [2014] T:2014:981.

> TEU, which confers upon it the general task of overseeing the application of EU law, and Article 13(3) and (4) of the ESM Treaty, which requires it to ensure that the memoranda of understanding concluded by the ESM are consistent with EU law, *to ensure that such a memorandum of understanding is consistent with the fundamental rights guaranteed by the Charter*.'[81] [emphasis added]

This situation – an international agreement between the Member States which falls outside the scope of the EU legal order – is evidently not the same as the Union concluding an international agreement which would fall within the scope of the EU legal order. The Court however derived from Article 17(1) TEU, which entrusts the Commission with the task to oversee the correct application of the Treaties, a duty of care, capable of engaging the liability of the EU, including in the conclusion of international agreements falling outside the EU legal order.[82] This reasoning is *a fortiori* applicable to international agreements falling within the scope of the EU legal order. [83] On the basis of the judgment in *Ledra Advertising,* Article 17(1) TEU thus constitutes in the eyes of the Court an additional legal basis, *ratione personae*, imposing the obligation on the Commission to ensure that international agreements concluded within the scope of EU law comply with EU primary law.

ii. *Through the control of acts deriving from international agreements*

A second scenario in which the Court exercised its jurisdiction to conduct an indirect review of the compatibility of an international agreement with the Charter can be identified. This time, the CJEU assessed such compatibility through the control of acts of secondary law deriving from international agreements.

The case presented itself in the context of the Euro-Mediterranean Association Agreement between the EU and the Kingdom of Morocco, concluded on 26 February 1996.[84] In the framework of this Agreement, the Council adopted

[81] *Ledra Advertising e.a.*, *supra* note 79, para. 67.

[82] The Commission itself acknowledged in reply to a question asked at the hearing, that it retains, within the framework of the ESM Treaty, its role of guardian of the Treaties as resulting from Article 17(1) TEU, so that it should refrain from signing a memorandum of understanding whose consistency with EU law it doubts.

[83] R. Tinière, « L'influence croissante de la Charte des droits fondamentaux sur la politique extérieure de l'Union européenne », *supra* note 4.

[84] Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part - Protocol 1 on the arrangements applying to imports into the Community of agricultural products originating in Morocco - Protocol 2 on the arrangements applying to imports into the Community of fishery products originating in Morocco - Protocol 3 on the arrangements applying to imports into Morocco of agricultural products originating in the Community - Protocol 4 concerning the definition of originating products and methods of administrative cooperation - Protocol 5 on mutual assistance in customs matters between the administrative authorities - Final Act - Joint Declarations - Agreements in the form of an Exchange of Letters - Declaration by the Community - Declarations by Morocco, *OJ* [2000] L70/2, 18.3.2000.

a decision on free trade of agricultural and other products, replacing certain Protocols of the Agreement.[85]

This Council decision has been challenged before the General Court through an action for annulment brought by the Front Polisario, a national liberation movement present in Western Sahara, a disputed territory of which it controls a small part, the biggest part being under Moroccan occupancy.[86] The Front Polisario considered the decision approved the application of the Agreement to the Western Sahara as well, resulting in a number of violations of EU law and international law by the Council, since the European Union does not recognise the sovereignty of Morocco over the entire Western Sahara. Among other pleas, the Front Polisario considered the Council violated several dispositions of the Charter, since:

> 'by deciding to implement an agreement which flouts the right to self-determination of the Sahrawi people and which has the immediate effect of encouraging the policy of annexation conducted by Morocco, the occupying power, the Council breaches the principle of freedom, security and justice, and turns its back on the respect for the fundamental rights and legal systems of the Member States.'[87]

On a preliminary note, the General Court interpreted the Agreement as applying to Western Sahara, based on the provisions of the Agreement and based on the fact that the European authorities were aware that the Kingdom of Morocco applied itself the Agreement to the part of the Western Sahara it occupies.[88] Based on this finding, it considered that while EU institutions enjoy a wide discretion in concluding international agreements with third countries, and that the control is therefore limited to manifest errors of assessment, the protection of fundamental rights is of particular importance, especially in this case where an agreement applies to a disputed territory. The Council must therefore examine all relevant factors in order to ensure that such an agreement and the production of goods destined to export to the EU is not detrimental to the fundamental rights of the population of such territory.[89] These fundamental rights include the rights to human dignity, to life and to the integrity of the person (Articles 1 to 3 of the Charter), the prohibition of slavery and forced labour (Article 5 of the Charter), the freedom to choose an occupation and right to engage in work (Article 15 of the Charter), the freedom to conduct a business (Article 16 of the Charter), the right to property (Article 17 of the Charter), the right to fair and just working

[85] Council Decision 2012/497/EU of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, *OJ* L 241, 7.9.2012, p. 2-47.

[86] GC, Case T-512/12, *Front Polisario* v. *Council and Commission* [2015] ECLI:EU:T:2015:953.

[87] *Front Polisario*, *supra* note 86, para. 143.

[88] *Front Polisario*, *supra* note 86, paras 89-103.

[89] *Front Polisario*, *supra* note 86, paras 227-228.

conditions and the prohibition of child labour and protection of young people at work (Articles 31 and 32 of the Charter).[90]

The General Court argued that even if the EU is not directly liable for the infringement of fundamental rights in third countries, it may indirectly encourage such infringements or profit from them if it allows an export of goods produced or obtained in conditions which do not respect the fundamental rights of the population of the territory from which they originate.[91] In this specific case, the General Court considered that the Agreement facilitates the export of products to the EU originating from Western Sahara,[92] and that the Agreement does not guarantee an exploitation of the natural resources of Western Sahara beneficial to its inhabitants.[93] According to the General Court, the Council committed a manifest error of assessment by failing to ensure that the exploitation of natural resources of Western Sahara would not be detrimental to the fundamental rights of its inhabitants, and that the argument that this is a matter that only concerns the Kingdom of Morocco cannot be accepted.[94]

On appeal brought by the Council, the judgement has been set aside by the Court on the preliminary finding that the General Court erred in considering that the Agreement would apply to the territory of Western Sahara.[95] Therefore, there has been no examination of the possible fundamental rights implications.

This does not as such invalidate the reasoning of the General Court which is interesting for a number of reasons: firstly, the General Court, established its competence to assess the compatibility of international agreements through acts derived from it, with fundamental rights. As described above, this possibility is especially meaningful as it allows the CJEU to exercise an *a posteriori* control of international agreements, contrary to the procedure in Article 218(11) TFEU, allowing thus compliance with EU law in the long term. A second interesting question raised here is the territorial scope of the Charter. Going further than the European Court of Human Rights' review of the actions of its States parties in territories of third countries that they effectively control ('effective control test'), the General Court gives extraterritorial effect to the Charter by widening its scope to EU decisions that have an extraterritorial effect.[96] This is in line with the provisions of the Charter, as there is no territoriality clause akin to other international human rights instruments,[97] that would limit the application of the Charter to violations occurred on the "territory" of the EU (or of that of the Member States), and solely a material scope of application: the implementation of EU law. V. Moreno-Lax and C. Costello saw herein the emergence of an autonomous paradigm governing the applicability of the Charter, depending on the allocation

[90] *Front Polisario*, *supra* note 86, para. 228.
[91] *Front Polisario*, *supra* note 86, paras 230-231.
[92] *Front Polisario*, *supra* note 86, para. 238.
[93] *Front Polisario*, *supra* note 86, para. 239.
[94] *Front Polisario*, *supra* note 86, para. 247.
[95] ECJ, Case C-104/16 P, *Council* v. *Front Polisario* [2016] EU:C:2016:973.
[96] For more details, see C. Ryngaert, 'EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations', 20 *International Community Law Review* 2018, 383-385 and cited case-law.
[97] See, e.g., Article 1 of the European Convention of Human Rights.

of powers organised by the Treaties, and irrespective of any geographical criterion.[98] S. Hummelbrunner proposed to qualify this position, making a distinction between negative and positive obligations stemming from the Charter, expanding the extraterritorial scope of the Charter only to the former,[99] and relying on the effective control test of the ECtHR for the latter.[100] The question of democratic legitimacy of expanding the scope of application of the Charter, an EU internal instrument, to a third country, can also be raised,[101] but this judgment of the General Court shows, as in the Opinions analysed above, that the CJEU is determined to mainstream the high level of protection provided for by the Charter throughout not only internal EU policy, but also external policy.

c. The ambiguous mobilization of the principle of autonomy of the EU legal order

Finally, it is important to address the ambiguous use by the Court of another legal basis it appears to rely upon to justify that international trade agreements must respect fundamental rights, which is the general principle of autonomy of the EU legal order, taken in its external dimension. B. De Witte defined external autonomy as 'the capacity and perceived necessity for the European Union legal system to give priority to its own internal rules over and above external international norms', in order to protect the EU legal order against threats originating from international law.[102]

The CJEU allows international agreements concluded by the EU to affect, in a certain way, the powers of the EU institutions, provided that they do not alter the essential character of those powers and, moreover, that there is no adverse effect on the autonomy of the EU legal order.[103] This autonomy stems from, according to the Court, the essential characteristics of the EU and its law (namely the principles of primacy and direct effect of EU law in the Member States) and is characterised by its unique constitutional framework, which encompasses the founding values, the general principles of EU law, the Treaty provisions and the Charter.[104] In the *Kadi* judgment,[105] as in Opinions 2/13 on the accession of the EU to the European Convention on Human Rights,[106] and 1/17 on

---

[98] V. Moreno-Lax, C. Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model', in S. Peers *et. al*. (eds.), *supra* note 16, 1657-1683.

[99] S. Hummelbrunner, 'Beyond Extraterritoriality: Towards an EU Obligation to Ensure Human Rights Abroad?', *CLEER Papers* 2019, 26-29.

[100] *Ibid.*, at 27.

[101] C. Ryngaert, *supra* note 96 at 382.

[102] B. De Witte, 'The Relative Autonomy of the European Union's Fundamental Rights Regime', 88 *Nordic Journal of International Law* 2019, 65-85; see also C. Eckes, 'International Rulings and the EU Legal Order: Autonomy as Legitimacy?', *CLEER Papers* 2016, at 12.

[103] Opinion 1/17, *supra* note 44, para. 107.

[104] *Ibid.*, paras 109-110.

[105] ECJ, Joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, [2008] ECLI:EU:C:2008:461, para. 283.

[106] ECJ, Opinion 2/13 (*Accession to the ECHR*) [2014] ECLI:EU:C:2014:2454, paras 169-170.

the CETA,[107] the Court recalled, in the context of the autonomy of the EU legal order, that respect for fundamental rights is a condition of the lawfulness of EU acts, including in relation to international law.[108]

However, when looking closely at Opinions where the Court examined the compatibility of envisaged international agreements with the provisions of the Charter, the principle of autonomy plays an ambiguous role. In Opinion 1/17, this ambiguity is especially evident. In addition to the questions on equal treatment and access to an independent tribunal analysed above, the Court was also called upon by the Belgian government to assess the compatibility of the ISDS mechanism with the principle that the Court has exclusive jurisdiction over the definitive interpretation of EU law, of which the respect is necessary in order to ensure the autonomy of the EU legal order.[109]

In its position, the Court followed this three-fold questioning, and answered each question subsequently,[110] effectively disconnecting the question whether the ISDS mechanism is compatible with the autonomy of the legal order on the one hand, and with the Charter on the other hand. When assessing the question on the compatibility of the ISDS mechanism with the principle of autonomy of the EU legal order, the Court primarily relied on the fact that the preservation of this autonomy is ensured through the judicial system established by the Treaties, which is intended to ensure consistency and uniformity in the interpretation of EU law.[111] The Court stressed that this means it must have exclusive jurisdiction to interpret EU law.[112] The Court thus solely verified whether the CETA Tribunal would have jurisdiction to apply and interpret EU law provisions other than the CETA,[113] or whether the CETA Tribunal would be able to weigh on the EU constitutional framework, by calling into question the high levels of protection of public interest against the freedom to conduct business.[114] The Court found that the CETA Tribunal had no such powers, and therefore declared that the ISDS mechanism has no adverse effect of the principle of autonomy of the EU legal order.

This seems at odds with how the Court has defined the general principle of autonomy of the EU legal order, as explained above, which appears as the foundation of the comprehensive legal system that constitutes the EU and its specificities. Rather than proceeding to a comprehensive analysis of the effects of the ISDS on the EU legal order, the Court seems to primarily rely on this principle of autonomy to assess whether international agreements would affect its monopoly on the interpretation of EU law.[115] This was also the case in the recent *Achmea* judgment, where the Court considered that arbitral tribunals established in Bilateral Investment Treaties between Member States could be

[107] Opinion 1/17, *supra* note 44, para. 110.
[108] B. De Witte, *supra* note 102, p. 68.
[109] Opinion 1/17, *supra* note 44, para. 46.
[110] Opinion 1/17, *supra* note 44, paras 105 ff.
[111] Opinion 1/17, *supra* note 44, para. 111.
[112] Opinion 1/17, *supra* note 44, para. 111.
[113] Opinion 1/17, *supra* note 44, paras 120-136.
[114] Opinion 1/17, *supra* note 44, paras 137-161.
[115] B. De Witte, *supra* note 102, p. 70.

called upon to interpret EU law, without being subject to Article 267 TFEU, and are therefore contrary to the principle of autonomy.[116] This was also the case in Opinion 1/09 on the draft agreement of the creation of a unified patent litigation system.[117] In contrast, in cases where the exclusive jurisdiction of the Court was not at stake, the principle of autonomy has not been mobilised by the Court.[118] As Bruno De Witte put it:

> 'protecting the Court's exclusive jurisdiction is presented in these rulings as a *means* of preserving the autonomy of the [EU] legal order. In reality, it seems the other way around: the autonomy of the [EU] legal system is put forward as a rhetorical device to help to protect the Court's own exclusive jurisdiction in [EU] law matters.'[119]

A more conciliatory approach is to consider that within the EU constitutional framework solely the CJEU and the national courts are vested in ensuring the respect of EU law in general, and of the Charter in particular. The reliance of the autonomy of the EU legal order is therefore needed to *firstly* verify that this competence is not threatened by international mechanisms, which are not entrusted with this task.

What is striking is that once the CJEU had determined that the autonomy of the EU legal order was not under threat, and turned to the assessment of the compatibility of international agreements with fundamental rights, it no longer referred to the autonomy of the EU legal order, but fell back on its traditional case-law. It referred more precisely to its well-established competence, identified since 1974[120], and analysed above, according to which:

> 'the provisions of an international agreement entered into by the European Union under Articles 217 and 218 TFEU form an integral part of the EU legal system as from the coming into force of that agreement. The provisions of such an agreement must therefore be entirely compatible with the Treaties and with the constitutional principles stemming therefrom.'[121]

These developments lead us to stress the ambiguous function the Court gives to the principle of autonomy of the EU legal order. While this general principle of autonomy constitutes in itself a legal basis derived from primary law for the obligation of international agreements to respect the fundamental rights ensured by the EU, this is not the way the Court construes this principle.

To conclude this overview of the tools used by the CJEU to review international agreements, it is noticeable that the CJEU has developed an extensive case law regarding the compatibility of international agreements with EU primary law, including the Charter. Going beyond the possibility it received to

---

[116] ECJ, Case C-284/16, *Achmea* [2018] ECLI:EU:C:2018:158, paras 42-59.

[117] ECJ, Opinion 1/09 (*Unified Patent Litigation System*) [2011] ECLI:EU:C:2011:123, para. 78.

[118] See, for instance, Opinion 1/15, *supra* note 18.

[119] B. De Witte, *supra* note 102, p. 71.

[120] see *Haegemann*, *supra* note 13, para. 5.

[121] Opinion 1/15, *supra* note 18. para. 67.

conduct a direct *a priori* compatibility control under Article 218 (11) TFEU, the CJEU has made full use of its extensive jurisdiction to ensure that in the interpretation and application of the Treaties, the law is observed (Art. 19 (1) TEU). It has relied on various provisions of the Treaties to conduct an indirect compatibility control of specific acts. One question remains whether these cases are merely topical or whether they indicate a more profound shift.

3. CONCLUSION

The CJEU has been increasingly including the EU Charter of Fundamental Rights among the standards in light of which it reviews the compatibility of international agreements concluded by the EU (and/or its Member States) with the Treaties. A new extended standard of protection of fundamental rights has emerged in the case-law. In cases concerning the conclusion of international agreements by the EU, the Court simply extended the requirement of the compatibility of EU international agreements with EU primary law to their compatibility with the Charter. This was for instance the case in Opinions 1/15 and 1/17, which illustrated how this new standard applies in classical EU external relations. The Court also applied such control to acts adopted on the basis of existing international agreements, such as in the *Front Polisario* case. Finally, and maybe more surprisingly, the Court also started increasingly referring to the Charter in cases which fall outside the scope of the EU legal order, but in which EU institutions receive competences to act. These cases illustrate the various avenues taken by the Court to ensure a direct or indirect compatibility control of EU external actions with the Charter.

The CJEU has thus given flesh and legal substance to the principles and objectives of Article 21 TEU that guide the EU's external relations, especially the advancement in the wider world of the universality and indivisibility of human rights and fundamental freedoms. It is almost as if in the eyes of the CJEU, the fundamental rights enshrined in the Charter equate the human rights protected in the international legal order. This certainly leaves room for new questions, such as the coherence between the use of this standard of protection in the different fields of EU external policy, or whether the CJEU will, in the future, set aside its stance on interpreting foreign law and practices to ensure the protection of fundamental rights.[122]

Such move appears to integrate itself in a larger shift in the EU's external relations in favour of a higher level of protection of fundamental rights. Two examples of such shift can be highlighted.

The first example can be found in the case law of the CJEU regarding the scope of the EU's competence within the Common Commercial Policy (Art. 207 TFEU), and the protection of human rights and fundamental freedoms within this policy area. This has been the case with the interpretation the Court offered in its Opinion 2/15.[123] The Opinion was highly anticipated, since it concerned

[122] C. Kuner, *supra* note 34, p. 880.
[123] ECJ, Opinion 2/15 (*EU-Singapore Free Trade Agreement*) [2017] ECLI:EU:C:2017:376.

one of the very first "new generation" free trade and investment agreements with Singapore, for which the Council authorised the Commission to start negotiations just weeks after the entry into force of the Lisbon Treaty. Relying on Article 21 TEU and the objectives enshrined therein,[124] as well as the renewed importance given to the protection of fundamental rights in the EU, the Court provided for an extensive definition of the scope of the Common Commercial Policy. The judges, in contrast with Advocate General Sharpston's View,[125] redefined the objectives of EU trade policy in light of the general objectives and principles governing all of the EU's external action.[126] This reasoning allowed the Court to include the objectives of sustainable development and high labour protection standards within the Common Commercial Policy.[127] It considered that the EU and the Republic of Singapore did not intend to regulate with this envisaged trade agreement the levels of social and environmental protection in their respective territories, but rather want to ensure that the liberalisation of trade between themselves is conditional to their compliance with their international obligations.[128] As a consequence, the provisions in question were thus linked to the trade between the two parties, and fell within the scope of the EU's common commercial policy, and its exclusive competence. This Opinion reinforced the capacity of the EU to include provisions on the protection of the environment and labour standards in its new agreements with external partners. This is particularly important since sustainable development and labour protection standards are considered as fundamental rights enshrined within the Charter (Title IV Solidarity) and they are a welcome addition to the human rights previously protected in EU's international agreements.[129]

The second example can be found in the discussion initiated by the Netherlands in late 2018, which led to an agreement on 9 December 2019 by the Foreign Affairs Council on the elaboration of an "EU-Magnitsky Act".[130] This Act – owing its name to a Russian accountant who investigated large-scale Russian money-laundering in the EU, and who died in a Russian prison after suffering from torture and being denied medical treatment despite visible conditions – would be an EU human rights sanctions regime that targets serious human

[124] Opinion 2/15, *supra* note 123, para. 143.

[125] AG Sharpston View on on the EU-Singapore Free Trade Agreement [2016] EU:C:2016:992.

[126] M. Cremona, 'Shaping EU trade policy post-Lisbon: Opinion 2/15 of 16 May 2017', 14 *European Constitutional Law Review* 2018, 242-243.

[127] Opinion 2/15, *supra* note 123, para. 147.

[128] As listed by the CJEU, in Opinion 2/15, para. 150: the obligation on them to implement effectively the multilateral environmental agreements to which they are party (Article 13.6.2), to address trade in illegally harvested timber and timber products (Article 13.7(b)), to comply with sustainable exploitation of fish stocks as defined in the international instruments ratified by the Parties (Article 13.8(a)), to combat illegal, unreported and unregulated fishing (Article 13.8(b)) and to adopt effective monitoring and control measures to ensure compliance with conservation measures (Article 13.8(c)).

[129] See e.g. human rights clauses in association agreements.

[130] Council, *Outcome of the Council Meeting, 3738th Council meeting, Foreign Affairs*, 9 December 2019, doc. 14949/19, p. 6: "The Council reflected on how to improve the EU toolbox on human rights, and the High Representative announced the launch of preparatory work on a possible horizontal sanctions regime to address serious human rights violations."

rights violations by individual offenders.[131] Even though the scope of this sanctions regime is still unclear, it is intended to be global, meaning that the alleged violations and targeted individual(s) could be situated anywhere in the world.[132] Such sanctions regime would be a way for the EU to reaffirm its global lead on the protection of human rights. Yet, when elaborating such mechanism, the EU must ensure respect for fundamental rights of potential offenders, including those guaranteed in the Charter. In that regard, special attention would have to be devoted to the standards of proof for the imposition of global sanctions that may be imposed in situations in which geographical distance and dependency on more indirect sources of information may go against the requirements of due process and respect for procedural rights of the individuals concerned.[133] These rights, protected in Articles 47 and 48 of the Charter, have already been the object of scrutiny and control by the Court of Justice,[134] and the Court may be called upon to control that the envisaged sanctions regime complies with them.

As mentioned above, these two examples illustrate how EU external relations are increasingly governed by fundamental rights. Their protection expands beyond those considered as *jus cogens* under international law and the EU mobilises modern tools, such as international sanction regimes to ensure their enforcement. The CJEU plays an important role in such promotion of fundamental rights, by relying on the variety of avenues and instruments, and especially the Charter, at its disposal to ensure the respect for fundamental rights in all aspects of EU external relations.

[131] For an analysis of the possible mechanism, see N. van der Have, 'The Proposed EU Human Rights Sanctions Regime A First Appreciation', 30 *Security and Human Rights* 2019, p. 1-16.

[132] *Ibid*., p. 2.

[133] *Ibid* , p. 7.

[134] See for instance the saga "Kadi", supra note 17, and the need to ensure respect for procedural rights.

JUDICIAL EXTRATERRITORIAL APPLICATION OF THE EU CHARTER OF FUNDAMENTAL RIGHTS AND EU TRADE RELATIONS – WHERE DO WE STAND TODAY?

Katarzyna Szepelak[1]

1. INTRODUCTION

The Charter of Fundamental Rights of the European Union (CFR or Charter) has the same legal value as the Treaties.[2] However, its lack of an explicit reference to *externality* or *extraterritoriality* raises the question of whether EU acts with external effect that are potentially violating fundamental rights can be set aside by the Court of Justice of the European Union (CJEU) on the basis of the Charter. At the same time, the EU's activities in the international arena are subject to a number of self-imposed human rights obligations. Articles 21 TEU and 3(5) TEU in particular commit the EU to protecting human rights globally. There is, however, no consistent judicial practice pertaining to the Charter's extraterritoriality. The purpose of this contribution is to discuss the extraterritorial scope of application of the CFR in the context of the EU's trade policy – more specifically in the context of the EU's trade agreements.[3] The question of the extraterritorial applicability of the Charter will be specifically considered with regard to the possibilities for judicial review laid down in the Treaties.

Section 2 of this paper presents general issues regarding the judicial review of trade agreements. In that context the paper will explore the adequate judicial review with a focus on the review of the compatibility with fundamental rights.[4] Noting that the extraterritorial applicability of the Charter could be substantially limited if traditional International Human Rights Law[5] concepts such as *author-*

---

[1] Ph.D. candidate, Chair of European Law, Jagiellonian University, Kraków.

[2] Article 6 TEU.

[3] As EU trade agreements, I understand international agreements concluded by the EU with relevant trade components: (1) Free Trade Agreements (FTAs) and Custom Unions (XXIV par. 8 (a) and (b) GATT 1994); (2) Partnership and Cooperation Agreements (PCAs), concluded primarily under Articles 207 TFEU, 209 TFEU, 217 TFEU, and 325 TFEU; (3) agreement for partnership with countries from Africa, the Caribbean, and the Pacific (ACP), concluded under Article 217 TFEU); (4) sectoral trade agreements liberalising trade in a specific area or in specific products (concluded under Article 207 TFEU). FTAs include: (1) first-generation trade agreements (including association agreements concluded under Article 217 TFEU and agreements concluded under Article 207 TFEU); (2) new-generation trade agreements (concluded primarily under Article 207 TFEU); (3) The Deep and Comprehensive Free-Trade Areas (DCFTA) concluded primarily under Article 217 TFEU, and additionally Economic and Partnership Agreements with ACP countries concluded primarily under Article 207 TFEU and Article 209 TFEU.

[4] Whenever this paper mentions 'fundamental rights' it refers exclusively to the rights enshrined in the CFR. 'Human rights' for the purposes of this paper mean both human rights envisaged in IHRL and fundamental rights prescribed in the CFR.

[5] Hereinafter: 'IHRL'

ity of *effective control* are applied, the paper presents and discusses the standpoints of the CJEU and Advocate Generals on that matter. In particular, it discusses the adequacy of autonomous jurisdictional standards for the application of the CFR. Further, Section 3 provides an analytical case-study of the *Front Polisario* case – which to this day constitutes the only example of extraterritorial judicial application of the CFR in the *ex post* review of trade agreements conducted by the GC. Section 4 assesses the limits of judicial review of the compatibility of trade agreements with the CFR imposed by the standard of institutional discretion. To that end, the premise of the discretionary standard as applied to the legislative acts is dismissed, and alternative models for the reasonable judicial review of external action in the field of trade are proposed.

1.1 **Setting the stage**

At the outset, there is a need for clarification of the terminology adopted in this paper. Central concepts for this research include: *external action*, *extraterritoriality*, and *territoriality* in the context of human rights obligations. In general terms, for the purposes of this paper, the concept of *external* shall be used for the laws and policies of the EU related to third countries, whereas the concept of *extraterritoriality* in general refers to situations in which the abovementioned laws and policies apply or have a direct effect outside the EU territory.[6] In the scenario when the judicial body applies the law, *extraterritoriality* for the purposes of this paper refers to the effect prompted by determining the relevant rights of individuals abroad by a domestic judicial body. Finally, the concept of *territory* in Public International Law[7] refers to the land within the national borders and territorial waters of a State,[8] whereas *territoriality* refers to the exercise of authority by a certain entity over a given territory.[9]

This paper deals predominately with the *judicial extraterritorial application* of fundamental rights enshrined in the CFR in the context of the judicial review of compatibility of trade agreements with this instrument.[10] It is therefore useful to explain the concept of the *application of the Charter* as it is understood in this paper. As J. Wróblewski observed in his book 'The Judicial Application of Law' that:

---

[6] V. Moreno-Lax and C. Costello, 'The extraterritorial application of the EU Charter of Fundamental Rights: from territoriality to facticity, the effectiveness model', in S. Peers *et al.* (eds.), *The EU Charter of Fundamental Rights. A Commentary* (Oxford: Oxford University Press 2014), at 1658, in footnote 3 thereof.

[7] Hereafter: 'PIL'

[8] J. Wouters *et al.*, *International Law. A European Perspective* (Oxford: Hart Publishing 2018), at 426.

[9] A. Arcuri and F. Violi, 'Reconfiguring Territoriality in International Economic Law', in M. Kuijer and W. Werner (eds.), 47 *Netherlands Yearbook of International Law* 2016.

[10] In literature limits of the application of the Charter have been extensively discussed primarily in the context of the examination of national measures. Less focus has been given to the extraterritorial application of the Charter.

> "judicial application of law", similarly to the term "application of law", is one which lacks any precisely fixed meaning either in legal language, in which enacted rules are formulated, or in other languages associated with law. Legal practice and legal science use the terms with various meanings, this variability resulting from the pressures to which the functioning of law and analytical studies of law are subject, as well as from the pressures of judicial ideology.[11]

This finding is corroborated by relevant scholarship on the application or judicial application of the CFR (be it territorial or extraterritorial application). For the purposes of this paper, the application of the CFR shall mean that the CFR constituted a definite legal basis determining the content of the judicial decision.[12] The external judicial application of CFR is understood here as determining, in the context of judicial review, the rights of individuals located outside the EU's territory,[13] be it positively in the cases of alleged infringement, or in cases of *ex ante* control without any positive legal consequences.[14] Therefore, a situation of extraterritorial application occurs whenever the CJEU reviews the compatibility of a trade agreement with the Charter to investigate whether an infringement of the fundamental rights of a person based abroad has occurred or not.[15]

1.2 **Extraterritorial human rights obligations of the EU**

The question of the extraterritorial application of the CFR fits into the larger scheme of the EU's extraterritorial human rights obligations described in the treaty. To understand the architecture of the EU's human rights obligations with relevance to its external action, it is helpful to investigate how these obligations interact with the more general scheme of international human rights law (IHRL) obligations of states and international organisations. According to the classical division of the IHRL obligations of states, these obligations can be divided into the following groups[16]: (1) the *obligation to respect human rights*, which encompasses abstention from actions that can negatively impact human rights in

[11] J. Wróblewski, *The Judicial Application of Law* (Dordrecht: Springer 1992), at 1.

[12] See J. Wróblewski, *supra* note 11, at 1.

[13] For the simplification in this article I will refer to EU territory instead to the territory of all Member States.

[14] See J. Wróblewski, *supra* note 11, at 1.

[15] See C. Ryngaert, 'EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligation's', 20 *International Community Law Review* 2018, at 379. Similarly Advocate General Wathelet found that application of the Charter (as understood in Article 51) encompasses the examination of the EU act's compatibility with the CFR's provisions. However, at the same time Advocate General Wathelet dismissed the extraterritorial application of the Charter to the indigenous people of Western Sahara, whose rights have been threatened by the application of the EU's trade agreement. Against this particular finding I will further argue in Section 2 of this paper. See AG Wathelet, Opinion to Case C-104/16 P, *Council* v. *Front Polisario* [2016] ECLI:EU:C:2016:677, para 271.

[16] O. De Schutter, *International Human Rights Law* (Cambridge: Cambridge University Press 2010), at 242, ACHPR, *The Social and Economic Rights Action Center and the center for Economic and Social Rights* v. *Nigeria*, Communication No. 155/96, para. 45.

another state;[17] (2) the obligation to *protect human rights,* which in IHRL means taking adequate steps to deter third parties from violating human rights in another state;[18] (3) the obligation to *fulfil human rights,* which means undertaking positive legislative or administrative efforts to enable full realisation of human rights;[19] (4) additionally, the obligation to *promote* human rights closely linked to the obligation to *fulfil.*[20]

In the literature, the obligation to respect *human rights* is described as *negative* (it creates obligations to refrain from action),[21] whereas the obligations to *protect, fulfil,* and *promote* demand undertaking certain action and are therefore described as *positive.*[22]

With the entry into force of the Lisbon Treaty, the EU became bound by a wide array of obligations concerning human rights in external settings. Treaty provisions, unfortunately, provide no guidance on the understanding of the delimitation between notions of extraterritoriality and territoriality of the human rights obligations prescribed therein. It is, however, useful at this point to present how the obligations envisaged in the Treaties at least linguistically fit into the categories of the IHRL obligations listed above.

Firstly, Article 21 (3) TEU stipulates that the Union shall *respect* the principles encompassing universality and indivisibility of human rights and fundamental freedoms.[23] Article 21 (2) TEU states that the EU shall pursue common policies and actions, and work towards a high degree of cooperation in all fields of international relations, in order to consolidate and support *inter alia* human rights in different areas of the Union's external action. In this context, Bartels argues that Article 21 (3) TEU (read in conjunction with Articles 21 (1) and (2) TEU) sets out beyond doubt the duty of the EU to *respect* human rights; so it is safe to assume that under EU law, there is an obligation to ensure that the EU's policies do not have negative effects on human rights in third countries.[24]

The duty to *protect* is enshrined in Article 3 (5) TEU, which provides that the EU shall contribute to the *protection* of human rights. Article 3 (5) TEU is also

---

[17] *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997), para. 6, available at: http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html

[18] *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, supra* note 17.

[19] *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, supra* note 17.

[20] ACHPR, *supra* note 16, para 47.

[21] J. Czepek, *Zobowiązania pozytywne państwa w sferze praw człowieka pierwszej generacji na tle Europejskiej Konwencji Praw Człowieka* [Positive obligations of the state concerning first generation of human rights in context of the European Convention on Human Rights] (Olsztyn: Wydawnictwo UWM 2014), at 13 see also L. Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects', 25(4) *European Journal of International Law* 2014, at 1090 and M. Bulterman, 'The Contribution of the Agency to the External Policies of the European Union', in P. Alston and O. De Schutter (eds.), *Monitoring Fundamental Rights in the EUS. The Contribution of the Fundamental Rights Agency* (Oxford: Hart Publishing 2005), at 254.

[22] See A. Ganesh, 'The European Union's Human Rights Obligations towards Distant Strangers', 37 *Michigan JIL* 2015–2016, at 475. H. Breakey, 'Positive Duties and Human Rights: Challenges, Opportunities and Conceptual Necessities', 63(5) *Political Studies* 2015, at 1198.

[23] Article 21 (1) TEU.

[24] L. Bartels, *supra* note 21, at 1090.

strengthened by the wording of Article 21 (1) TEU, which reads as follows: 'in the international scene the EU shall be *guided by* the principles which have inspired its own creation, development, and enlargement, and which it seeks to advance in the wider world including human rights'. Article 21 (1) TEU and the principle of 'guidance' also incorporate the duty to *fulfil* human rights. Finally, Article 3 (5) TEU provides that the EU *promotes* its values (which include human rights[25]) in its relations with the wider world.

Even though there seems to be some consensus on the notion that Article 3 TEU is legally binding on the EU institutions[26] and that Article 21 TEU forms a point of reference for EU institutions in the legislative process,[27] the normative scope of these provisions is yet to be defined.[28] The case law of the CJEU shows that the Court also attributes legal value to Article 21 TEU; however, it does not indicate clearly that this provision contains any hard obligations.[29] Also, it is worth noting that the Article 2 TEU, which stipulates that EU is founded on values including respect for human rights, is now considered to be justiciable (although it has been suggested that it should be applied in combination with another treaty provisions).[30]

It is nevertheless safe to say that the EU sets the threshold very high when it comes to its international presence, and it self-imposed an array of obligations which, at least textually, reflect the typology of IHRL obligations.

It is important also to recognise that the abovementioned provisions should be read in line with Article 6 (1) TEU, which provides that 'The EU recognises the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted in Strasbourg on 12 December 2007, which shall have the same legal value as the Treaties'.

2. JUDICIAL REVIEW BY THE CJEU AND THE EXTRATERRITORIAL APPLICATION OF THE CHARTER

As already stated, the EU has obligations to respect, protect, and promote human rights in its external actions. It was also underlined that the Treaties do not limit these obligations to merely territorial or extraterritorial situations. The EU's judicature over the years has dealt with situations in which the revision of EU

[25] Article 2 TEU

[26] K.-P. Sommermann, 'Commentary to Article 3 TEU', in H.-J. Blanke and S. Mangiameli (eds.), *The Treaty on European Union (TEU)* (Berlin, Heidelberg: Springer 2014), at 159.

[27] S. Oeter, 'Commentary to Article TEU', in H.-J. Blanke and S. Mangiameli, *supra* note 26, at 840.

[28] E. Cannizzaro, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels', 25(4) *European Journal of International Law* 2014, at 1097.

[29] S. Hummelbrunner, 'Beyond extraterritoriality: towards an EU obligation to ensure human rights abroad? Reflections in light of the *Front Polisario* saga', 2 *CLEER PAPERS* 2019, at 39 and at note 181.

[30] A. Von Bogdandy and L. Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values. Reverse Solange, and the Responsibilities of National Judges', 15(3) *European Constitutional Law Review* 2019, at 410.

acts (including trade agreements) demanded employment of the notion of human rights or more recently fundamental rights envisaged in the Charter. In this light, this Section presents fundamental rights as a potential ground of review of trade agreements. Then the Section examines possible limitations of such a review (for example lack of the EU's external jurisdiction). Finally, it is argued that the review of the trade agreement's compliance with fundamental rights calls for the emergence of an independent judicial standard.

2.1 **Judicial review and fundamental rights**

It is important to underline, that trade agreements undergo the same level of scrutiny as other EU acts.[31] Also, because the trade agreements are instruments of external action, it is important to remember that the EU is bound by an additional, sophisticated array of specific human rights obligations envisaged in the Treaties.

It is therefore remarkable that in cases like the *Western Sahara Campaign UK*,[32] which concerned external trade relations of the EU, the Court of Justice decided to omit in its reasoning any reference to Articles 3(5) and 21 TEU. The Court referred instead to the *Kadi I* doctrine,[33] which was established before the abovementioned provisions were even introduced to the Treaty in their present form (in *Kadi I* the Court of Justice stressed that the EU is based on the rule of law and therefore respect for human rights is a condition of the lawfulness of Community acts). At the same time, the Court of Justice failed to mention the relevance of the examination of the act's compliance with fundamental rights. The relationship between the *Kadi I* doctrine and Articles 3(5) TEU and 21 TEU was, however, considered by Advocate General Wathelet in his Opinion in the *Western Sahara Campaign UK* and Advocate General Bot in his Opinion in 1/17 *CETA*. Advocate General Wathelet stated that:

> [A]s the Court held in (…) *Kadi* (…), respect for human rights is a condition of the lawfulness of EU acts and measures incompatible with respect for human rights are not acceptable in the EU legal order. Thus, the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EU and FEU Treaties, such as Article 3(5) TEU and Article 21 TEU, which provide that the Union's external action is to respect human rights (…).[34]

---

[31] For examples of judicial review of trade agreements see: ECJ, Opinion 1/17, *Comprehensive Economic and Trade Agreement between Canada* (hereafter: 'CETA') [2019] ECLI:EU:C:2019:341 (review under Article 218 TFEU), ECJ, Opinion 2/15, *Free Trade Agreement between the European Union and the Republic of Singapore* [2017] ECLI:EU:C:2017:376 (review under Article 218 TFEU), ECJ, Case C-266/16, *Western Sahara Campaign UK* [2018] ECLI:EU:C:2018:118 (review under Article 267 TFEU), GC, Case T-512/12, *Front Polisario* v. *Council* [2015] ECLI:EU:T:2015:95 (review under Article 263 TFEU).

[32] *Western Sahara Campaign UK*, *supra* note 31.

[33] ECJ, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi, Al Barakaat International Foundation* v. *Council (hereafter: 'Kadi I')* [2008] ECLI:EU:C:2008:461.

[34] *Western Sahara Campaign UK*, *supra* note 31, para 100.

Similarly, Advocate General Bot underlined (referring inter alia to the *Kadi I* doctrine in conjunction with the *Western Sahara Campaign UK* judgement findings):

> [I]t follows from the second sentence of Article 207(1) TFEU, read in conjunction with Article 21 TEU, that the European Union must, when exercising the competences conferred on it by the EU and FEU Treaties, including those relating to the common commercial policy, respect fundamental rights (..) I note, in this regard, that, in accordance with settled case-law, international agreements concluded by the European Union 'are, from the date of their entry into force, an integral part of the EU legal order. The provisions of such agreements must therefore be entirely compatible with the Treaties and with the constitutional principles stemming therefrom'. This of course *includes the Charter, pursuant to Article 51 thereof, which has 'the same legal value as the Treaties' in accordance with Article 6(1) TEU* [emphasis added].[35]

Ultimately it is yet to be determined whether human rights obligations in the context of the EU's external action add to the threshold of the judicial review of trade agreements. The existence of such obligations nonetheless certainly strengthens the view that judicial review shall in all cases include an examination of the compatibility of the agreement with the CFR.

2.2 **CFR and the notion of territoriality**

Even if CFR can be applied as a threshold of validity for EU acts such as trade agreements, one can cast doubt on the limits of the instrument's applicability in extraterritorial settings. It is important to recall that there is no clause in the CFR concerning its territorial scope of application.[36] Article 51 (1) CFR, which generally delimits the Charter's scope of application, reads as follows:

> [t]he provisions of this Charter are addressed to the institutions, bodies, offices, and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles, and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

Accordingly, as Violeta Moreno-Lax and Cathryn Costello indicated in their study on the extraterritorial application of the CFR, in light of the provision of Article 51 (1) ECFR, the 'territoriality' question is simply irrelevant.[37] According to them, the only criterion that limits the application of the CFR results from the judicial doctrine established in *Fransson*.[38] According to *Fransson* and in line with Article 51, the Charter applies whenever the institutions, bodies, offices, and agen-

[35] AG Bot, Opinion, case 1/17, *Comprehensive Economic and Trade Agreement between Canada (hereafter: 'CETA')* [2019] ECLI:EU:C:2019:72, para. 195.
[36] L. Bartels, *supra* note 21, at 1075, V. Moreno-Lax and C. Costello, *supra* note 6, at 1658.
[37] V. Moreno-Lax and C. Costello, *supra* note 6, at 1658.
[38] V. Moreno-Lax and C. Costello, *supra* note 6, p. 1658.

cies of the Union apply EU law.[39] Yet it remains unclear if and when the Charter indeed applies in extraterritorial situations. The implementation of EU law by EU institutions can take many forms, and, as Wróbel suggests, in most cases it will encompass legislative initiatives. Nevertheless, 'implementation' within the meaning of Article 51 should not be limited only to legislative acts but should also include acts of the institutions, including, – as indicated by the cited author – international agreements concluded by the EU.[40] What follows from the previous parts of this paper is that neither the *Kadi I* doctrine nor the wording of Article 51 should preclude the judicial review of the compliance of trade agreements with the CFR. However, because such scrutiny could directly impact the rights of individuals outside the EU's territory, it is valid to consider whether there are other concepts that would justify the imposition of territorial limits to the scope of judicial application of the CFR.

2.3 **Jurisdiction – introduction of the concept**

Although the issue has not yet been discussed by the CJEU, there are a number of concepts known to international human rights monitoring bodies that limit the scope of application of the human rights instruments. For the sake of clarity, it should be highlighted that: (1) the CFR is not a human rights treaty open to signature to all countries; and (2) the CJEU is not a human rights court (at least not officially). However, the present author contends that the Charter in many ways reflects and serves the role of a conventional multilateral human rights instruments. Thus, considerations on extraterritorial applicability of human rights treaties – where relevant – can be useful in sourcing judicial paths for the extraterritorial application of the Charter.

The current debate on the scope of the application of the human rights instruments focuses on the criterion of *jurisdiction*.[41] The determination of the scope of application of human rights instruments implies the determination of the actors that benefit from the rights stemming from said instruments. As De Schutter demonstrates, the popular concepts of *territory* and *jurisdiction*, as criteria for application of human rights obligations, can differ in different multilateral human rights instruments.[42] Similarly, there is no coherent approach in multilateral human rights instruments to the issue of defining the groups of people towards which states have certain obligations, and not all of these instruments adhere to the notion of jurisdiction.[43] An important example for present pur-

[39] ECJ, Case C-617/10, *Åklagaren* v. *Hans Åkerberg Fransson*, [2013] ECLI:EU:C:2013:105.

[40] A. Wróbel, 'Artykuł 51' [Article 51], in A. Wróbel (ed.) *Karta Praw Podstawowych Unii Europejskiej. Komentarz* [EU Charter of Fundamental Rights. Commentary] (Warszawa: C. H. Beck 2013), at 6.

[41] M. Langford *et al*., 'Extraterritorial Duties in International Law', in M. Langford *et al.* (eds.), *Global Justice, state Duties: the extraterritorial scope of economic, social, and cultural rights in international law* (Cambridge: Cambridge University Press 2013), at 51, J. Wouters *et al*., *supra* note 8, at 421.

[42] O. De Schutter, *supra* note 16, at 123.

[43] For example article 2 (1) ICCPR stipulates: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdic-

poses is the instrument that often serves as a point of reference for the EU courts, the European Convention of Human Rights (ECHR), which provides a clear jurisdiction clause. Article 1 of the ECHR states: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. Therefore, the case-law of the European Court of Human Rights (ECtHR) focused extensively on questions of extraterritoriality and jurisdiction. It is also worth mentioning that the concept of jurisdiction in IHRL does not reflect the concept of the jurisdiction in PIL, which focuses instead on delimiting state competences.[44] However, as Ryngaert states, the occurrences of transporting the concepts from one field of law to another happened before.[45] Because this paper deals extensively with the judicial understanding of jurisdiction for the purposes of the CJEU's judicial review, in which the concept of extraterritorial application of the Charter is not even currently under construction, I propose borrowing *jurisdiction* concepts from IHRL and PIL whenever it serves the purposes of the treaties most adequately.[46]

2.4 **Evaluating the adequacy of external jurisdictional standards**

As mentioned above, the relevant instrument that served in a few cases as a point of reference for the purpose of delimiting the territorial scope of application of the Charter was the ECHR. The application of the doctrines and concepts such as *control* or *authority* were twofold and could be *ad hoc* or backed by the argument based on the text of Article 52 of the Charter, which provides guidelines on the scope and interpretation of rights and principles.

In his opinion given in the *Front Polisario* case, Advocate General Wathelet did not hesitate to apply the *jurisdiction* criterion developed by the ECtHR, and following that logic he dismissed the extraterritorial application of the CFR to the situation of the indigenous population of Western Sahara (the case involved the trade agreement concluded by the EU and Morocco applicable in fact to the territory of Western Sahara). The Advocate General admitted that in some cases fundamental rights enshrined in the CFR may apply extraterritorially; in that respect, he mentioned cases in which an activity is governed by EU law *and* carried out under the effective control of the EU and/or its Member States but outside their territory. The concepts mentioned by the Advocate General

---

tion the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' See also M. den Heijer, and R. Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"', in M. Langford, *et al.* (eds.), *supra* note 41, at 159.

[44] C. Ryngaert, 'Jurisdiction. Towards a Reasonableness Test', in M. Langford, *et al.* (eds.), *supra* note 41, at 194.

[45] C. Ryngaert, *supra* note 44, at 194.

[46] I agree with Martin Scheinin that jurisdiction can be in some ways be seen as a word rather than a concept considering how its capacity shifts and expands. I do believe however that the ways the term jurisdiction can be interpreted can be conceptualized and that the terminological clarity and expanded reasoning can shed a light on the paths of the understanding of this concept. And operationalizing this concept in one way or another can be beneficial for the study on the extraterritorial application of the human rights instruments. See: M. Scheinin, 'Just Another Word? Jurisdiction in the Roadmaps if State Responsibility', in M. Langford *et al.* (eds.), *supra* note 41.

were borrowed directly and without any explanation from ECtHR case law.[47] Applying the abovementioned concepts to the facts in *Front Polisario*, he observed that neither the EU nor its Member States exercised control over Western Sahara, and that Western Sahara was not among the territories to which EU law is applicable, so the CFR should not be applicable in the context of reviewing the trade agreement with Morocco.[48] Unfortunately, however, he did not explain the reasons why the case-law of the ECHR should be considered even by analogy in determining the extraterritorial applicability of the CFR (which itself contains a clause regarding its scope of application)[49]. Also, interestingly, to support his arguments the Advocate General cited the *Soering* case, in which the ECtHR precisely provided that the state *can* be responsible for violation of human rights extraterritorially, provided that: (i) the act undertaken within its territory produces later foreseeable consequences on human rights outside its territory; and (ii) the State does not exercise control over the territory affected by this measure/act ,[50] which is precisely the case of trade agreements concluded in the territory of the EU but producing effects outside this territory.[51]

Without any clear justification, Advocate General Wathelet applied concepts known to ECHR case-law in order to answer the question of extraterritoriality of the Charter. However, more sophisticated argumentation explaining the need for the application of the concepts developed by the ECHR can be found in the literature. According to some, an jurisdiction rule analogous to the Article 1 of the ECHR should be applicable in the scheme of the Charter (at least in relation to the Charter rights that correspond to those guaranteed by the ECHR).[52] That is because Article 52 (3) of the Charter provides that: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.' According to the Belgian government's stance in the case *X.X.* v. *État belge*,[53] this provision should be interpreted as follows: 'where the rights of that Charter correspond to rights guaranteed by the ECHR, the meaning and scope

[47] AG Wathelet referred by analogy to the following cases before the ECtHR: ECtHR, *Loizidou* v. *Turkey (Preliminary Objections),* Appl. No. 15318/89, March 1995, which concerned acts committed by a State outside its own territory, judgement referred to the Turkey's occupation of Cyprus; ECtHR, *Al-Skeini and Others* v. *The United Kingdom*, Appl. No. 55721/07, 7 July 2011 and ECtHR, *Al-Jedda* v. *The United Kingdom*, Appl. No. 27021/08, 7 July 2011, which concerned acts committed by a State in a territory outside its own territory (the case involved indefinite detention of a dual British/Iraqi citizen in a Basra facility run by British forces), and interestingly ECHR, *Soering* v. *The United Kingdom,* Appl. No. 14038/88, 7 July 1989, which concerned extradition of a German national to the USA, where he faced charges of capital murder, AG Wathelet, *Front Polisario,* v. *Council, supra* note 15, footnote 128 thereof.

[48] AG Wathelet, *Front Polisario* v. *Council, supra* note 15, para 227.

[49] See A. Berkes, 'The extraterritorial human rights obligations of the EU in its external trade and investment policies', 2(1) *Europe and the World: A law review* (2018), at 6.

[50] ECtHR, *Soering* v. *UK*, *supra* note 47, para. 86 in fine.

[51] See generally on this analogy C. Ryngaert, *supra* note 15, at 385 and following pages.

[52] C. Ryngaert, *supra* note 15, at 385 and following pages.

[53] AG Mengozzi, Opinion to Case C-638/16 PPU, *X.X.* v. *État belge*, [2017] ECLI:EU:C:2017:93, para 95.

of those rights are to be the same as those laid down by that convention, including the accepted limitations (…) such limitations include Article 1 of the ECHR – delimiting the territorial scope of the application of the Convention based on the criterion of the jurisdiction.'[54] Therefore, according to this line of argumentation, if a person is not within the EU's territory (as understood according to ECtHR case-law), the Charter cannot apply.

The argument described above is, however, quite unconvincing and illogical. The wording of Article 52 (3) of the Charter does not support the importation of notions of territoriality within the scheme of the Charter. This article provides guidance on the understanding of the *rights prescribed in the Charter* and their content. The potential application of the Charter is a separate discussion, and Article 52 (3) of the Charter does not influence this because it merely deals with the scope of the rights contained in the Charter. As Advocate General Mengozzi stressed:

> [T]he reference, made in the explanations relating to Article 52 (3) of the Charter, to the 'limitations' of the rights provided for by the Charter, must be understood as meaning that EU law cannot apply to the rights of the Charter which correspond to those of the ECHR limitations which would not be accepted in the scheme of the ECHR. (…) In other words, that provision enshrines the rule that the law of the ECHR prevails where it guarantees protection of the fundamental rights at a higher level.[55]

Consequently, Advocate General Mengozzi concluded that the level of protection under the ECHR shall only establish a minimum threshold related to the rights that correspond to those in the ECFR; therefore, it would not be reasonable to assume that Article 52(3) of the Charter *obliges* the EU to adopt the same jurisdictional criteria of limitation envisaged in Article 1 ECHR of the CFR.[56]

2.5 CJEU case law and the question of the extraterritorial application of the Charter

It is worth noting that Bartels argued that it is highly doubtful that the CJEU will adopt rules regarding the extraterritorial application of ECHR in situations requiring the application of the CFR.[57] The author stated that it is more likely that in the process of the judicial review the CJEU will develop rules of extraterritorial application specific to the CFR.[58]

The question of the potential extraterritorial application of fundamental rights was addressed in *Parliament/Council (Al-Qaeda)*.[59] In this case, the European Parliament asked the Court to annul Council Regulation (EU) No. 1286/2009 of 22 December 2009 amending Regulation (EC) No. 881/2002 imposing specific

[54] AG Mengozzi, *X.X.* v. *État belge*, *supra* note 53, para 95.
[55] AG Mengozzi, *X.X.* v. *État belge*, *supra* note 53, para. 98.
[56] AG Mengozzi, *X.X.* v. *État belge*, *supra* note 53, para. 99.
[57] L. Bartels, *supra* note 21, at 1078.
[58] L. Bartels, *supra* note 21, at 1078.
[59] ECJ, Case C-130/10, *Parliament* v. *Council (hereafter: 'Al-Qaeda')* [2012] ECLI:EU:C:2012:472.

restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network, and the Taliban.[60] When discussing the Common Foreign and Security policy (CFSP), the Court observed that: 'the duty to respect fundamental rights is imposed, in accordance with Article 51(1) of the Charter of Fundamental Rights of the European Union, on all the institutions and bodies of the Union.'[61] As Bartels noted, in light of the *Al- Qaeda* judgement, one can assume that the CJEU allows the extraterritorial application of the Charter, however, the *scope* of such application has not been established in that judgement in any manner.[62] This conclusion follows especially from the fact that the CJEU seems to assume the applicability of the CFR to all actions under the CFSP, whereas for obvious reasons many of those actions have extraterritorial dimensions. That is quite a far-reaching interpretation because the CJEU on multiple occasions gave rulings or advisory opinions on acts that may produce extraterritorial effects, maintaining that such acts must be in accordance with fundamental rights, and it somehow always managed to omit the question of whether these rights should be understood universally or should encompass only the rights of those residing within the EU or demonstrating any link to EU territory. However, this silence does not necessarily mean that the CJEU assumes the extraterritorial application of the CFR.

An interesting contribution shedding some light on the relation between the person whose rights are on the line with the EU was the opinion of the Advocate General Mengozzi in *X.X.* v. *État Belge.*[63] The case concerned a reference for a preliminary ruling made by the *Conseil du contentieux des étrangers* (Council for asylum and immigration proceedings, Belgium). The request was made in the context of proceedings between two Syrian nationals and their three young children, who resided in Aleppo (Syria), and the *État Belge* concerning refusal to grant the Syrian family a visa with limited territorial validity, which they sought on humanitarian grounds.[64] In the proceedings the applicants submitted that failure to grant them a visa created risk of infringement of *inter alia* Article 4 of the CFR, which provides that no one is to be subjected to torture or to inhuman or degrading treatment or punishment.[65] The Syrian applicants did not reside in the EU and in fact had no connection to EU territory,[66] and their situation would certainly escape the *jurisdiction* as envisaged in ECtHR case law. Advocate General Mengozzi argued that the Member State, which in these conditions refuses to grant a visa with limited territorial validity, implements EU law, and thus such a decision should respect the rights guaranteed by the Charter.[67] Considering the territorial scope of the CFR, Advocate General Mengozzi applied the criterion to the effect that the Charter applies wherever EU law is imple-

[60] *OJ* [2009] L 346, p. 42
[61] *Al- Qaeda*, *supra* note 59, para. 83.
[62] L. Bartels, *supra* note 21, at 1076.
[63] Even though this case concerned a Member State's conduct within its territory.
[64] AG Mengozzi, *X.X.* v. *État belge*, *supra* note 53, para. 2.
[65] AG Mengozzi, *X.X.* v. *État belge*, *supra* note 53, para. 34.
[66] AG Mengozzi, *X.X.* v. *État belge*, *supra* note 53, para. 90.
[67] AG Mengozzi, *X.X.* v. *État belge*, *supra* note 53, paras. 80-88.

mented irrespective of where the relevant individual is residing.[68] As Advocate General Mengozzi observed, there seems to be no reason to exclude parts of EU activity from the applicability of the CFR based only on territorial grounds.

> [I]f it were to be considered that the Charter does not apply where an institution or a Member State implementing EU law acts extraterritorially, that would amount to claiming that situations covered by EU law would fall outside the scope of the fundamental rights of the Union, undermining that parallelism. It is clear that such an interpretation would have consequences that go beyond the field of visa policy alone.[69]

The Advocate General's findings in this respect are similar to those drawn by the ECtHR in the *Soering* case because he focused on the EU activity and dismissed the relevance of the territory in which this activity might produce a negative effect. In *X.X./ État Belge,* the Advocate General chose to analyse how EU law might have affected a person's fundamental rights, regardless of whether the affected person resided within the EU at that time.

Finally, it is necessary to compare two advisory opinions issued by the CJEU, which curiously exemplify the Court's silent treatment on the question of the Charter's extraterritorial application. In Opinion 1/15 PNR, the CJEU for the first time reviewed the compatibility of an international agreement with the provisions of the CFR.[70] The agreement in question covered all passengers flying to or from a third country, Canada and the EU. In answer to the request for an Opinion, the CJEU specifically enumerated the amendments that should be introduced to ensure that the agreement was compatible with fundamental rights.[71] These amendments included, for example: limiting the retention of PNR data after the air passengers' departure; making the disclosure of PNR data by the Canadian Competent Authority to the government authorities of a third country subject to the specific conditions; providing, in specific situations, for a right to individual notification for air passengers in the event of use of PNR data concerning them. Notably, these preconditions would serve not only the purpose of protecting the rights of air passengers who were EU citizens but, in practice, could also serve the purpose of protecting non-EU citizens residing outside the EU. The Court of Justice therefore did not dismiss explicitly the application of the CFR to the situation of people with no link to the territory of a Member State. At the same time, nothing in the judgement indicated that the extraterritorial protection of fundamental rights could be more than the side effect of actions undertaken to protect EU citizens. Interestingly, in another case of the review of trade agreements under Article 218 (11) TFEU (Opinion 1/17 CETA) the Court of Justice excluded the possibility of applying *some particular rights provided*

[68] See V. Moreno-Lax and C. Costello, *supra* note 6, at 1658.

[69] AG Mengozzi, *X.X.* v. *État Belge*, *supra* note 53, para. 92.

[70] ECJ, Opinion 1/15, Transfer of Passenger Name Record data from the European Union to Canada (hereafter: 'PNR') [2017] ECLI:EU:C:2017:592, A. Berkes, *supra* note 49*,* at 19, A. Vedaschi, 'The European Court of Justice on the EU-Canada Passenger Name Record Agreement: ECJ, 26 July 2017, Opinion 1/15', 14(2) *European Constitutional Law Review* 2018, at 426.

[71] Opinion 1/15 *PNR*, *supra* note 70, para. 232.

in the Charter to the situation of nationals of non-Member States residing outside the EU. In particular, the Court of Justice dismissed the notion of the application of the principle of non-discrimination (Article 21 CFR) to the difference in treatment between nationals of Member States and nationals of non-Member States (EU investors as compared with Canadian investors).[72] In that respect, the Court referred to the doctrine of *Vatsouras and Koupatantze* regarding, in general, Article 18 TFEU.[73] However, even though the Court of Justice refused to apply the CFR extraterritorially (to the investors located outside the EU), it is worth noting that the Court did not dismiss in general the possibility of applying the Charter instrument extraterritorially. Further, the argumentation for refusal of application was not made on the basis of *jurisdictional* concerns. Indeed, rather than adhere to this concept – and state that the CFR would not apply simply because the EU had no jurisdiction over the situation of Canadian investors – the Court felt a need to justify the application of the Charter by referring to its previous case law.[74] The assessment of the relevance of these two opinions (1/17 CETA, 1/15 PNR) issued under Article 218 (11) TFEU is not an easy task because the territorial and extraterritorial aspects in these two cases are closely intertwined. Both the Court and the Advocates General did not provide instruments to resolve that problem. It should also be noted that both cases were brought to the Court with the clear intent of protecting the rights of EU citizens. Notably, however, in both cases the Court of Justice did not clearly dismiss the application of the CFR to extraterritorial situations (even though the standard of *jurisdiction* would not have been met in relation to third-state nationals outside the EU in either case). It is also worth observing that the Court of Justice seems to distinguish between rights that should and should not be protected in the case of distant non-EU actors. This finding is potentially highly important. It will be further discussed in the next part of this paper.

2.6 **The territorial scope of the CFR**

As stated previously, the CFR, unlike the ECHR and many other multilateral human rights instruments, does not contain a jurisdiction clause delimiting the scope of its territorial application. For comparison, some commentators understand the absence of a similar clause in the International Covenant on Civil and Political Rights (ICCPR) as leading to the conclusion that this instrument applies *globally* and *without limitation.*[75] However, as Scheinin correctly underlined, the absence of the notions of territory or jurisdiction in the text of the instrument

[72] Opinion 1/17 *CETA*, *supra* note 31, paras. 169-170.

[73] ECJ, Joined Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze* [2009] ECLI:EU:C:2009:344, para. 52.

[74] Arguably not very convincingly because deliberations in *Vatsouras and Koupatantze* regarded the specific intent behind adopting Article 18 TFEU, and there is no clear analogy between this explanation and the scope of application of Article 21 TFEU.

[75] M. Langford *et al., supra* note 41, at 58, see also for the example of universal application of human rights instrument: ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, I.C.J. Reports 2007, at 43.

does not imply that this instrument creates obligations to secure human rights for everyone anywhere in the world, irrespective of the factual link between the person and the State.[76] One must also bear in mind that the ICCPR is in its nature a universal instrument whereas the CFR is specific in that it is a regional instrument and thus, not open for signature universally. The CFR exists within the framework of EU law, and its application – whether territorial or extraterritorial – should be designed to fit the human rights obligations and aspirations of the EU. On the other hand, as Hummelbrunner rightfully suggested, the absence of the notion of jurisdiction or of a rule on territorial application of the Charter does not automatically imply that the Charter applies only territorially.[77] I believe that the constraints for the territorial application of the Charter in the case of the EU's trade agreements can be *mutatis mutandis* transported from some doctrines on *jurisdiction* as far as these doctrines suit the facticity of the EU's trade relations.

It should be underlined that concepts and judicial practices regarding *jurisdiction* were established in ECtHR case law primarily in the context of occupation or military actions, and they do not necessarily have to suit the specifics of the EU trade agreements with third countries. On the one hand, it is not difficult to imagine how trade agreements can have a negative impact on human rights in third countries (for example, the extensive export of some agricultural products to the EU can endanger the right to food). On the other hand, concluding a trade agreement, which is undoubtedly an action with an external dimension,[78] escapes the traditional concepts of *control* and *authority*. In general, by concluding a trade agreement the EU does not gain control over the foreign territory; neither do the inhabitants of the third state automatically fall under the control of the EU institutions. The described approach might lead to the conclusion that a restrictive standard of *jurisdiction* regarding *effective control* (over territory or people) developed in ECtHR case law, which generally fits cases of military operations, will not be suitable in the case of trade agreements.[79] At the same time, the ECtHR jurisprudence should bear relevance in shaping the CJEU's understanding of jurisdiction. As the *Soering* case shows, there are cases of extraterritorial application of the Convention which can serve as adequate comparative examples in the case of trade agreements.

Thus, there is not an easy answer to the question regarding the jurisdictional scope of the CFR. The simple transposition from ECtHR case law seems insufficient. If the concepts developed by the ECtHR are inadequate, as I argued above, there is no general reason to use them in the potential application of the Charter to trade agreements (in particular, there is no such requirement arising from Article 52(3) of the Charter). After all, using the concept of *jurisdiction* (in any of its formulations) without a particular reason impedes the prospect of fulfilling the EU's human rights obligations prescribed in treaties. There are,

[76] M. Scheinin, *supra* note 46, at 226.
[77] S. Hummelbrunner, *supra* note 29, at 18.
[78] Title V TFEU
[79] C. Ryngaert, *supra* note 15, 379-380. Contra: AG Wathelet, *Front Polisario* v. *Council, supra* note 15, para. 227.

however, doctrines that suit the ambitious aspirations of the EU prescribed in Article 21 TEU and Article 3(5) TEU better. Ryngaert, in his chapter on jurisdiction and the reasonableness test, deliberated on the conduct doctrine known in PIL, which bases jurisdiction on the territorial conduct that can produce adverse effects on human rights abroad[80]. He maintained that although the doctrine was developed in anti-trust law, it can be utilised outside that particular field.[81] Conduct doctrine limited by some diligently crafted reasonableness test[82] seems suitable to the issue of trade agreements that are concluded by a domestic act and are themselves an act of the EU with potential adverse effects abroad. This concept shifts the focus from the territorial link to the person potentially harmed by an act of state regardless of his/her residence, and it seems to reflect better the human rights obligations that the EU has imposed upon itself. The question that should be central to the CJEU's deliberations should be the proximity between the person affected by the trade agreement and the EU, which would mean examining whether there was a sufficiently close connection between the EU's act and the individual.[83] The next section will discuss more extensively the question of the adequate jurisdictional scope of the CFR since it deals specifically with the study of the possible adverse effects of one of the EU's trade agreements.

3. THE *FRONT POLISARIO* CASE – ASSUMED JUDICIAL EXTRATERRITORIAL APPLICATION OF THE CFR

Arguably one of the most interesting cases regarding the possible application of the Charter's extraterritorially is the legal saga concerning trade agreements concluded between the EU and Morocco and their impact on Western Sahara.

'Africa's Last Colony' - Western Sahara, formerly colonised by Spain, is situated between Morocco, Algeria, and Mauritania in northern Africa.[84] In 1963, in accordance with Article 73(E) of the Charter of United Nations, it was listed as a Non-Self-Governing Territory (on this list it figures up to this day).[85] Relations between Western Sahara and Morocco are defined by the ongoing conflict that originated in Western Sahara's war of independence between 1975 and 1991. The indigenous people of Western Sahara's struggle for independence is led by the *Front Polisario* - a liberation movement aimed at ending Morocco's pres-

---

[80] C. Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press 2008), at 195.

[81] C. Ryngaert, *supra* note 80, at 195.

[82] C. Ryngaert, *supra* note 80, at 197

[83] C. Ryngaert, *supra* note 80, at 200. It goes , however, beyond the scope of this paper to deliberate in detail how the proximity should be investigated in the case of the possible violations caused by trade agreements.

[84] More on the history of Western Sahara, see A. Kosidło, *Sahara Zachodnia. Fiasko dekolonizacji czy sukces podboju? 1975-2011* [Western Sahara. Failure of decolonisation or the success of the conquest? 1975-2011] (Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego 2012), A. Kosidło, 'Saharyjska Arabska Republika Demokratyczna – państwo na wygnaniu' [Sahrawi Arab Democratic Republic – state on exile], 5 *Studia Historica Gedanenia* 2014, 175-195.

[85] https://www.un.org/dppa/decolonization/en/nsgt.

ence in Western Sahara.[86] Currently the parties have agreed to a ceasefire, and the UN Security Council established the peacekeeping mission MINRUSO[87], which should help to hold a referendum in which the people of Western Sahara will choose between independence and integration with Morocco. However, a referendum has not been held to this day. The literature, distinguishes between two approaches regarding the status of Morocco in relation to Western Sahara: (1) Morocco is perceived to be *de facto* administering power in relation to Western Sahara,[88] (2) more often and with consideration of international law it is perceived that Morocco's presence in Western Sahara constitutes occupation.[89]

Morocco and the EU have cultivated mutual trade relations for years. On 26 February 1996 they signed the Euro-Mediterranean Agreement establishing an association between Morocco and the EU (then the European Community) and its Member States. The agreement was aimed at liberalising the trade flow between the parties, especially in agricultural products and in fisheries, and at developing a common economic relationship. In 2012 an agreement in the form of an exchange of letters was signed between the European Union and the Kingdom of Morocco concerning *inter alia* the reciprocal liberalisation measures on agricultural products, processed agricultural products, and fish and fishery products. The agreement was approved by the 2012/497/EU Council Decision.[90]

In response, *Front Polisario* filed an action for annulment of Council Decision 2012/497/EU under Article 263 TFEU before the General Court. It put forward 11 pleas in law, which included: 'infringement of fundamental rights', 'breach of the principle of consistency of the policy of the European Union, by failing to observe the principle of … sovereignty', 'breach of the fundamental values of the European Union … and the principles governing its external action'.[91] *Front Polisario* argued against the trade agreement approved by the disputed decision insofar as it concerned the territory of Western Sahara, *inter alia* because it furthered export of products from Western Sahara (without the indication of their origins) which led to exploitation of this region to the detriment of its indigenous inhabitants. Further, *Front Polisario* maintained that the application of the trade agreement to the territory of Western Sahara flouts the right to self-determination of the Sahrawi people and has the immediate effect of encouraging the policy of annexation conducted by Morocco, the occupying power.[92] The General Court annulled the act insofar as it approved the application of the trade agreement to Western Sahara, the invalidation of the decision concluding trade

[86] The partially recognized state that raises claims to the territory of Western Sahara is the Sahrawi Arab Democratic Republic (SADR).

[87] UNSC, *Resolution 690 of 29 April 1991*, (1991), available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/MINURSO%20SRES690.pdf.

[88] See S. Hummelbrunner and A-C. Prickartz, 'It's not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union', 32(83) *Utrecht Journal of International and European Law* 2016, at 23.

[89] Eva Kassoti, 'The ECJ and the art of treaty interpretation: Western Sahara Campaign UK', 1 *Common Market Law Review* 2019, at 212.

[90] *OJ* L 241 [2012] 7.9.2012, p. 2–3.

[91] *Front Polisario* v. *Council, supra* note 31, para 115.

[92] *Front Polisario* v. *Council, supra* note 31, para 143.

agreements was justified on the grounds that the Council failed to fulfil its obligation to examine all the elements of the case before the adoption of the contested decision.[93]

Arguably, however, the most noteworthy part of the General Court's considerations was the indication that:

> (…) [A]s regards an agreement to facilitate, *inter alia,* the export to the European Union of various products originating in the territory concerned, the Council must examine, carefully and impartially, all the *relevant facts in order to ensure that the production of goods for export* is not conducted to the detriment of the population of the territory concerned, or *entails infringements of fundamental rights*, including, in particular, the rights to human dignity, to life and to the integrity of the person (Articles 1 to 3 of the Charter of Fundamental Rights), the prohibition of slavery and forced labour (Article 5 of the Charter of Fundamental Rights), the freedom to choose an occupation and right to engage in work (Article 15 of the Charter of Fundamental Rights), the freedom to conduct a business (Article 16 of the Charter of Fundamental Rights), the right to property (Article 17 of the Charter of Fundamental Rights), the right to fair and just working conditions and the prohibition of child labour and protection of young people at work (Articles 31 and 32 of the Charter of Fundamental Rights).[94]

The General Court seemed to therefore assume the application of the CFR to the extraterritorial situation of indigenous people of Western Sahara who did not show evidence of any link to the territory of the EU's Member States.[95] Notably, no theory of effective control developed in ECtHR case law would have been applicable to this situation because the Court did not accept that Morocco was exercising control over Western Sahara. Nonetheless, the question of jurisdiction (whether intentionally or not) did not appear in the Court's reasoning, leaving open the question of the limits of the Charter's extraterritorial application. The value of the judgement can only be undermined by two factors. Firstly, it was later overruled by the Court of Justice; secondly, the judicial review of the merits of the case was substantially limited by the General Court due to the wide margin of institutional discretion enjoyed by the Council.

The ruling given by the GC in the *Front Polisario* case provides one very important finding: trade agreements (international agreements in general) form part of EU law, apply to non-EU territories,[96] and might affect the enjoyment of fundamental rights of the inhabitants of said territories. Therefore, in line with the decision given by the GC, there seems to be no reason to dismiss the judicial review of the compatibility of said agreements with the Charter provisions even in cases where the CJEU would have to investigate whether these agreements conflict with third-country nationals' rights. The extension of the territorial scope of application of the CFR in this case could very well be explained under the conduct doctrine described in the previous part of this paper. One

[93] *Front Polisario* v. *Council, supra* note 31, para 247.
[94] *Front Polisario* v. *Council, supra* note 31, para 228.
[95] S. Hummelbrunner, *supra* note 29, at 10.
[96] Contra: AG Wathelet, *Front Polisario* v. *Council, supra* note 15, para. 270.

might also say that the scheme of extraterritorial obligations imposed on the EU by the Treaties (Articles 3 (5) TEU and 21 TEU) creates sufficient normative underpinnings for the judicial extraterritorial application of the Charter to such cases.[97] However the question of the limits and the depth of the review remains open and will be discussed in the next part of this paper.

4. CONSTRAINTS FOR THE JUDICIAL REVIEW

The General Court's reasoning in *Front Polisario* might still come to many as a disappointment. On one hand, the Court employed, without limitation, the CFR to the situation of people outside the EU (Sahrawi people) who were not linked directly to the EU's territory. On the other hand, the General Court managed to escape essential analysis of evidence of breaches of fundamental rights enshrined in CFR in Western Sahara, limiting its judgment to finding formal errors in the Council's action. It is argued that this happened because the General Court relied heavily on the concept of institutional discretion. In this part the constraints for the review of the compatibility of the trade agreements with the CFR will be discussed with focus on the critique of the concept of institutional discretion. However mindful of the problems that a too far-reaching external application of the CFR could cause, the present author will propose certain solutions outside the institutional discretion that could suit better the objectives prescribed in the treaties.

4.1 **Institutional discretion – external commercial relations**

Discretion, as held by Fritzsche, can be defined as the power and competence of a decision-maker to decide, with the highest authority, about the application of the law to a specific fact pattern or certain elements thereof.[98] Fritzsche also notes that European courts do not make a distinction between discretion and margin of appreciation.[99] It is worth noting that the CJEU in its case law recognises the doctrine of institutional discretion with regard to external relations. In the *Swiss International Air Lines* case, the CJEU stated in general terms that in the context of the EU's external relations: '[t]he institutions and agencies of the Union have available to them, in the conduct of external relations, a broad discretion in policy decisions (…)'.[100] Consequently, also in the case of external commercial relations (including Common Commercial Policy) according to CJEU

[97] See V. Kube, *The Polisario case: Do EU fundamental rights matter for EU trade policies?* (2017) available at: https://www.ejiltalk.org/the-polisario-case-do-eu-fundamental-rights-matter-for-eu-trade-polices/

[98] A. Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law' 47(2) *Common Market Law Review* 2010, at 364.

[99] A. Fritzsche, *supra* note 98, at 364.

[100] ECJ, Case C-272/15, *Swiss International Air Lines* v. *The Secretary of State for Energy and Climate Change, Environment Agency* [2016] ECLI EU:C:2016:993, para. 24.

case law following the judgement given in *Odigitria* case,[101] EU institutions are attributed a wide margin of discretion due to the complexity of the economic, political, and legal assessments they must undertake.[102]

The judgement of the General Court in *Front Polisario* exemplifies how discretion can preclude judicial review of the merits of a case. The General Court also recalled the *Odigitria* doctrine and emphasised that EU institutions enjoy wide discretion as regards the appropriateness of concluding a trade agreement (in that case an agreement concluded under Article 207 TFEU) with a non-Member State which will be applied on a disputed territory.[103] Consequently, the General Court emphasised that, in cases when EU institutions enjoy a wide margin of discretion, judicial review is *limited* to verifying: 'whether it has committed a manifest error of assessment, the Courts of the European Union must verify whether it has examined carefully and impartially all the relevant facts of the individual case, facts which support the conclusions reached.'[104] In *Front Polisario* the GC considered fundamental rights enshrined in the Charter to be *relevant facts*.[105] It thus held that the Council should have ensured that there were no indications of the exploitation of resources of Western Sahara against the will of the Sahrawi people before adopting the decision approving the liberalisation agreement.[106] Accordingly, it upheld the action because the Council failed to fulfil its obligation to examine all the elements of the case before the adoption of the contested decision.[107] Even with that outcome, the judicial application of the CFR was, however, substantially limited as the GC was not able to investigate the merits of the case and review the alleged infringements of fundamental rights.

It is unclear from the previous case-law of the CJEU whether the self-imposed limitation of the judicial review was even a standard suitable for the review in the case of trade agreements. Interestingly, the General Court cited *Technische Universität München* and *Gowan Comércio Internacional e Serviços*[108] in sup-

---

[101] GC, Case T 572/93, *Odigitria AAE* v. *Council, Commission* [1995] ECLI EU:T:1995:131, para 38.

[102] ECJ, Case C-398/05, *AGST Draht - und Biegetechnik GmbH* v. *Hauptzollamt Aachen* [2008] ECLI:EU:C:2008:126, para. 33, The case law so far regarded particularly the realm of measures to protect trade. Against this backdrop, Advocate General Wathelet, in his opinion given in *Front Polisario*, observed that trade agreements such as the association agreement with Morocco (under Article 217 TFEU) or the liberalisation agreement (under Article 207 TFEU) are part of external commercial relations, being thus protected by a higher standard of institutional discretion (as stems from CJEU case law). AG Wathelet, *Front Polisario* v. *Council, supra* note 15, para 221. To support that argument AG Wathelet cited the judgement in case *Germany* v. *Council*, which concerned action for annulment of Decision 94/800 concerning the conclusion on behalf of the Community of the agreements reached in the Uruguay Round multilateral negotiations, to the extent to which the Council approved therein conclusion of the Framework Agreement on Bananas. Judgement concerned, therefore, the decision approving multilateral trade agreements. ECJ, Case C -122/95, *Germany* v. *Council* [1998] ECLI: EU:C:1998:94, paras. 77 and 79.

[103] *Front Polisario* v. *Council, supra* note 31, para. 223.

[104] *Front Polisario* v. *Council, supra* note 31, para. 225.

[105] *Front Polisario* v. *Council, supra* note 31, para. 227.

[106] *Front Polisario* v. *Council, supra* note 31, paras. 241-246.

[107] *Front Polisario* v. *Council, supra* note 31, para. 247.

[108] ECJ, Case C-77/09, *Gowan Comércio Internacional e Serviços* [2010] ECLI: EU:C:2010:803, para. 57.

port of these findings. These cases did not, however, concern legislative acts (whatever the legislative procedure) but administrative acts of EU institutions.[109] The General Court never explained why case law regarding legislative acts should matter in the case of an act adopted under a legislative procedure (decision on approval of the conclusion of the international agreement). In that respect, Advocate General Wathelet explained how this finding did not constitute an error in the Court's logic. Firstly, the principles applicable in administrative procedures are applicable *mutatis mutandis* to legislative procedures[110]. Secondly, the principle established in *Technische Universität München* and *Gowan Comércio Internacional e Serviços*[111] cited by the General Court in *Front Polisario* was then reproduced almost verbatim in *Spain and Italy v. Council* – a case concerning a decision authorising enhanced cooperation under Article 329(1) TFEU.[112] If the principle applied to the ordinary legislative procedure, then, as Advocate General Wathelet pointed out, there was no reason not to apply it to the special legislative procedure for the conclusion of an international agreement.[113] In my view, however, the argumentation of the Advocate General is rather unconvincing. The standard of discretion is a doctrine established and developed to provide for flexibility in administrative choices; however, it cannot be transposed automatically to legislative acts. As far as the *Spain and Italy v. Council* case is concerned, it should be treated more as an exception than as a general rule.[114] The GC's use of the standard of discretion received mixed reviews. Whilst some praised the judgement given in *Front Polisario* to the extent of describing it as an example of judicial activism because it reversed the decision of the EU's executive,[115] others remain sceptical. For example, Hilpold noted that the examination of whether an institution has committed a manifest error of assessment will in practice amount to reviewing whether there was an impact assessment of the draft trade agreement prepared beforehand.[116] This is because it might not be clear which fundamental rights should be included in such assessments and, if so, to what extent.[117]

It should be noted that the standard of discretion raises further questions. Sometimes the impact assessment can be diligently prepared, but in a later stage a trade agreement can still infringe the rights of the third parties in an extraterritorial manner that was not foreseeable (or extremely hard to foresee) at the moment of concluding the agreement. In that context, the reflection made

[109] AG Wathelet, *Front Polisario* v. *Council, supra* note 15, para. 223.

[110] AG Wathelet, *Front Polisario* v. *Council, supra* note 15, para. 223.

[111] ECJ, Case C-269/90, *Technische Universität München* [1991] ECLI: EU:C:1991:438, para. 14.

[112] Joined cases C-274/11 and C-295/11, *Spain and Italy* v. *Council* [2013] ECLI: EU:C:2013: 240.

[113] AG Wathelet, *Front Polisario* v. *Council, supra* note 15, para. 227.

[114] J. Öberg, 'The Rise of the Procedural Paradigm: Judicial Review of EU Legislation in Vertical Competence Disputes', 13 *European Constitutional Law Review* 2017, at 267.

[115] A. Rasi, 'Front Polisario: A Step Forward in Judicial Review of International Agreements by the Court of Justice?', 2(3) *European Papers* 2017, at 970.

[116] P. Hilpold, 'Self-determination at the European Courts: The *Front Polisario* Case' or 'The Unintended Awakening of a Giant', 2(3) *European Papers* 2017, at 915.

[117] P. Hilpold, *supra* note 116, at 915.

by Advocate General Wathelet in his opinion given in Western Sahara UK seems especially relevant. Advocate General Wathelet observed that the CJEU is: 'by default, the only court with jurisdiction to review the external action of the Union'.[118] It is therefore highly troublesome to rely on standards that might allow the actual extraterritorial infringement of human rights contrary to the clear obligations established in the Treaties in that respect. In my view, the discretion standard impairs also the rule of law paradigm so densely emphasised in the *Kadi I* case because it allows certain legislative acts to escape thorough control of their consistency with fundamental rights enshrined in CFR.

Interestingly enough, arguments on institutional discretion did not appear even once when the CJEU conducted *ex ante* reviews of the trade agreement under Article 218 (11) TFEU, e.g. in Opinion 1/17 CETA and 1/15 PNR. It is therefore curious that the CJEU chose to rely so strongly on the standard in the *ex post* control pursuant to Article 263 (4) TFEU, because the contested decision concerned precisely the conclusion of an international agreement that might endanger the rights of individuals (who therefore were found to have a concern in invalidating the act)The finding that the CJEU should not be bound strictly by the discretionary standard in reviewing the fundamental rights situation in a third country possibly affected by a trade agreement does not imply that the due diligence standard should not bear any relevance in the review of trade agreements.[119]

4.2 **Outside of discretion – possible patterns**

Some maintain that eliminating the discretionary standard could open a gate for arguably overly rigorous assessments of trade agreements.[120] This could perhaps block the negotiations or possibly impact negatively upon the political relations with third states. In that respect, it is worth mentioning that the EU is committed to encouraging the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade (Article 21(2)(e) TEU). Even if international trade in itself is not an end but rather a means to an end, it can impact the socioeconomics of EU trade partners in many ways on different fields. Furthermore, it goes without saying that delaying or breaching negotiations with a third country can impact its nationals in ways that could not even be foreseeable at the time of the negotiations. That being said, trade as a means rather than an end cannot impede the exercise of the human rights obligations that bind the EU. The drafting of the treaties and the changes brought about by the Lisbon Treaty are of such special nature and gravity that one cannot doubt the honest normative devotion of the EU to the goals prescribed in Article 21 and 3(5) TEU.

---

[118] AG Wathelet, *Front Polisario* v. *Council, supra* note 15*,* para. 85.

[119] The scope of this paper precludes me from going into detail in describing normative issues raised in regard of legal basis for the duty of due diligence imposed on the EU institutions. For that matter, see for example S. Hummelbrunner, *supra* note 29.

[120] C. Ryngaert, *supra* note 15, 389-390.

In an attempt to strike a balance between trade and fundamental rights protection, other propositions were made in the literature – for example advocating in favour of limiting judicial review to only the most striking human rights infringements or to examining the possibility of infringing core human rights.[121] Also, perhaps the catalogue of rights protected in extraterritorial situations need not reflect ideally the catalogue prescribed in the CFR that might land close to the Court's observations in Opinion 1/17 CETA (however, in that case there would be a need for a substantial and convincing case law defining the catalogue of the fundamental rights that can never be waived).

As was stated before, the reasonable conduct-based jurisdiction assists in determining when the proximity between the fundamental rights' infringement and the EU's action is sufficient to deliver a judicial decision. At the same time, I contend, agreeing with Milanovic, that a reasonable interpretation of the jurisdictional scope of human rights instruments (in the case of absence of a jurisdiction clause in such instruments) should be read into relevant instruments – so that the negative obligation to respect human rights would be territorially unlimited while positive obligations would generally require territorial jurisdiction to be exercised.[122] The negative duty to respect – which means abstaining from the policies that create a negative effect – should certainly serve as a point of reference for the EU's credibility in its external action. That is why in the literature this obligation was previously found to be binding on the EU with more certainty than the obligations to protect or fulfil.[123] In that way, the CJEU would be able to apply the Charter extraterritorially in cases of alleged violation of the right to life or to water by the EU trade agreement, but the EU would not be bound to ensure all citizens of the world are provided with access to water. Because the EU links the value of human rights protection so strongly with its international presence, it would be only logical to strengthen the role of the Court in the examination of the external misconduct of the Union itself.

5. CONCLUSIONS

Today, the EU presents itself as a diligent global player, which pays great respect to human rights. In many respects this is true, and the inclusion of a human rights perspective in the EU's external actions is indeed worthy of praise. At the same time, however, the CJEU challenges the EU's credibility when it conducts insufficiently in-depth judicial reviews of trade agreements, without analysing the implications of extraterritorial human rights violations. The question of how and to what extent the review of the CJEU could be deepened should not be dismissed easily under the pretext of maintaining political balance. This contribution argued that the CFR can and should serve as ground for review of trade agreements. The external standards limiting the CJEU's jurisdiction borrowed

[121] P. Hilpold, *supra* note 116, at 916.

[122] M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, (Oxford: Oxford University Press 2011), at 228.

[123] L. Bartels, *supra* note 21, at 1090.

from the ECtHR case-law do not suit the specificity of the review of EU trade agreements. It is possible however to search for more suitable paths for an application of the CFR. In that respect the conduct doctrine known in PIL, concerning the territorial conduct that can produce adverse effects abroad, seems an appropriate path for delimiting the territorial scope of CFR's judicial application. Established reviews should also not be constrained by foggy standards of discretion to the point where judicial review can no longer reveal extraterritorial violations of human rights produced by the EU's conduct. Instead, the jurisdiction of the CJEU established under the conduct doctrine could be limited to the cases of breaches of negative obligations imposed on the EU.

FUNDAMENTAL RIGHTS IN THE EU'S EXTERNAL TRADE RELATIONS: FROM PROMOTION '*THROUGH*' TRADE AGREEMENTS TO PROTECTION '*IN*' TRADE AGREEMENTS

Isabella Mancini*

INTRODUCTION

At an international level, the linkage of international trade law and human rights law has always been an extremely contested one,[1] and 'one of the central issues confronting international lawyers at the beginning of the twenty-first century.'[2] In the context of a trade regime that has long been accused of being embedded in, not least designed by, neoliberal thought, and whose legitimacy is highly disputed, questions have been raised as to the normative foundations and purpose of such a system today.[3] At present, the two legal frameworks remain largely separate and hardly speak to each other.[4] The main developments have instead occurred in the context of regional and preferential trade agreements.[5] In this case, the linkage with human rights has mainly manifested in the inclusion of provisions on labour standards, which yet have only recently

* Isabella Mancini is a PhD candidate at the City Law School (City, University of London) and an Early Stage Researcher within the Marie Skłodowska-Curie Innovative Training Network on EU Trade and Investment Policy (EUTIP). Isabella is working on a thesis on "The Place of Fundamental Rights in the New Generation of EU 'Deep' Trade Agreements with other Developed Economies".

[1] See *inter alia* E. U. Petersmann, 'Human rights and international economic law in the 21st century. The need to clarify their interrelationships' (2001) 4 *Journal of International Economic Law* 3, 3-39; T. Cottier *et al.* (eds.), *Human Rights and International Trade* (New York: Oxford University Press 2005).

[2] P. Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' 13 *European Journal of International Law* 2002, at 181.

[3] A. Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (New York: Oxford University Press 2014); Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge: Harvard University Press 2018); P. O'Connell, 'Brave New World? Human Rights in the Era of Globalisation' in M. A. Baderin and M. Ssenyonjo (eds.), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Abingdon: Routledge 2010); N. Lamp, 'How Should We Think about the Winners and Losers from Globalization? Three Narratives and their Implications for the Redesign of International Economic Agreements' (Queen's University Legal Research Paper No 2018-102, 2018); F. J. Garcia and T. Meyer, 'Restoring Trade's Social Contract' 116 *Michigan Law Review Online* 2017, 78-100; F. Bourguignon *et al.*, *The Globalization of Inequality* (Princeton: Princeton University Press 2015); B. Milanovic, *Worlds Apart: Measuring International and Global Inequality* (Princeton: Princeton University Press 2005).

[4] H. Gott, 'Labour Standards in International Economic Law: An Introduction' in H. Gott (ed.), *Labour Standards in International Economic Law* (Cham: Springer International Publishing 2018), at 4.

[5] H. Gott, *supra* note 4, at 3.

gained wider acceptance as forming part of an international system of human rights.[6]

When it comes to trade and human rights linkages, the European Union (EU) emerges as a leading actor. Depending on the partner at stake, the EU has operationalised the linkage between trade and human rights in different ways: by means of human rights conditionality clauses, by making market access concessions dependent on, e.g., ratification of a number of human rights instruments and/or ILO Conventions, and most recently via provisions binding the Parties to respect certain core labour standards.[7] The aim of this paper is nonetheless not to review the history of the EU's approach to human rights in trade. Rather, it focuses on the latest, so-called 'new generation' of EU free trade agreements (FTAs) with other developed economies, and provides a critique of the EU's understanding and approach to fundamental rights therein.

The focus is on develope*d*, as opposed to develop*ing* or *least developed* countries, for they reflect the main EU's trade partners of the Post-Lisbon era, but most importantly as a way to enable an alternative to the traditional understanding of the linkage of trade and fundamental rights. EU trade agreements have been used as tools to promote human rights in third countries,[8] mainly as part of overarching development objectives for developing or least developed countries.[9] In the past, human rights requirements were a sort of EU political messianism or 'offensive' interest.[10] Conversely, it has been argued that today fundamental rights emerge as a 'defensive' tool for the EU and the rights of its citizens, as a result of deep trade relations with other developed countries.[11] The selection of developed economies as trade partners thus enables fresh thinking about fundamental rights in trade, beyond a development issue or as a problem for the trade partner alone.[12]

---

[6] See V. Mantovalou, 'Are Labour Rights Human Rights?' 3 *European Labour Law Journal* 2012, 151-172.

[7] See Section 2.1. below for specific variations of this: whether ratification of fundamental ILO Conventions, whether provisions committing the Parties not to lower levels of protection and so on.

[8] See F. Martines, 'Human Rights Clauses in EU agreements' in S. Poli (ed.), *Protecting Human Rights in the European Union's External Relations* (CLEER PAPERS 2016/5) (The Hague: T.M.C. Asser Institute 2015).

[9] L. Bartels, 'The Trade and Development Policy of the European Union' in M. Cremona (ed.), *Developments in EU External Relations Law* (New York: Oxford University Press 2008).

[10] J.H.H. Weiler, 'In the face of crisis: Input legitimacy, output legitimacy and the political Messianism of European integration' 34 *Journal of European Integration* 2012, 825-841.

[11] V. Depaigne, 'Protecting fundamental rights in trade agreements between the EU and third countries' 42 *European Law Review* 2017, at 563.

[12] The paper will speak of 'fundamental rights' as opposed to 'human rights' for two main reasons: the willingness to take an EU law and governance perspective, which in turn should allow going beyond the minimum floor and understanding provided by internationally recognised human rights. By referring to fundamental rights, the aim is to appreciate a broader set of rights which additionally form part of and are recognised under EU law. The paper thus wants to outdistance understandings of human rights according to which protection of rights would be satisfied with the protection of basic rights or would be limited to civil and political rights. There is an important revived debate in the literature on international human rights, particularly on what they encompass and their role within the global economy. The most recent contribution in this respect is Samuel Moyn's controversial book 'Not Enough: Human Rights in an Unequal World.' Samuel

From this perspective, the paper does not embark upon an examination of *all* possible fundamental rights. The focus is on two sets of rights: labour and data privacy rights. The former represents the most common set of rights being incorporated into trade agreements, while the latter have typically not been included in trade agreements and have only recently emerged as an increasingly significant set of rights in the context of digital trade. Regarding labour rights, the paper wants to embrace a broad understanding beyond core labour standards, which is warranted in a context of ever evolving employment conditions in the digital era, even witnessing labour and data privacy issues coming together.[13] Labour rights are understood as forming part of broader frames of social justice, encompassing i.a. matters of health and safety at the workplace, decent work, social protection and promotion of social dialogue. In this respect, together with the EU Social Charter, the ILO Declaration on Social Justice for a Fair Globalization[14] and the objectives of the ILO Decent Work Agenda, represent key frameworks of reference. By employing the terminology of 'data privacy rights' the aim is to avoid discussions that dispute the difference between 'data protection' and 'privacy' rights, and to focus instead on the protection of 'personal' data, as opposed to any other kind of data.[15] The relevance of labour and data privacy rights is provided later. Suffice to say that the contrasting way they are addressed in EU trade agreements is telling of many inconsistencies and deficiencies in the EU's approach towards the linkage of fundamental rights and trade.

The paper proceeds as follows: it starts with a discussion of how the Treaty of Lisbon provides for 'new normative impetus' which outdoes the limited perception of trade agreements promoting human rights as a development issue[16] (Section 1). In the light of this, it gives an overview of the EU's current approach to fundamental rights in the new generation trade agreements (Section 2) and offers reasons why it is problematic from a fundamental rights perspective (Sec-

Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge: Harvard University Press 2018). The paper is informed by a broad reading of the sources of fundamental rights under EU law and international human rights agreements, not least the ILO Conventions. From an EU law perspective, fundamental rights are understood as encompassing the rights flowing from the sources specified in Article 6 TEU, as well as from the member states' obligations under international human rights treaties to which they are party. The European Charter of Fundamental Rights (EUCFR) has introduced some socio-economic rights which were not included in the ECHR. The EUCFR constitutes an important yardstick as it incorporates internationally recognised human rights while also developing them further and amplifying their catalogue. As such, it goes beyond both minimum standards and understandings of rights limited to civil and political.

[13] See F. Hendrickx, 'Video surveillance at work: European Human Rights Court approves hidden cameras', *Regulating for Globalization: Trade, Labour and EU law perspectives* (18 October 2019), available at <http://regulatingforglobalization.com/2019/10/18/video-surveillance-at-work-european-human-rights-court-approves-hidden-cameras/>.

[14] International Labour Organisation, *ILO Declaration on Social Justice for a Fair Globalization* (2008), available at <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf>.

[15] Recognised under Art.8 of Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

[16] V. Kube, 'The European Union's external human rights commitment: what is the legal value of Article 21 TEU?' *EUI Working Paper LAW 2016/10* (2010).

tion 3). It concludes by suggesting a change in perspective and an exploration of fundamental 'in' trade as opposed to 'through' trade (Section 4).

1. THE NEW NORMATIVE IMPETUS OF THE TREATY OF LISBON FOR THE EU'S EXTERNAL RELATIONS

With the Treaty of Lisbon, the EU Common Commercial Policy (CCP) has been brought under the umbrella of the EU's external action, including its principles and objectives. As per Article 207(1) TFEU, the CCP of the Union 'shall be conducted in the context of the principles and objectives of the Union's external action.' Such principles and objectives are to be found in Articles 21 and 3(5) TEU, which include human rights and the Union's values, more broadly. Because of Article 207(1), these principles and objectives can now be read as applying to the EU CCP, leading some to speak of a 'Union's human rights obligation in its external relations.'[17] Such an alleged obligation has been extensively debated in its scope and effect, raising questions of whether it should be understood as giving rise to a duty for the EU to protect the rights of third country citizens.[18] This paper does not embark upon this discussion, its aim being much narrower in scope: it wants to rely on the innovations of the Treaty of Lisbon in this regard to suggest a change in perspective on the relationship between EU external trade and fundamental rights, and address the question of what the combined reading of these articles would imply: is it about respecting, protecting and/or promoting fundamental rights?

The relevance of this question lies in recent arguments maintaining that the Treaty of Lisbon provides a 'new normative impetus' that allows going beyond the typical understanding that sees human rights in trade agreements as a development issue in third countries.[19] The EU has traditionally found in preferential trade agreements, and a series of mechanisms attached to them, useful convectors to promote the respect of human rights *externally*, in the rest of the world.[20] Meunier and Nicolaïdis have coined the concept of governing 'through trade' to refer to how the EU uses its trade policy 'to 'export' its laws, standards, values and norms.'[21] Most of the literature on EU external trade and

---

[17] I. Vianello, 'Guaranteeing Respect for Human Rights in the EU's External Relations: What Role for administrative Law?' in S. Poli, *supra* note 8, at 35.

[18] See L. Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' 25 *European Journal of International Law* 2014, 1071-1091; E. Cannizzaro, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels' 25 *European Journal of International Law* 2014, 1093-1099; C. Ryngaert, 'EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations' 20 *International Community of Law Review* 2018, 374-393.

[19] V. Kube, *supra* note 16.

[20] A. Dashwood, 'Article 47 TEU and the relationship between first and second pillar competences' in A. Dashwood and M. Maresceau (eds.) *Law and practice of EU external relations* (New York: Cambridge University Press 2008), p.85 and footnote 44; Piet Eeckhout, *External relations of the European Union* (New York: Oxford University Press 2004), at 473.

[21] S. Meunier and K. Nicolaïdis, 'The European Union as a Conflicted Trade Power' 13 *Journal of European Public Policy* 2006, 906-925; A. Marx *et al.*, 'Protecting labour rights in a globalizing world: an introduction' in A. Marx *et al.* (eds.), *Global Governance of Labour Rights Assess-*

its relationship with human rights has accordingly focused on the effectiveness of EU's instruments in bringing a change or securing compliance with human rights in third countries.[22]

This section wants to provide a different angle: it argues that a combined reading of Articles 207 TFEU and 21(1) and 3(5) TEU allows liberation from the traditional understandings of the EU as a global trade actor that is expected to *promote* fundamental rights globally 'through' its trade agreement, and to prompt an exploration of the protection of fundamental rights 'in' trade; in the sense of making sure that trade agreements do not become, as of themselves, sources or intensifiers of downward pressures on fundamental rights.

The table below is an attempt to unpack what the combined reading of Articles 207(1) TFEU, 21 TEU and 3(5) TEU can imply in terms of: (a) what the EU is expected to pursue (object) in relation to its external relations, and the extent to which these objects encompass fundamental rights; (b) what the EU is expected to do (action) in its external dimension in relation to fundamental rights; and then (c) it explores and questions the meaning of 'EU's external action' and similar phrasings such as 'in its relations with the wider world'; given the abstractness of these phrasings, it tries to highlight specific instances where EU's action is required and/or possible, for instance 'when defining', 'developing', and also 'implementing' areas of the Union's external action.[23] In this respect, EU trade agreements are regarded as specific instances 'developing' and 'implementing' the EU's external relations in trade, and essentially the Union's Common Commercial Policy as an area of the Union's external action.

Table 1: The Union's mandate to respect and promote fundamental rights in its external relations.

Relevant Article	Action	Object	Level/phase
Art.21(1)[24]	*[Be guided by]*	Principles of: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity..	When acting on the international scene

ing the Effectiveness of Transnational Public and Private Policy Initiatives (Cheltenham: Edward Elgar Publishing 2015) at 4-5.

[22] See *inter alia* L. Campling *et al.* 'Can labour provisions work beyond the border? Evaluating the effects of EU free trade agreements' 155 *International Labour Review* 2016, 357-382; J. Orbie et al., 'The Impact of Labour Rights Commitments in EU Trade Agreements: The Case of Peru' 5 Labour Standards in a Global Environment 2017, 6-18; A. Marx *et al.* (eds.) *supra* note 21; S. Poli (ed.) *supra* note 8.

[23] Art.21(3) Consolidated version of the Treaty on European Union [2008] OJ C115/13 (hereafter, TEU).

[24] Art.21(1) TEU: 1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

Art.21(2)(a)[25]	*Safeguard*	[Union's] values	When defining and pursuing common policies and actions
Art.21(2)(b)[26]	*Consolidate and support*	Human rights	*Ibid*
Art.21(3)[27]	*Respect*	Principles (set out in paras 1 and 2)	When developing and implementing areas of the Union's external action
	Pursue	Objectives (set out in paras 1 and 2)	*Ibid*
Art.3(5)[28]	*Uphold and promote*	Its values	In its relations with the wider world
	Contribute	Protection of human rights	-

The table should help to visualise that principles and objectives of the Union's external action, which include human rights and the Union's values, not only have to be 'pursued' and 'promoted',[29] but also have to be 'respected', 'upheld' and 'safeguarded'[30] – the timing of this being 'in the development and implementation of the different areas of the Union's external action.'[31] This suggests that the EU's external action itself should i.a. 'respect', 'safeguard', 'consolidate and support' principles and values of fundamental rights. To the extent that trade agreements can be considered concrete manifestations of the 'EU's external action', it could be argued that as of themselves they should be consistent with such principles and objectives, and therefore 'respect', 'safeguard' and 'uphold' fundamental rights.

[25] Art.21(2)(a) TEU: 2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity;

[26] Art.21(2)(b) TEU: (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;

[27] Art.21(3) TEU: The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

[28] Art.3(5) TEU: 5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

[29] Art.21(3), Art.3(5) TEU.

[30] Art.21(3), Art.3(5) TEU, Art.21(2)(a) TEU.

[31] Art.21(3) TEU.

Understanding the articles this way enables a different perspective on how fundamental rights are addressed in the context of trade agreements, and how their protection should be pursued in practice. Fundamental rights would not represent *external* objectives alone, but would become *inherent* objectives to EU external trade. Such reading suggests two views: not only that trade *can* and *has to* work as an instrument for the pursuit of fundamental rights objectives *externally*; but that also the Union's external action, and in fact the trade agreements themselves, should be consistent with such principles and objectives, including fundamental rights. This can imply that trade agreements should not undermine the protection of fundamental rights as a minimum ('respect'), and can be understood as having to ensure their protection ('safeguard').

Such a different understanding is also allowed by Article 207(1) TFEU,[32] wherein the second sentence states that the CCP of the Union 'shall be conducted *in the context of* the principles and objectives of the Union's external action.' [emphasis added] This sentence was not present in previous versions of the treaties,[33] and in fact represents a novelty of the Treaty of Lisbon. However, it is not clear, generally speaking, what 'conducting' a policy '*in the context of* principles' could mean. Arguably, a less vague wording could have been used, such as 'shall respect and promote' the principles of the Union's external action. For instance, as regards the EU's foreign and security policy, the EU treaties have typically specified that the Union and its Member States shall 'define and implement' a common foreign and security policy, 'the objectives of which shall be', i.a. to safeguard 'common values.'[34] Yet in this case, the focus on the 'objectives' clearly alludes to an *outward* perspective. The legacy of this provision is now Article 21(1) TEU,[35] which deploys a vague phrasing in its first paragraph, namely 'shall be guided by', similar to Article 207(1) TFEU. Arguably, it is precisely the vagueness of the wording of Article 207(1) TFEU that allows embracing a broader, normative understanding of the relationship between the EU's external action in trade and fundamental rights.

2. THE EU'S APPROACH TO FUNDAMENTAL RIGHTS IN POST-LISBON FREE TRADE AGREEMENTS

2.1 **Labour and Data Privacy Rights in EU FTAs with other Developed Economies**

The post-Lisbon EU trade agreements with Canada, Singapore and Japan, as well as what would have been the TTIP, do not include a chapter on fundamen-

[32] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (hereafter, TFEU).

[33] See Art.113 Treaty on European Union [1992] OJ C191/1 (Treaty of Maastricht) (hereafter, EC Treaty), Art.113 Treaty establishing the European Community [1997] OJ C340/1 (Amsterdam consolidated version (hereafter, EEC Treaty) and Art.133 Treaty establishing the European Community [2001] OJ C80/1 (Nice consolidated version).

[34] Art.J.1 EC Treaty and EEC Treaty.

[35] Art.21(1),(2)(a) and (2)(b) TEU.

tal rights, yet can be understood as still providing a series of mechanisms aimed at their protection.[36] Starting with labour rights, relevant provisions are to be found in the so-called Trade and Sustainable Development chapters.[37] With slight variations and different configurations, a taxonomy of the provisions included across trade agreements can be largely classified as displayed in the table below.

Provisions including commitments on certain standards	Provisions envisaging cooperation on labour matters	Provisions on upholding levels of protection
• Commitments to respect, promote and implement/realise the principles concerning the fundamental rights at work (ILO Declaration 1998) • Commitments to ratify and/or implement Fundamental ILO Conventions (or implement the ILO Conventions that the Parties have ratified) • Make continued and sustained efforts towards ratifying and effectively implementing the fundamental ILO conventions	• Cooperation at the international level • Exchange of information and the sharing of best practices • Cooperation on trade-related aspects of the ILO Decent Work Agenda	• Recognition that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded by their domestic labour law • Recognition that labour standards should not be used for protectionist trade purposes

In addition to these, CETA is the only trade agreement that includes commitments in relation to labour rights beyond core labour standards, and which refers to the ILO Decent Work Agenda and the ILO Declaration on Social Justice for a Fair Globalization, and 'other international commitments', which are listed: health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness; establishment of acceptable minimum employment standards for wage earners, including those not covered by a collective agreement; and non-discrimination in respect of working conditions, including for migrant workers.[38]

With respect to data privacy rights, a very small number of provisions can be found, limitedly the chapters on financial services, telecommunications (or electronic communications) and e-commerce. They usually require the Parties to 'adopt or maintain appropriate safeguards to protect privacy and personal data';[39] and make data privacy rights part of general exceptions, allowing derogation

[36] See V. Depaigne, *supra* note 11.

[37] The Comprehensive Economic Trade Agreement (CETA) between the EU and Canada, and recently the EU-Singapore FTA, include a specific subsection on Trade and Labour, but in practice the commitments remain the same.

[38] Art.23.3(2) and (3) CETA.

[39] See e.g. Art.8.54 EU-Singapore FTA.

from a more general commitment to liberalise trade in services.[40] Unlike the provisions on labour rights, provisions on data privacy rights do not require the Parties to promote or realise certain standards via their laws, nor to cooperate on the matter. The underlying idea, as it will be explained below, is to avoid including substantive standards related to data privacy rights *in* the trade agreements. Even though not envisaged prior to the negotiations, the EU-Japan trade talks led to parallel negotiations on an adequacy decision on their level of protection of personal data.[41] On this path, the EU has initiated similar negotiations with trade partners with which it had concluded trade agreements, such as South Korea, and is contemplating doing the same with Singapore. At present, the EU maintains the Privacy Shield with the US, a partial adequacy decision with Canada.

Beyond these provisions specifically on labour and data privacy rights, three additional mechanisms can be considered as providing room for protection. First, clauses on the right to regulate have been included to reaffirm the right of the Parties to pursue their public policy objectives. Overall, these can be found in the chapters on trade and sustainable development and in the chapters regulating services and investment. Safeguards under these formulations have been introduced to address concerns that regulatory cooperation and investment chapters would have restrained the regulatory space or even prevented each Party to adopt new regulatory measures, particularly in the public interest. It has been argued that such provisions could be invoked or relied upon by the Parties to justify the adoption of measures that are necessary to protect and ensure respect of certain rights, while preventing regulatory chill effects.[42] However, they do not imply a proactive stance, representing a rather defensive, and not absolute, guarantee. Similarly, general exceptions are a second means by which the Parties retain their possibility to derogate from the agreement to introduce measures in favour of, e.g., protection of public morals and public order, public

[40] CETA also specifically provides that, in cases of transfers of financial information that involves personal information, 'such transfers should be in accordance with the legislation governing the protection of personal information of the territory of the Party where the transfer has originated.' (Art.13.15(2) CETA). In practice, any transfer originating from the EU will have to fall within the restrictive EU standards of protection, and that as such, there is no indication that standards for data protection would be lowered. See W. Berka, 'CETA, TTIP, TiSA, and Data Protection' in S. Griller *et al.* (eds.), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA; New Orientations for EU External Economic Relations* (New York: Oxford University Press 2017) 178-179; K. Irion *et al*., 'Trade and Privacy: Complicated Bedfellows? How to achieve data protection-proof free trade agreements' (2016) independent study commissioned by BEUC et al., Amsterdam, Institute for Information Law (IViR), p.43. On the other hand, it has been also argued that the use of the language 'should' does not lead to a binding obligation and that has been weakened if compared to the version preceding the legal scrubbing. See A. Wessels, 'CETA will harm our privacy' (15 April 2016), available at <https://blog.ffii.org/ceta-will-harm-our-privacy/>.

[41] See E. Fahey and I. Mancini, 'The EU as an Intentional or Accidental Convergence Actor? Learning from the EU-Japan Data Adequacy Negotiations' *International Trade Law and Regulation* 2020 (forthcoming).

[42] V. Depaigne, *supra* note 11; L. Bartels, 'Human Rights, Labour Standards and Environmental Standards in CETA', *University of Cambridge Faculty of Law Research Paper No.13/2017*, 12-16.

life and health, the environment, privacy and national security.[43] Yet again, they do not provide for a positive relationship between trade reform and fundamental rights issues related to it.[44]

Finally, human rights conditionality clauses could also be understood as providing a mechanism for fundamental rights protection. Some have seen in the human rights conditionality clauses an additional venue via which labour rights could be protected.[45] However, these clauses have seldom been invoked by the EU to suspend trade benefits,[46] and their scope is usually one that envisages an outrageous violation of human rights of the magnitude of coups d'état. Furthermore, the EU's practice has recently been to include these clauses in political agreements (called Strategic Partnership Agreements or Framework Agreements) which are negotiated parallel to the trade agreements: they are not binding and their relationship to the trade agreement remains often very vague.

Having briefly outlined what can be found in relation to fundamental rights in the new generation of EU's trade agreements, the next section turns to the arguments that back such an approach, and explains essentially why so little is there. The way fundamental rights are dealt with in EU trade agreements reflects underlying assumptions and open standpoints in relation to their linkage, which are used to justify such an approach. However, as it will be shown, they raise a series of concerns from a fundamental rights perspective.

2.2 **Arguments Backing the Current Approach to Fundamental Rights in EU FTAs**

a. *Fundamental Rights are 'non-negotiable'*

One of the main arguments is that fundamental rights are 'non-negotiable', and as such, should fall outside trade negotiations and trade agreements altogether. This has been mostly manifested and voiced in relation to data protection, and particularly during the trade negotiations with the US and Japan. In a speech in the US, amid TTIP negotiations, Vice-President of the Commission, Viviane Reding warned 'against bringing data protection to the trade talks', for data protection 'is a fundamental right and as such it is not negotiable.'[47] Similarly, when faced with Japanese demands to discuss data protection-related issues, the Commission said that data protection 'is a fundamental right in the Euro-

[43] S.M. Walker, *The Future of Human Rights Impact Assessments of Trade Agreements* (Intersentia 2009), p.57.

[44] S.M. Walker, *supra* note 43.

[45] L. Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements' 40 *Legal Issues of Economic Integration* 2013, 297-313.

[46] T. Novitz, 'Labour Standards and Trade: Need We Choose Between 'Human Rights' and 'Sustainable Development'?' in H. Gott, *supra* note 4, p.129.

[47] V. Reding, 'Towards a more dynamic transatlantic area of growth and investment' (29 October 2013), available at <https://ec.europa.eu/commission/presscorner/detail/de/SPEECH_13_867>.

pean Union and is therefore not up for negotiation.'[48] The Commission's open position in respect to trade *and* fundamental rights is clearly that fundamental rights are non-negotiable and should therefore not be dealt with in trade agreements.

It is totally logical and understandable that the EU does not want to compromise the level of protection of fundamental rights by making them objects of trade negotiations. The trade realm is a particularly sensitive setting where this could occur, as the rhetoric is usually one of 'cutting the red tape.'[49] On the other hand, what does it mean that fundamental rights are not negotiable in the context of trade negotiations? What would 'negotiation of fundamental rights' imply *in practice*? Such an approach arguably raises a series of concerns. The first is the implication of excluding altogether any discussion relating to fundamental rights in the context of trade. Even though the Commission's stance aims at ensuring that levels of protection are not compromised, it simultaneously removes any positive action or consideration for ensuring that fundamental rights are not compromised by the trade agreement itself once in place.

Second, one could argue that negotiations on data protection have indeed taken place, in the context of data adequacy negotiations with Japan. Here, the benchmark, or starting point of reference, for the assessment of adequacy was the EU legal framework on data protection (GDPR).[50] Yet the outcome of such negotiations has been criticised for not providing a true equivalent level of protection; while others have also noticed how the alleged convergence of the Japanese and EU legal framework on data protection has been reached in a way that only personal data of EU citizens have been granted additional safeguards, leaving much unchanged for Japanese citizens' personal data. One could argue that, in this case, data protection emerges as a clear defensive interest of the EU when deepening trade relations with third countries. At the same time, the EU-Japan adequacy talks can inform a different understanding of 'negotiations': not as something that only leads to *down*wards pressures on the levels of protection, but one that can aim at achieving *up*wards convergence of standards.

Third, the argument that fundamental rights are not for negotiation raises the question of why trade agreements include provisions on the protection of labour standards: are labour standards not fundamental rights? These provisions only concern 'core' internationally agreed labour standards: they are understood as guaranteeing a 'level playing field', and thus represent a minimum floor of labour rights for which there would be no lower levels, hence in fact nothing to be 'negotiated.' Asking more would certainly prove very controversial and raise much opposition. Yet while trade agreements include provisions on *minimum*

[48] European Commission, 'Key elements of the EU-Japan Economic Partnership Agreement', Press release (18 April 2018), available at <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_3326>.

[49] V. Reding, *supra* note 47.

[50] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119 (hereafter, GDPR).

levels of labour protection, no corresponding provisions exist for data protection, for instance referring to the OECD Privacy Guidelines or the APEC Privacy Framework (the latter having been included, for instance, by Canada and the US in their newly concluded trade agreement with Mexico).[51] Instead, data protection occupies a complex place in trade agreements,[52] and the reference benchmark for (albeit parallel) adequacy decisions is the strictest legal framework in the world, namely the GDPR. Most importantly, an explanation for the minimum labour standards lies in the Union's limited competences in labour matters[53] and the scope of Common Commercial Policy, which result in the impossibility for the EU *alone* to include new substantive obligations in relation to i.a. labour in its trade agreements.[54] Yet there remains an underlying contradiction, or incoherence, in the argument that fundamental rights are non-negotiable. This is reflected in the differential treatment of the two sets of rights: while for labour standards it is generally accepted to have the lowest common denominator, for data protection it is the highest standard that is maintained.

b. *'Trade agreements are for trade'*

Recently, the EU Commission has also been outspoken about the fact that trade agreements are essentially for trade, done to liberalise trade and make it less costly.[55] This position contends that trade agreements cannot become the vehicles for everything and anything. Whilst one should concede that EU trade agreements now go far beyond anything that had ever been included for fundamental rights, this logic remains highly problematic from a fundamental rights perspective, inasmuch as fundamental rights are considered to form part of a broader category of 'non-trade objectives.' There is similar scepticism among EU policy officials, economists and academics about the usefulness of provisions on, for instance, environment and/or labour rights in trade agreements.[56] The argument is either that trade agreements should be primarily for trade,[57] or

---

[51] Article 19.8 Agreement between the United States of America, the United Mexican States, and Canada.

[52] See Section 2.1.

[53] More precisely, it is a shared competence, see Articles 3 and 4 TFEU.

[54] See Opinion 2/15 (*Singapore FTA*), ECLI:EU:C:2017:376, paras. 164 and 471 (hereafter Opinion 2/15).

[55] See DG Trade Commissioner Cecilia Malmström at Civil Society Dialogue, available at <https://webcast.ec.europa.eu/civil-society-dialogue-with-cecilia-malmstrom>.

[56] See i.a. R.J. Flanagan, *Globalization and Labor Conditions* (New York: Oxford University Press 2006).

[57] L. Campling *et al.*, 'Can labour provisions work beyond the border? Evaluating the effects of EU free trade agreements' 155 *International Labour Law Review* 2016, 357-382; F. C. Ebert, 'Labour provisions in EU trade agreements: What potential for channelling labour standards-related capacity building?' 155 *International Labour Law Review* 2015, 407-433; E. Postnikov and I. Bastiaens, 'Does dialogue work? The effectiveness of labor standards in EU preferential trade agreements' 21 *Journal of European Public Policy* 2014, 923-940; J. M. Siroen, 'Labour provisions in preferential trade agreements: Current practice and outlook' 152 *International Labour Review* 2013, 85-106; L. Van Den Putte and J. Orbie, 'EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions' 31 *International Journal of Comparative Labour Law and Industrial Relations* 2015, 263-283; A. Marx and J. Soares, 'Does integrating labour provisions in

that such provisions are not effective in achieving compliance to certain standards by the third country: whereas some would advocate for a change in the approach, others would still be sceptical about their usefulness altogether.[58]

With respect to the first argument, a series of developments clearly show that trade agreements have already for a long time expanded beyond purely trade-related matters. And this is so even if one were to exclude the newly-introduced 'trade and sustainable development' chapters. The new generation of EU FTAs is marked by a high degree of ambition in terms of the liberalisation pursued and matters to be regulated under trade agreements. For instance, CETA and EUJEPA now include chapters on Regulatory Cooperation, which is something that has traditionally been undertaken outside the negotiations of trade agreements, often in much looser forms. In general, the new generation of EU FTAs includes a series of so-called 'WTO-X' issues, such as anti-corruption and transparency, which are not part of the WTO legal framework, and whose link to trade, strictly-speaking, could be questioned. The widening of the scope of FTAs is at once inevitable in the context of an increasingly interconnected and digitalised world, with structural changes having altered the way goods are produced and exchanged. A parallel can be drawn with the gradual expansion of the scope of the EU Common Commercial Policy, which has been interpreted as a reflection and adjustment 'to the constantly evolving international trade environment.'[59] Hence the scope of trade agreements has been enlarged to such an extent that FTAs are not strictly-speaking about trade anymore; or they might be, but because the nature of trade itself has changed, in a way that it has raised the relevance of more matters in relation to it.

This backdrop has two related implications: first, that arguing trade agreements cannot become the hub for everything and anything misses the empirics of the current situation, and can thus hardly hold when used to reply to demands regarding fundamental rights; and second, that as the scope of trade agreements expands and touches upon a wider array of issues, its reach is also more liable to have an impact on fundamental rights, which thereby warrants scrutiny of potential collisions with fundamental rights. It is noticeable how current discussions on the inclusion of a chapter on gender in trade agreements has been put forward as an additional issue to be tackled via trade agreements. And it is even more remarkable how much more emphasis has been placed on explaining how trade negatively affects women more than men: no such discourses have emerged with respect to labour, explaining and recognising how trade agreements might have an impact of labour rights. Hence if one is to counter conten-

free trade agreements make a difference? An exploratory analysis of freedom of association and collective bargaining rights in 13 EU trade partners' in J. Wouters *et al.* (eds.), *Global Governance through Trade: EU Policies and Approaches* (Cheltenham: Edward Elgar Publishing 2015); K. Banks, 'Trade, Labor and International Governance: An Inquiry into the Potential Effectiveness of the New International Labour Law' 32 *Berkeley Journal of Labor and Employment Law* 2011, 45-142.

[58] A. G. Brown and R. M. Stern, 'What are the issues in using trade agreements to improve international labor standards?' 7 *World Trade Review* 2008, 331-357.

[59] P. Koutrakos, *EU International Relations Law* (Oxford: Hart Publishing, 2nd edition 2015) p.71.

tions that FTAs are about trade and cannot be loaded with too many issues, it is important for any argument in favour of fundamental rights to spell out their relevance and linkage with trade.

With respect to the second argument, namely that provisions on labour rights are not effective in prompting positive change in the third country, it is clear that the assumption is one that sees ensuring fundamental rights protection as an issue to be tackled only by the third country alone. Yet it is argued that this misses the point of having labour provisions in trade agreements, and a more thorough understanding of their relationship with trade. Alternatively, they become an *internal* EU's cause for concern when contemplated from an economic perspective: the concern is that the third country will lower its labour standards, hence altering the relative terms of trade and affecting workers at home – a rationale that, as discussed further below, remains very narrow-sighted from a fundamental rights perspective, as it only contemplates the rights of EU citizens. Related to this, and in addition to the outspoken arguments for the current approach to fundamental rights in trade agreements, it is worth considering an underlying assumption that rows against more compelling contemporary understandings of linkages between trade and fundamental rights.

c. *Fundamental Rights protection as 'a problem of third countries'*

Specifically with respect to the linkage of trade agreements and fundamental rights, an underlying assumption is that the protection of fundamental rights, yet more often in this case 'human rights', is an 'external problem.' This has been traditionally the case with conditionality clauses[60] and the Generalised System of Preferences.[61] The recent EU Commission's Communication on Trade, Growth and World Affairs of 2010 similarly states that through trade, the EU should aim to encourage *partners* 'to promote the respect of human rights, labour standards, the environment, and good governance.'[62] Again, the target partners in this case are developing countries, while nothing is mentioned about the understanding and role of human rights with more economically advanced countries, which were the main trade partners targeted by the Global Europe Strategy at the basis of the new generation of EU trade agreements.

Yet also in the context of the Post-Lisbon trade agreements with develop*ed* economies, potential breaches of fundamental rights seem to remain a problem of third countries: the inclusion of provisions that commit the Parties to core labour standards and fundamental ILO Conventions which all EU Member States have already ratified leads one to wonder about its *added-value*. Conversely, one could see some added value to the EU's partners of the latest trade negotiations: at the time of the negotiations, Canada, the US, Singapore and Japan

[60] Had the trade partner committed an outrageous violation of human rights, the EU could have suspended the trade agreement.

[61] Preferential access can be withdrawn where the trade partner fails to ratify or implement a series of human rights instruments.

[62] European Commission, 'Trade, Growth and World Affairs: Trade Policy as a core component of the EU's 2020 strategy', COM(2010) 612 final (2010).

were all missing ratification of some of the Fundamental ILO Conventions. While the trade negotiations with Canada, for what would have become CETA, have triggered Canada's ratification of the ILO Convention on the right to organise and collective bargaining, discussions on the inclusion of ILO commitments have proven very controversial in the negotiations with the US and Japan, both which are presently missing ratification of some important ILO Conventions. While the EU-US talks for TTIP have failed, it has to be seen whether commitments under EUJEPA will bring about changes on the Japanese side in terms of ILO Conventions ratification. Yet again, this perspective leads to an outward-look on the issue.

Additionally, Labour standards are reportedly included in trade agreements between developed countries to counter claims of protectionism by developing countries. Therefore, it has been suggested that the EU, to counter such accusation, has to include the same provisions in agreements with developed countries. However, what this entire argument reveals is the assumption that fundamental rights are only an issue for concern outside EU borders.[63] Developing countries have traditionally opposed the inclusion of provisions on labour standards and similar terms within the WTO framework, relying on the argument that these clauses are disguised protectionist measures. On a related note, while the EU maintains that its demands in relation to labour do not go beyond core labour standards, and should therefore meet no opposition by developing countries, discussions at the WTO on e-commerce, supported by the EU, are being accused of 'digital colonialism.'[64] In any case, justifying the inclusion of labour provisions in FTAs with developed countries because of possible accusations by developing countries is a window dressing that misses the purpose, and emerges in fact as a very narrow and dry understanding of the relationship between labour protection and trade agreements.

Finally, the discussion on sanctions for breaches of labour rights reveals similar assumptions. The whole debate around labour rights in trade agreements typically ends up being narrowed down to the discussion on having binding mechanisms for their enforcement and the possibility of imposing sanctions on the trade partner. While not irrelevant, it reveals that concerns are about violations of labour rights *abroad*, rather than at home. In this sense, the idea purported is the same that has dominated trade agreements with developing countries: namely using trade agreements as tools, or 'sticks and carrots', to trigger compliance with human rights in third countries. Interestingly enough, in the trade negotiations with Canada, it was the EU that rejected the Canadian proposal to include the possibility of having sanctions in relation to the trade and sustainable development chapter, revealing concerns about *its own* labour protection.[65] Furthermore, the discussion on sanctions reflects an understanding of labour rights which considers them as exogenous and independent from

[63] Informal interview with policy official from the European Commission.

[64] D. James, 'Big tech seeks to cement digital colonialism through the WTO', ALAI's magazine No 542: Social justice in a digitalized world, 24 June 2019.

[65] B. M. Araujo, 'Labour Provisions in EU and US Mega-regional Trade Agreements: Rhetoric and Reality' 67 *International and Comparative Law Quarterly* 2018, at 242.

the trade agreement, i.e. which focuses on the (possibly precarious) situation of labour protection in the third country, regardless of the trade agreement. Such a perspective fails to question inherent challenges and pressures posed by the trade agreement upon the enjoyment of fundamental rights also *within* EU borders.[66]

3. WHY PROBLEMATIC FROM A FUNDAMENTAL RIGHTS PERSPECTIVE: OVERLOOKING INTRINSIC LINKAGES BETWEEN TRADE AND FUNDAMENTAL RIGHTS

From a fundamental rights perspective, three main flaws are highlighted here in the EU's current approach to fundamental rights in trade agreements: first, it overlooks the economically developed nature of the trade partner, for which fundamental rights would not be a development issue (3.1); second, it omits contextualisation in an era of globalisation and digitalisation, which increases the relevance of labour and data flows to trade; and which puts additional pressure on potential adverse effects of trade agreements on fundamental rights (3.2); and third, it overlooks new features of the 'new generation' of trade agreements that warrant exploration in their linkage with and impact upon fundamental rights (3.3).

3.1 **Fundamental Rights in the context of FTAs with Economically Developed Trade Partners**

What has taken the name of 'new generation' of EU trade agreements is the result of the EU Global Strategy. Under the latter, the EU targeted 'economically significant trading partners' and 'industrialised states that [could] offer the greatest potential for economic growth'[67] in North America as much as Asia. Negotiations were then initiated with South Korea, Canada, the US, Singapore and Japan. It is argued here that the way fundamental rights have been dealt

[66] See Sections 3.2 and 3.3. The (down)side of this latter argument, however, is the risk of embroiling in arguments that would require the establishment of a link to trade before triggering any action, which is extremely difficult to prove. This argument yet goes beyond the scope and main thesis of this paper: the aim is not to identify how enforcement could be triggered, but rather provide a critique of the EU's current approach in understanding the relationship between fundamental rights and trade agreement. Suffice to say that while the link between an instance of lowering, e.g., labour standards and facilitation of trade is indeed usually required for the action to be brought, the relevant provisions of the FTAs dealing with labour rights do not elaborate on the features of this link: there is no description, nor examples are provided, as to how trade agreements could have such a link, for which action could be triggered. This again shows a lack of appreciation, or underestimation, of trade and fundamental rights linkages. As shown below, the idea of the paper is to trigger a change in perspective and advocate for the inclusion of provisions in the trade agreements that would address these linkages, and prevent, or at least minimise, and not intensify, potential adverse effects on fundamental rights in the first place. Issues of dispute settlement remain outside the scope of this paper.

[67] L. McKenzie and K. L. Meissner, 'Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU-Singapore FTA' 55 *Journal of Common Market Studies* 2017, 832-849.

with in the resulting trade agreements[68] (including TTIP had it been successful) ignores the fact that the trade partner is *not* a developing country. Instead, the EU Commission should have taken into consideration that those trade agreements were being negotiated with developed countries, for which fundamental rights concerns arising from a trade agreement would probably differ from those of a developing country.

Developing countries usually argue that they do not have the economic capacity or tools to achieve the degree of fundamental rights protection demanded by developed countries, and essentially look at social clauses as disguised protectionism. It is typically in these cases, where the trade partner is one where breaches of basic human rights are more likely, that the EU has adopted an approach 'through trade', aimed at changing the situation in the third country, by supporting mechanisms which promote human rights compliance. This criticism is not intended to suggest that the current provisions would be redundant in trade agreements with developed countries. This is particularly so since, as mentioned before, third countries might not have ratified some of the fundamental ILO conventions; and even when these were ratified, it might in fact not be enough.[69] Rather, some have suggested that the EU's trade instruments 'to promote and uphold human rights be tailored to the specificities of the countries that are parties to a given agreement', including at the implementation, monitoring and enforcement levels.[70] While EU policy officials recognise that concluding trade agreements with developed countries is a totally different matter from FTAs with developing ones, this is not reflected in the way fundamental rights are dealt with in trade agreements.

From a fundamental rights perspective, one would wish that, particularly with countries such as Canada and the US, the EU recognised the economically developed nature of the trade partner and were more ambitious in thinking about fundamental rights in trade, beyond basic human rights. More creativity and thorough exploration is needed when considering the relationship between fundamental rights and trade agreements in the context of present challenges to labour and data privacy rights. The economically developed nature of the trade partners enables thinking of fundamental rights as a matter of intrinsic relevance to trade agreements in an era of globalisation and increasing inequality. This would permit not condemning trade agreements in their entirety, but finding ways to avoid making them intensifiers of downward pressures on fundamental rights by globalisation and digitalisation.

For instance, this could imply that safeguards are either embedded 'in' trade agreements to prevent or cushion such adverse effects; or in mechanisms parallel to trade agreements, and having similar purpose, but whose implementation would become an obligation *in* the trade agreement, in light of their operation and implications for fundamental rights. A second way of conceiving of fundamental and trade agreements between developed countries could in fact

[68] See Section 2.1

[69] World Bank, *World Development Report 2013 on Jobs* (World Bank 2012), pp.32-33.

[70] S. Velluti, 'The promotion and integration of human rights in EU external trade relations' 32 *Utrecht Journal of International and European Law* 2016, pp.41-68.

turn to the rights of 'distant others', namely citizens in fourth countries: not so much as a matter of worldwide mission for human rights promotion, as it seems the case in the current discussions between the EU and Canada;[71] but rather, as a matter of European and trade partner's companies' conduct abroad, in a context of global value chains.[72] While trade agreements include a few provisions on corporate social responsibility, these are usually hortatory, besides being very vague, as much as overlooking controversies and ambiguities surrounding the concept of CSR itself. Arguably, there needs to be more consideration of the present context of globalisation and digitalisation, and how trade agreements might become companions for further downward pressures on the enjoyment of fundamental rights.

3.2 A Context of Globalisation and Digitalisation Putting Pressures on Fundamental Rights

The EU's current approach to fundamental rights in trade agreements omits contextualisation in an era of globalisation and digitalisation, which increase the relevance of labour and data flows to trade, making them inevitable issues to be tackled. For practical reasons, it is not possible to assess or appreciate the relevance of *all* fundamental rights to trade, and the potential impact of trade agreements to *all* fundamental rights. As mentioned, priority is given to labour and data privacy rights. However, it is posited that in fact research would be needed to conduct such assessment for a broader range of rights.[73] The need to tackle labour and data privacy rights stems above all from the appreciation of the fact that international trade economically depends on, and intertwines with, labour and data flows. In a context of global value chains and the data-driven economy, labour and data underlie dynamics of international trade. Global trade has experienced significant structural changes – from unbundling of production and the emergence of global value chains; to the intensification of trade in services and foreign direct investment, alongside with technological developments – which make the economic relevance of labour and data flows to trade today both undeniable and pivotal.

---

[71] European Commission, Meeting of Committee on Trade And Sustainable Development (13 November 2019), available at <https://trade.ec.europa.eu/doclib/docs/2019/november/tradoc_158424.11.19%20(for%20publication).pdf>.

[72] E. Lee and M. Jansen, *Trade and Employment Challenges for Policy Research* (Joint Study by the Secretariat of the ILO and the Secretariat of the WTO, 2007) (hereafter, Joint ILO-WTO study), available at <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_091038.pdf>, p.29.

[73] The sustainability impact assessments are such example but a very criticised tool: it is not clear always what definitions of human rights are taken into consideration, and are often criticised for obscure methodologies. See e.g. discussion in J. Harrison and A. Goller, 'Trade and Human Rights: What Does 'Impact Assessment' Have to Offer?' 8 *Human Rights Law Review* 2008, 587-615; and C. Kirkpatrick and C. George, 'Methodological issues in the impact assessment of trade policy: experience from the European Commission's Sustainability Impact Assessment (SIA) programme' 46 *Impact Assessment and Project Appraisal* 2006, 325-334.

Labour and labour rights

Unlike data flows, labour has always underlay the dynamics of international trade. The way labour has an impact on trade is not only because, perhaps obviously, services and products come to life as a result of some kind of human activity, which inevitably becomes a factor of production in the trade of these goods and services; but particularly because such activity takes place within a legal system setting parameters to it; this will have a bearing upon the costs of labour, in turn affecting the competitive advantage of the country providing those goods and services.[74] Differences in labour standards have been found to explain differences in international trade patterns, fostering concerns about 'races-to-the-bottom.'[75] The intrinsic economic relevance of labour to trade has traditionally justified the inclusion of international labour standards in trade agreements: since the 1970s, developed countries voiced concerns about cheaper labour in developing countries, and called for provisions on core labour standards to be included in the framework of the WTO.[76] 'Social dumping' arguments are also usually advanced, also to refer to cases where labour standards are intentionally lowered for the purpose of altering the terms of trade and enhancing one country's competitive advantage.[77]

The EU has also embraced similar considerations in the context of its trade agreements. The motivation behind the inclusion of labour provisions seems to be only partially driven by *normative* considerations: while it might reflect concerns about the negative consequences of social dumping on workers *at home*, it seems to overlook potential negative consequences on third or fourth countries' citizens' labour rights. Such interpretation is in line with recent arguments by the Commission that 'labour protection between States can have direct and immediate effects on international trade and investment' and that 'lower standards of protection in one of the Parties can enhance trade and investment in its territory.'[78] The justification for the inclusion of those clauses reflects the 1970s discourses and at once reveals defensive interests of the EU. Yet, arguably, the EU could understand its defensive interests as going beyond concerns over lower labour standards in developing countries. Particularly in the context of trade agreements with other developed economies, the EU could think of ensuring that its trade partner's and its own companies do not violate labour rights of workers abroad. This should be even more so in the context of increased economic interconnectedness and unbundling of production. In an era where

[74] A. Marx *et al.*, 'Protecting labour rights in a globalizing world: an introduction' in A. Marx *et al.* (eds.), *Global Governance of Labour Rights Assessing the Effectiveness of Transnational Public and Private Policy Initiatives* (Cheltenham: Edward Elgar Publishing 2015).

[75] M. Artuso and C. McLarney, 'A Race to the Top: Should Labour Standards be Included in Trade Agreements?' 40 *VIKALPA The Journal for Decision Makers* 2015, 1-14.

[76] A. Verma and G. Elman, 'Labour Standards for a Fair Globalization for Workers of the World' 16 *The Good Society* 2007, 57-64.

[77] See e.g. in the context of future EU-UK relations, European Parliament resolution of 14 March 2018 on the framework of the future EU-UK relationship (2018/2573(RSP)).

[78] Opinion 2/15 para. 470.

trade liberalisation is increasingly being blamed for,[79] or at least recognised to have a bearing upon,[80] increasing job insecurity and economic inequality,[81] the aim here is to provide an overview of ways in which trade agreements are liable to put downward pressures on labour protection. [82] The focus is on the potential downward pressure on the workers *at home*, on the one hand, and on the workers *abroad*, on the other.

Pressures on workers abroad

Liberalisation of trade has meant that trade in intermediate goods has grown in prominence.[83] Trade liberalisation opens up market space for firms to contract with foreign suppliers,[84] which allows production to be organised along global value chains whereby products are manufactured by supplier companies abroad.[85] For instance, in the apparel industry, it has been argued that 'trade

---

[79] See *i.a.* G. Shaffer, 'Retooling Trade Agreements for Social Inclusion' *Illinois Law Review* 2019 (forthcoming) at 18; Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge: Harvard University Press 2018); N. Lamp, 'How Should We Think about the Winners and Losers from Globalization? Three Narratives and their Implications for the Redesign of International Economic Agreements', *Queen's University Legal Research Paper* No. 2018-102 (2018); F. Bourguignon, *The Globalization of Inequality* (Princeton: Princeton University Press 2015); B. Milanović, *Worlds Apart: Measuring International and Global Inequality* (Princeton: Princeton University Press 2005).

[80] International Monetary Fund, World Bank and World Trade Organisation, *Making Trade an Engine of Growth for All: The Case for Trade and for Policies to Facilitate Adjustment* (2017), available at <https://www.wto.org/english/news_e/news17_e/wto_imf_report_07042017.pdf>.

[81] B. Milanović, *Global Inequality: A New Approach for the Age of Globalization* (Cambridge: Harvard University Press 2016).

[82] For reasons of space, the paper cannot go into depth about the economic theories explaining the relationship between trade liberalisation and labour rights: the empirical picture varies greatly across countries (see i.a. Joint ILO-WTO study, *supra* note 73, at 2), which complicates taking a hard line on whether trade agreements have a positive or negative impact on labour rights, which would additionally require addressing a number of empirical economic research and findings. Furthermore, it should be borne in mind that while trade liberalisation in the long run is expected to produce positive effects on the 'quantity' of jobs, employment and the wages earned, economic studies still lack the appropriate data to assess broader standards of labour rights, such as the 'quality' or 'conditions' of employment, i.a. health and safety in the workplace, or job stability (see Joint ILO-WTO study, *supra* note 72, at 20). Similarly, Milberg and Winkler (2011), who find global production networks to lead to 'social upgrading', by using 'employment growth' as the relevant standard, concede that their approach would not be sufficient to fully capture that relationship, if one were to broaden the meaning of 'social upgrading' to 'decent work', hence beyond employment and wages (W. Milberg and D. Winkler, 'Economic and social upgrading in global production networks: Problems of theory and measurement' 150 *International Labour Review* 2011, 341-365).

[83] See e.g. P. Antràs and R.W. Staiger, 'Offshoring and the Role of Trade Agreements' 102 *American Economic Review* 2012, at 3140.

[84] A. Smith *et al.*, 'Labor Regimes, Global Production Networks, and European Union Trade Policy: Labor Standards and Export Production in the Moldovan Clothing Industry' 94 *Economic Geography* 2018, 550-574.

[85] A. Salmivaara, 'New governance of labour rights: the perspective of Cambodian garment workers' struggles' 15 *Globalizations* 2018, 329-346; F. Mayer and G. Gereffi, 'Regulation and economic globalization: Prospects and limits of private governance' 12 *Business and Politics* 2010, 1-25; K. W. Abbott and D. Snidal, 'Strengthening international regulation through transnational new governance' 42 *Vanderbilt Journal of Transnational Law* 2009, 501-578; R. M. Locke,

liberalization', and particularly the WTO-mandated phasing out of the Multi-Fiber Arrangement controlling trade in textile products, has enabled 'buyers to play suppliers in more countries off against each other without concern for quotas or other barriers that had earlier restricted their sourcing options.'[86] In addition, it has been observed that because of the falling costs of communication and transport, lead companies would be able to exercise a great amount of control on the production process, including on the 'throughput time, costing structures, delivery systems, workplace organization and labour', even when not directly hiring workers abroad, and not directly owning the supplier.[87] What this implies for workers *abroad* has been studied extensively in the literature, and can be divided into studies that have found either positive outcomes in terms of higher employment and higher wages,[88] or deepening of exploiting conditions,[89] i.e. 'social downgrading.'[90] While the facts might lie in between, it is striking that German firms operating in China have recently planned to leave (or relocate) their production, the main reason being rising labour costs.[91] Two main aspects are worthy of attention here.

First, regardless of better or worsening conditions, the fact remains that fragmented production makes it extremely difficult to identify employment relationships, were one to think about how to improve them and support workers' rights effectively.[92] On this, the inclusion of core labour standards in trade agreements is largely regarded as lagging behind, whereas empowering local institutions to monitor what happens on the ground would be a means to address potential

The promise and limits of private power: Promoting labor standards in a global economy (New York: Cambridge University Press 2013).

[86] M. Anner *et al.*, 'Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks' 35 *Comparative Labour Law & Policy Journal* 2013, at 8.

[87] S. Barrientos *et al.*, 'Decent work in global production networks: Framing the policy debate' 150 *International Labour Review* 2011, p.302.

[88] See i.a. N. M. Coe *et al.*, 'Global production networks: realizing the potential' 8 *Journal of Economic Geography* 2008, 271-295; Cumbers *et al.*, 'The entangled geographies of global justice networks' 32 *Progress in Human Geography* 2008, 183-201; N. Coe and M. Hess, 'Global production networks, labour and development' 44 *Geoforum* 2013, 4-9; A. Rossi, 'Does economic upgrading lead to social upgrading in global production networks? Evidence from Morocco' 46 World Development 2013, 223-33; N. Coe, 'Labour and global production networks' in K. Newsome *et al.* (eds.), *Putting labour in its place* (London: Palgrave 2015).

[89] G. Starosta, 'Revisiting the new international division of labour thesis' in G. Charnock and G. Starosta (eds.), *The new international division of labour* (London: Palgrave Macmillan 2016); A. Smith, 'Economic (in)security and global value chains' 8 *Cambridge Journal of Regions Economy and Society* 2015, 439-58; K. Newsome, *et al.* (eds.), *Putting labour in its place* (London: Palgrave 2015); E. Baglioni, 'Labour control and the labour question in global production networks' 18 *Journal of Economic Geography* 2018, 111–137.

[90] I.e. the worsening of 'conditions and remuneration of employment and respect for workers' rights, as embodied in the concept of decent work.' See S. Barrientos *et al.*, *supra* note 87, at 301.

[91] See 'Quarter of German firms in China plan to leave', *Asia Times*, 12 November 2019, available at <https://www.asiatimes.com/2019/11/article/quarter-of-german-firms-in-china-plan-to-leave/>.

[92] See Gereffi (1999) in S. Barrientos *et al.*, *supra* note 87, at 301. See also J. Kenner, 'The Enterprise, Labour and the Court of Justice' in A. Perulli and T. Treu (eds.), *Enterprise and Social Rights* (The Netherlands: Kluwer Law International 2017).

labour rights violations.[93] Second, the outsourcing of production creates a 'transnational' dimension that gives rise to 'governance gaps' or 'deficits' in global labour protection,[94] making national standards falling short of being the only means for addressing labour.[95] For instance, while some companies might have bilateral arrangements with local governments that would commit them to fair practices in relation to labour protection,[96] some labour unions warn that when this is not the case, workers might be left without an interlocutor that could provide support; for instance, in situations where companies do not pay the wages or decide to lower them without prior consultations. Similarly, many observe how 'it is now widely recognised that business operations affect the public interest and can impact on a range of human rights.'[97]

Pressures on workers at home

Turning to the *domestic* workers perspective, and in the light of what has been discussed in terms of trade agreements facilitating GNPs, liberalisation of trade has the potential to increase the price elasticity of labour demand, as substituting domestic workers with foreign workers becomes easier.[98] It has been found that, as employers become subject to stiffer price competition, they are 'more likely to threaten to lay off workers when they demand higher wages.'[99] Rules of origin in this respect become important as they determine the amount of domestic labour that a product needs to 'contain' for it to qualify for a preferential tariff: more lenient rules of origin, in the sense of less domestic content required for it to fall under the preferential tariff, means that it will be easier for companies to source inputs from 'lower cost countries.'[100] Similarly, Foreign Direct Investment also plays a role in raising labour demand elasticities, as it allows 'globalising' production, via direct foreign affiliates or by means of inter-

[93] A. Smith *et al.*, 'Labor Regimes, Global Production Networks, and European Union Trade Policy: Labor Standards and Export Production in the Moldovan Clothing Industry' 94 *Economic Geography* 2018, 550-574.

[94] G. Gereffi and F. W. Mayer, 'Globalization and the Demand for Governance' in G. Gereffi (ed.), *The New Offshoring of Jobs and Global Development* (ILO 2006) p.39; K. Van Wezel Stone, 'Labor and the Global Economy: Four Approaches to Transnational Labor Regulation' 16 *Michigan Journal of International Law* 1995, 987-1028.

[95] E. de Wet, 'Labor Standards in the Globalized Economy: The Inclusion of a Social Clause in the General Agreement On Tariff and Trade/World Trade Organization' 17 *Human Rights Quarterly* 1995, 443-462.

[96] F. Hendrikx *et al.*, 'The architecture of global labour governance' 155 *International Labour Review* 2015, 339-355.

[97] See i.a. J. Wouters and N. Hachez, 'When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights Be Ensured?' 3 *Human Rights & International Legal Discourse* 2009, at 316; S. Velluti, *supra* note 70, at 42; T. Novitz, *supra* note 46, at 124.

[98] Joint ILO-WTO study, *supra* note 72, at 42.

[99] This could happen not only in the context of trade between developed and developing countries, but also in trade between developed countries. See Joint ILO-WTO study, *supra* note 72, at 4.

[100] A. Santos, 'The Lessons of TPP and the Future of Labor Chapters in Trade Agreements', *IILJ Working Paper 2018/3 MegaReg Series* (2018).

mediate inputs.[101] It has been found that even the mere possibility of threat of turning to source inputs from another country, or to delocalise, can affect the price elasticity of demand, and thus for instance weaken the possibility for workers to resist wage reductions.[102] One of the consequences of higher price elasticity of labour demand is that workers may have to accept lower wages.[103] This also links to another impact that has been pointed out, namely the reduction of governments' ability to carry out redistributive policies, including the manipulation of wages.[104] Finally, higher price elasticity of labour demand may lead to a reduction of domestic workers' power to bargain, as it becomes easier for employers to replace them with foreign workers.[105]

A final element considered here relates to practices of offshoring tasks, which has become far easier today because of technology that facilitates 'tradability of services.'[106] Expectedly, tasks that can be performed at a distance will be also more likely the ones to be offshored. And this is a case where not only "low-skilled" jobs are likely to be affected, but also more "high-skilled" jobs that can be high IT intensive or transmittable, as in the case of security analysts.[107] Baldwin has also recently coined the term 'globotics' to refer to a mix of 'globalisation' and 'robotics' that will make it easier to outsource services jobs.[108] While his suggestion for worried workers is to move to jobs that cannot be done by 'globots', it has been found that policy-makers will find it extremely difficult to predict next directions and new forms of employment in the digital era.[109] As trade in services has recently witnessed a dynamic growth,[110] trade agreements should take into consideration potential effects on labour and changes in the nature of employment, which might be facilitated not only by digitalisation, but also by further liberalisation of trade in services.[111]

[101] Joint ILO-WTO study, *supra* note 72, at 43, on the basis of Scheve and Slaughter (2004).

[102] *Ibid*, at 4.

[103] In a context of higher elasticity for labour demand, it will be harder for workers to have the employers bearing the costs of benefits and standards, and might find themselves to accept lower wages to maintain these standards/benefits. Joint ILO-WTO study, *supra* note 72, at 44.

[104] *Ibid*, at 45.

[105] *Ibid*.

[106] *Ibid*, at 29.

[107] *Ibid*, at 30.

[108] J. Crabtree, 'The Globotics Upheaval by Richard Baldwin — white-collar disruption', *Financial Times*, 23 January 2019.

[109] Joint ILO-WTO study, *supra* note 73, at 30.

[110] Eurostat, International trade in services - an overview, available at <https://ec.europa.eu/eurostat/statistics-explained/index.php/International_trade_in_services_-_an_overview>.

[111] Rules on cross-border provision of services have already been found to have competitive and divisive effects within the EU, see K. Debeuf, 'The labour market is not ready for the future', *EUobserver*, 20 November 2019, available at <https://euobserver.com/who-is-who/146470?utm_source=euobs&utm_medium=email>.

Data flows and data privacy rights

Unlike labour, free flow and mobility of data have only lately become the backbone of trade, and particularly of what is now called 'digital trade.'[112] Different from e-commerce, digital trade goes beyond online purchases or sales, and covers more broadly those trade activities that make use of digital technologies for business purposes.[113] The emergence of new technologies has meant that now 'data' increasingly underlie global flows of goods, services, capital as well as people crossing borders. It must be noted, however, that not every transfer of data will necessarily occur in the context of trade, and can instead be simply transferred or collected via a number of mechanisms unrelated to it. Cross-border data flows become a prominent component of digital trade for instance when data flows are used as a tradeable commodity on its own, or when it is attached to goods and services crossing borders, as in the case of e-commerce or financial services. Businesses increasingly demand the regulation of cross-border data flows in trade agreements via provisions that would forbid measures restricting their free flow.[114] The discussions in the context of Brexit, and the demands for an adequacy decision, as opposed to more costly arrangements such as standard contractual clauses and non-binding codes of practices, further confirm the economic relevance of data to trade.[115]

However, concerns have arisen as to when data contains 'personal' data, prompting a debate between those advocating free flow of data and those concerned with the protection of personal data. Trade has moved towards a digital and information space, which increases the amount of data crossing borders, making the protection of personal data ever more crucial. Data transfers in the context of cross-border services, such as financial, e-commerce and telecommunications, increasingly challenge the protection of personal data.[116] Globally, countries have understood that international trade necessitates coming to terms with data, yet divergent approaches mean that data protection will not always be the priority: this raises concerns as to the protection of personal data in an emerging global economic order where data flows are an important component. Whilst trade agreements have now become important vehicles to govern trans-border data flows,[117] the regulation of data flows in the context of trade agreements still seems to be a compelling challenge for the years to come.

---

[112] W. Berka, 'CETA, TTIP, TiSA, and Data Protection' in S. Griller *et al.* (eds.), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (New York: Oxford University Press 2017).

[113] UN Economic and Social Commission for Asia and the Pacific (ESCAP), *Asia-Pacific Trade and Investment Report 2016: Recent Trends and Developments* (2016), see Chapter 7 on 'Digital Trade.'

[114] McKinsey Global Institute, *Global Flows in a Digital Age: How Trade, Finance, People, and Data Connect the World Economy* (Brussels: McKinsey and Company 2014).

[115] O. Patel and N. Lea, 'EU-UK Data Flows, Brexit and No-Deal: Adequacy or Disarray?' *UCL European Institute Brexit Insights paper* (2019), available at <https://www.ucl.ac.uk/european-institute/news/2019/aug/eu-uk-data-flows-brexit-and-no-deal-adequacy-or-disarray>.

[116] K. Irion *et al.*, *supra* note 40.

[117] UNCTAD, *Data protection regulations and international data flows: Implications for trade and development* (United Nations 2016) p.36.

On the one hand, attempts to restrict cross-border data have been qualified as protectionist measures, a red tape or non-tariff barriers to trade.[118] Those who see restrictions of cross-border data as new non-tariff barriers to trade denounce measures that require data to be retained onshore (such as data localisation and local storage) and those that require businesses to have their physical presence on territory. Typical arguments against such measures are that they do not serve data security, while constituting an impediment to companies' competitive advantage. On the other hand, data protection is a fundamental right that should be guaranteed in the context of trade in data. Some have pointed at the risk of 'data havens', whereby data processing operations could end up being made in countries with less strict requirements for privacy.[119] The challenge is thus to allow data to flow across countries and reap the benefits this would bring, while ensuring that personal data is protected.

There is a need to define clear benchmarks drawing a line between, on the one hand, measures that amount to digital protectionism and unnecessary regulation impeding such flows of data; and on the other hand, measures that are addressed at the protection of personal data and privacy, and would therefore be legitimate. Whilst trade agreements might not necessarily be the place that most would advocate for including provisions on the protection of personal data, it is important to acknowledge that data today underpins global trade. Once it is recognised how data privacy rights are salient to data flows, and data flows to trade, trade agreements would need to ensure mechanisms to address these linkages. Inasmuch as trade agreements become more complex and far-reaching, giving rise to new possible linkages with fundamental rights, the next section maps some of the new features of the latest EU trade negotiations that should be examined in relation to their impact and potential for fundamental rights protection.

3.3 New Linkages Emerging From New Features of the Post-Lisbon EU Trade Agreements

Moving increasingly towards deeper legal and institutional integration, the new generation EU trade agreements have stretched the stakes and implications for rights over a wider segment of people.[120] Their complexity and ambition, not only in liberalising trade, but also in going beyond tariffs and seeking mechanisms for regulatory convergence and institutional arrangements, are at the basis for warranting exploration of new emerging linkages with fundamental rights: places and dimensions where fundamental rights could become subject to downward pressures, but where their protection could be arguably enhanced. What follows

[118] See e.g. J. Eger, 'Emerging Restrictions on Transnational Data Flows: Privacy Protection or Non-Tariff Trade Barriers?' 10 *Law and Policy in International Business* 1978, 1055-1104.

[119] See L. A. Bygrave, *Data Protection Law: Approaching Its Rationale, Logic and Limits* (The Netherlands: Kluwer Law International 2002); S. Zuboff, 'Big Other: Surveillance Capitalism and the Prospects of an Information Civilization' 30 *Journal of Information Technology* 2015, 75-89.

[120] E. Benvenisti, 'Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law' 23 *Constellations* 2016, 58-70.

aims to provide an exploratory agenda of the following dimensions in their intersection with fundamental rights: wider scope, new actors, regulatory cooperation and institution-building.

a. *Wider Scope*

The new generation of EU trade agreements has widened the scope far beyond strictly-related trade issues. The impact on fundamental rights of new objects of trade agreements, such as new actors, regulatory cooperation and institutions, are discussed further below. However, if one is to consider how the scope of trade agreements has widened in relation to fundamental rights, what emerges is that the new generation EU trade agreements for the first time include the trade and sustainable development (TSD) chapters, where provisions on labour rights can be found. By contrast, data privacy rights remain mostly outside, under formulations which yet include them as part of exceptions or by means of provisions requiring the Parties to 'maintain safeguards.'

Regarding labour rights, while most scholars point at the hortatory nature of these commitments and the fact that they are not truly binding nor enforceable, another perspective is warranted scrutiny here, which took into consideration the context of downward pressures on social protection and increasing inequalities. It has been observed that labour provisions mandating respect of core labour standards are very limited in addressing possible adverse impacts of trade on labour protection,[121] and do not go to the core of problems related to job insecurity, social dumping and income inequality.[122] Their inclusion in the TSD chapters has additionally the effect of 'compartmentalising' their relevance to those chapters, and thus of separating their protection as a self-standing issue. Instead, it is necessary to understand their relevance across issue areas within the trade agreement.[123] Increasingly, other disciplines and provisions in trade agreements are coming under the target of labour rights advocates, such as rules of origin, investment, currency manipulation and public procurement.[124] [125] Labour rights thus necessitate innovations and integrated approaches to not

[121] D. Rodrik, 'What Do Trade Agreements Really Do?' 32 *Journal of Economic Perspectives* 2018, 73-90; G. Shaffer, 'Retooling Trade Agreements for Social Inclusion' *Illinois Law Review* 2019 (forthcoming); A. Santos, 'The Lessons of TPP and the Future of Labor Chapters in Trade Agreements', *IILJ Working Paper 2018/3 MegaReg Series* (2018).

[122] A. Santos, *supra* note 121.

[123] See T. Novitz *supra* note 46, at 125.

[124] G. Shaffer, *supra* note 121; A. Santos, *supra* note 121.

[125] Furthermore, the Sustainability Impact Assessments of the new generation of EU trade agreements, whilst pointing at harming effects of some specific categories of jobs, do not provide tailored solutions to the problem, nor are follow-ups present in the trade agreements themselves. For instance, the SIA for CETA finds that 'While high degrees of liberalisation would produce the greatest overall economic gains, it could negatively impact dairy in Canada and beef/pork in the EU. Workers in these sectors would, subsequently, be expected to be negatively impacted with a number of workers likely forced to shift into alternative sectors over the long-term. Maintaining sensitivities on these sectors would likely limit any negative social impact on these workers. It is unclear how expansion in agricultural employment would impact quality and decency of work. (…) Further, as agriculture and food processing tend to have some of the highest rates of work

marginalise them, but to acknowledge their interaction with all aspects of a trade agreement, whose features have now become more complex and far-reaching.[126]

Regarding data privacy rights, the approach is one that avoids references to specific standards and makes them grounds for exceptions, limiting a more proactive stance towards their protection. As Yakovleva has argued, it only reflects 'the economic nature of personal data and not its dignitary nature protected as a fundamental right', with normative concerns not being truly elevated to the level of economic interests.[127] The lack of an international standard on the matter complicates what can and/or should be included in trade agreements about data privacy: data privacy frameworks provided by the OECD and APEC clearly rely on an economic, as opposed to a more normative, approach, and their inclusion might provide suboptimal standards for data privacy rights.[128] The EU's approach in this respect in fact allows concluding parallel adequacy decisions where the main benchmark is the GDPR. However, when adequacy is not granted, data can still flow under other specific, and usually administratively more costly, arrangements; but particularly in the light of the EU-US saga on the Umbrella Agreement, some may wonder as to whether requiring the trade partner to 'maintain or adopt safeguards' would be enough to ensure that data privacy rights are not breached. The recent EU Commission's proposal for horizontal provisions on data flows seems to perpetuate such an approach, as it provides that 'each Party may adopt and maintain the safeguards it deems appropriate to ensure the protection of personal data and privacy.'[129] On the other hand, their horizontal nature can be contrasted with the approach to labour rights, and be understood as acknowledging the relevance of data to different aspects of trade, from telecommunications to e-commerce, financial services and so on.

Arguably, the complexity of the linkage of trade respectively with labour and data privacy rights implies that the latter could be protected not necessarily via stricter commitments on a wider range of standards. Rather, it is argued here that more research and exploration is needed on more indirect (and possibly less controversial) means, as could be the incorporation of provisions on side-issues that would indirectly bolster their protection in relation to other trade

---

related injuries and fatalities, expansion of employment in Canada and the EU's agriculture and food processing sectors could expose a greater number of workers to working conditions that are more unsafe than average. This could, in turn, produce negative consequences for the level of work-related stress of employees in both Canada and the EU.' C. Kirkpatrick *et al.*, *EU-Canada SIA Final Report* (2011), available at <https://trade.ec.europa.eu/doclib/docs/2011/september/tradoc_148201.pdf>, at 49. For a critique, see F.C. Ebert, 'The Comprehensive Economic and Trade Agreement (CETA): Are Existing Arrangements Sufficient to Prevent Adverse Effects on Labour Standards?' 33 *International Journal of Comparative Labour Law and Industrial Relations* 2017, 295-329.

[126] T. Novitz, *supra* note 46.

[127] S. Yakovleva, 'Should Fundamental Rights to Privacy and Data Protection be a Part of the EU's International Trade 'Deals'?' 17 *World Trade Review* 2018, 477-508.

[128] *Ibid*.

[129] European Commission, Horizontal provisions for cross-border data flows and for personal data protection (in EU trade and investment agreements), available at <https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156884.pdf>.

disciplines and in the context of global production networks and further liberalisation of services in the context of digitalisation.

b. *Non-Traditional Actors*

Actors that have not traditionally engaged or been interested in EU external trade law and policy, have mobilised in the context of the new generation of EU trade agreements at an unprecedented degree. Crucially, not only have they mobilised, but they have been enabled to do so, as the Commission and the Council have introduced initiatives and changed their practices to allow for a wider engagement by non-traditional actors of EU external trade. A series of consultations, civil society dialogues and transparency initiatives, including publication of documents, reflect clear attempts to trump traditional criticisms of 'behind closed doors' trade negotiations. While the latter have been criticised until recently for excluding representation of broader constituencies with an interest in, not least liable to be affected by, the outcome,[130] the latest EU trade negotiations have been praised for changing this trend, with the EU Commission's 'Trade for All' strategy now being the most manifest example.[131]

However, while it is easy to call for, or exhibit, more inclusiveness broadly speaking, it is more difficult to grasp *who* the actors that are given a say are, how different inputs are weighed, and the extent to which they embrace fundamental rights issues; or put differently, the extent to which such actors understand the relevance of fundamental rights to trade. Research, as much as policy makers, should pay special attention to *whom* is entitled; to provide *what kind of input*; and at what *stage* of the life cycle of the FTA (from the negotiation stage, to the implementation and new regulatory mechanisms beyond the state). Importantly, actors demanding a say in trade negotiations become important voices underlying how trade agreements come about and what they are about. From a fundamental rights perspective, an exploration of linkages between non-traditional actors of the new generation of EU trade agreements thus could look at the extent to which these newly empowered actors have embraced actors advocating for the protection of fundamental rights.

Where this was the case, the next question would be whether they are given meaningful venues to express their views and influence the law-making process. A second issue to be addressed indeed relates to cases where these actors could meaningfully influence the outcome of the law *or not*. From a fundamental rights perspective, actors speaking in favour of rights should be able to shape the trade agreement accordingly, and in this sense, contribute to more thorough understandings of the relationship between trade and fundamental rights. A vast amount of literature has for instance pointed at civil society actors as among the key candidates for achieving democratisation of global governance, and

---

[130] Bull *et al.*, 'New Approaches to International Regulatory Cooperation: The Challenge of TTIP, TPP, and Mega-Regional Trade Agreements' 78 *Law and Contemporary Problems* 2015, pp.13-14.

[131] EU Commission, 'Trade for All: a More Responsible Trade and Investment Policy' (2015), available at <https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf>.

explored ways in which they could fill legitimacy deficits of law-making beyond the state.[132] Yet others have also addressed their limitations.[133] Hence, this would mean conceiving of mechanisms that understood and addressed typical shortcomings of participation of civil society. These mechanisms should be designed with the objective of representativeness and prioritisation of fundamental rights in mind. They should additionally create legal venues for 'normative' actors to provide meaningful input at different stages of trade law-making and ensure that their input is taken into consideration.

c. *Regulatory Cooperation*

Another typical new feature of the latest EU trade negotiations is 'regulatory cooperation.' Whilst regulatory cooperation is a concept that comprises a panoply of mechanisms, it can be defined as encompassing those institutional and procedural mechanisms whereby actors at sub- and trans- national levels of law-making cooperate to bridge their regulatory divergences. It is typically understood as a means to create a level regulatory field against a context of regulatory divergence. In trade, divergent regulatory requirements are 'non-tariff' barriers and essentially a source of costs. As trade is increasingly more about non-tariff barriers, regulatory cooperation provides a space for addressing them. In the new generation of EU FTAs, regulatory cooperation clauses provide a range of possibilities and activities that the Parties can undertake, leaving much room for both low and high ambition in terms of the degree of alignment to be sought. As some have observed, institutionalised forms of regulatory cooperation can become veritable 'vehicles for regulatory rapprochement', as the Parties commit to 'regulatory reform and changes to the regulatory culture.'[134] Regulatory cooperation can channel deeper forms of legal and institutional integration.

Regulatory cooperation started receiving public attention, and in fact great opposition, in the context of the trade negotiations with the US: the way it was envisaged would have made the TTIP a 'living agreement' whereby changes to the agreed texts could have taken place via the activity of regulators with the power to advance legally binding commitments in identified areas of convergence.[135] Academic research has also voiced concerns as to potential demo-

[132] J. Tallberg and A. Uhlin, 'Civil Society and Global Democracy: an assessment', in D. Archibugi *et al.* (eds.), *Global Democracy: Normative and Empirical Perspectives* (New York: Cambridge University Press 2011); F. Bignami, 'Theories of civil society and global Administrative Law: the case of the World Bank and international development' in S. Cassese (ed.), *Research Handbook on Global Administrative Law* (Cheltenham: Edward Elgar 2016).

[133] M. Bexell *et al.*, 'Democracy in Global Governance: The Promises and Pitfalls of Transnational Actors' 16 *Global Governance* 2010, 81-101; S. Kalm *et al.*, 'Civil Society Democratising Global Governance? Potentials and Limitations of 'Counter-Democracy'' *Global Society 2019*, 499-519.

[134] S. S. Krstic, 'Regulatory Cooperation to Remove Non-tariff Barriers to Trade in Products: Key Challenges and Opportunities for the Canada-EU Comprehensive Trade Agreement' 39 *Legal Issues of Economic Integration* 2012, at 10.

[135] A. Alemanno, 'The democratic implications of the Transatlantic Trade and Investment Partnership', *FEPS policy brief* (July 2016), at 3, available at <https://www.feps-europe.eu/attach-

cratic deficits of regulatory cooperation activities.[136] Some have warned that regulatory cooperation mechanisms would fall outside the scrutiny of domestic institutions, hence undermining 'traditional checks and balances characteristic of vibrant democracies.'[137] From a fundamental rights perspective, regulatory cooperation becomes problematic for there are no provisions reflecting concerns inherently related to the protection of fundamental rights: this is so, even though the subject matter falling under the scope of regulatory cooperation chapters is either very broad;[138] or specifically includes labour or e-commerce,[139] for which labour and data privacy would become a relevant issue.[140] Furthermore, regulatory cooperation is usually understood as a tool to facilitate trade and 'cut the red tape', less often in terms of 'enhanced protection.' This is reflected in the objectives of the relevant chapters, which is argued here to have an impact on how regulators will understand their role. Adding to this the potential legitimacy deficits that have been voiced, regulatory cooperation emerges as a new feature that warrants investigation on its impact on fundamental rights.

In fact, regulatory cooperation could be understood as having potential to contribute to the protection of fundamental rights, by providing a platform for mutual learning and cooperation, where challenges to fundamental rights could be discussed and jointly-addressed. This would require, for instance, making sure that the objectives of regulatory cooperation chapters are not confined to aims of trade and investment liberalisation, which is pivotal for the bodies involved to embrace fundamental rights considerations with a view to enhance their protection. For a research agenda, it would be important to focus on substantive and procedural safeguards that would enable protection of fundamental rights: be it via a mandate including human rights impact assessments of regulatory initiatives; mandatory participatory mechanisms, and the possibility for the European Parliament to scrutinise the activities, as already explored by some scholars.[141]

---

ments/publications/alemanno-finalpdf.pdf>; M. Cremona, 'Negotiating the Transatlantic Trade and Investment Partnership (TTIP)' (Guest Editorial) 52 *Common Market Law Review* 2015, pp.352-353.

[136] A. Alemanno, *supra* note 135; W. Weiß, 'Delegation to Treaty Bodies in EU Agreements: Constitutional Constraints and Proposals for Strengthening the European Parliament' 14 *European Constitutional Law Review* 2018, 532-566; F. De Ville and G. Siles-Brügge, *TTIP: The Truth about the Transatlantic Trade and Investment Partnership* (Cambridge: Polity Press 2016).

[137] E. Benvenisti, *supra* note 120.

[138] See Art.18.3(1) EU-Japan Economic Partnership Agreement; Art.x3.(1) TTIP - EU proposal for Chapter: Regulatory Cooperation.

[139] See Art.21.1 CETA.

[140] See I. Mancini, 'Deepening Trade and Fundamental Rights? Harnessing Data Protection Rights in the Regulatory Cooperation Chapters of EU Trade Agreements', in W. Weiß and C. Furculita (eds.), *Global Politics and EU Trade Policy: Facing the challenges to a Multilateral Approach* (European Yearbook of International Economic Law, Springer 2020).

[141] W. Weiß, 'The implementation of CETA within the EU: Challenges for democracy and institutional balance', presentation at CETA Implications Conference (Dalhousie University, Halifax, 27-28 September 2019).

d. *New Institutions Beyond the State*

A common feature of the new generation of EU FTAs is the presence of clauses that create a plethora of new entities forming a capacious institutional architecture for the operation of the trade agreement: from joint committees, to specialised (sub)committees, working groups, advisory groups and fora. For instance, the treaty bodies created via CETA encompass a Joint Committee, a Regulatory Cooperation Forum, a Civil Society Forum and a series of specialised committees, among which a Committee on Trade and Sustainable Development. To varying degrees, also the FTAs with Singapore and Japan and the envisaged TTIP all contain institutional provisions for the creation of bodies with different powers and mandates. The proliferation of treaty bodies in trade agreements, and the powers that these bodies are granted, warrant exploration in their relation to rights.

In studying these new institutional arrangements, some have warned against democracy and legitimacy problems that such bodies could entail.[142] Similarly, others have discussed global checks and balances, transparency, parliamentary control and accountability in the operation of the institutional structures that the latest trade initiatives create.[143] It has been observed that not only would these bodies operate for the monitoring and implementation of the trade agreements; in some cases they would also be vested with significant decision-making powers and to create new bodies in turn.[144] In these instances, they would emerge as autonomous institutions operating beyond the State, with uncertainty as to whether they would be subject to any control and by whom. On the other hand, many of these new mechanisms envisage exchanges with, or even encompass, civil society actors. Yet inasmuch as the involvement of civil society is envisaged under different configurations and overlapping mechanisms, some have argued that in the resulting framework, 'the purpose of civil society engagement is lost and genuine participation and voice is likely to fade.'[145]

Against this backdrop, it could be explored how fundamental rights are guaranteed or could be undermined under these new institutional sets-up in the context of trade agreements. Similarly to the emerging structures in the operation of regulatory cooperation chapters, consideration of fundamental rights should be given in the different elements of these new institutions, from the mandate to oversight and participatory mechanisms allowing and enabling discourses of protection of fundamental rights. Regarding the newly-established committees, some suggest a more prominent role being given to the European Parliament, which should be given the possibility to participate in the work of these committees and scrutinise relevant documents.[146] Regarding institutional arrangements for civil society participation, similar considerations as to the involvement of non-traditional actors could apply. A further argument that could

[142] W. Weiß, *supra* note 136.
[143] E. Benvenisti, *supra* note 120.
[144] W. Weiß, *supra* note 136.
[145] T. Novitz, *supra* note 46, at 128.
[146] W. Weiß, *supra* note 141.

be made is that instead of creating new institutions beyond the state, trade agreements could envisage the creation of institutions *domestically*, as they would be closer to local concerns regarding potential impacts upon the enjoyment of i.a. labour rights.[147] Relationships and interactions between new institutions and local institutions could also be spelled out, with a view to enable exchanges that would benefit the protection of fundamental rights.

4. CONCLUSION: FROM FUNDAMENTAL RIGHTS '*THROUGH* TRADE' TO FUNDAMENTAL RIGHTS '*IN* TRADE'

In the context of trade, the EU emerges as a singular global actor from a fundamental rights perspective: unlike other international actors, the EU's external action is to be guided by interests as much as values. The Treaty of Lisbon does not erase the tension between market goals and respect of fundamental rights, it opens up the possibility for the EU to pursue fundamental rights both *in* and *through* trade. Yet for a very long time, the EU has been a global actor *through* trade: it has taken for granted an understanding of human rights in trade that sees them as a development issue for third countries. No more sophisticated conceptualisations have been explored, making the EU's current approach heavily reliant on this legacy.

The way fundamental rights are provided protection in the Post-Lisbon new generation EU trade agreements emerges as outdated and not fit for purpose: not fit for trade relations with developed economies where fundamental rights concerns may differ from core labour standards, and where the economic capacity would be present to be more ambitious; not apt in a context of globalisation and new pressures for enjoyment of fundamental rights; and very narrow-sighted insofar as new features of such ambitious trade agreements that account for deeper integration would require a more thorough appreciation of potential linkages with fundamental rights. On this, a parallel can be drawn with the development of the EU Single Market and the emergence of a fundamental rights dimension: not only does the EU now have a Charter of Fundamental Rights that is part of primary law, but some scholars have also started addressing questions as to whether the EU could be considered a 'human rights organisation.'[148] The history of what started as a purely (albeit ambitious) economic project shows how further economic integration is liable to collide with fundamental rights[149] and evolve into *something more*. While fundamental rights have pervaded the EU internally, a lot still needs to be done externally.

The aim of this paper is to urge new conceptualisations of the relationship between trade agreements and fundamental rights. There is a compelling need to understand underlying linkages, and how trade agreements could intensify

---

[147] G. Shaffer, *supra* note 121. See also M. Barenberg, 'Sustaining Workers' Bargaining Power in an age of GlobalIzatIon: Institutions for the meaningful enforcement of international labor rights', *EPI Briefing Paper* (9 October 2009).

[148] A. von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' 37 *Common Market Law Review* 2000, 1307-1338.

[149] See T. Novitz, *supra* note 46.

negative effects upon fundamental rights in the context of new technologies and business practices that underlie the dynamics of production and trade in goods and services. The implication of thinking of trade agreements in relation to their potential for fundamental rights would not necessarily imply an expansion of the range of fundamental rights to be dealt with in a trade agreement – which would additionally 'load the boat.' Rather, it is necessary to engage in a systematic research and open discussion about how to ensure that more complex and far-reaching trade agreements do not provide additional fuel to downward pressures on fundamental rights protection. Furthermore, when new features and mechanisms are envisaged (eg. further liberalisation, inclusion of non-state actors, regulatory cooperation, institution-building), the fundamental rights component to them should be appreciated, potential harming effects be taken into consideration, and mechanisms provided to counter them. If not for the sake of social justice,[150] protecting fundamental rights 'in' trade agreements becomes vital for their legitimacy and social acceptance, not least their ultimate success.

[150] G. Shaffer, *supra* note 121.

DIRECT CHALLENGES TO EU MEASURES ADOPTING TRADE AGREEMENTS: *LOCUS STANDI* AND THE FRONT POLISARIO'S WESTERN SAHARA CLAIMS IN THE EU COURTS

Stephen Allen*

1. INTRODUCTION

The Joint Conference on EU Trade Agreements and the Duty to Respect Human Rights Abroad was convened to consider the extent to which the EU owes legal obligations to individuals, situated extraterritorially, who claim their human rights have been violated as a result of trade agreements concluded with third States.[1] In this context, it is worth recalling the Court of Justice of the European Union (CJEU) proclaimed, in *Kadi I*, that: (i) respect for human rights is a prerequisite for the lawfulness of EU acts; and (ii) international agreements cannot generate obligations which have a prejudicial effect on the constitutional principles contained in the EU's foundational treaties.[2] Such profound commitments presuppose that aggrieved individuals will have sufficient access to the courts for the purpose of contesting specific measures on human rights grounds. Against this background, this paper contends that the question posed at the outset cannot be fully addressed without considering the impact that the admissibility requirements governing direct challenges to EU acts have on the EU's ability to honour these obligations.[3] Specifically, it assesses the way in which the EU courts have interpreted the standing requirements, set out in Article 263(4) of the Treaty on the Functioning of the European Union (TFEU), in order to restrict severely the affected individuals' ability to contest the legality of EU measures and the implications of this approach for prospective Applicants located beyond the combined territory of its Member States.

For this purpose, it examines the operation of these rules by reference to the Polisario's *ongoing* dispute with the EU Council arising out of the extension of

* Senior Lecturer in Law, Queen Mary University of London. Barrister, 5 Essex Court Chambers, London: s.r.allen@qmul.ac.uk.

[1] This conference was jointly convened by the ESIL's Interest Group on the EU as a Global Actor and CLEER. Hosted by the T.M.C. Asser Institute, The Hague, 11 December 2019. Convenors: Professor Ramses Wessel and Dr Eva Kassoti.

[2] ECJ, Case C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation* v. *Council and Commission* [2008], paras. 284-285.

[3] The importance of this question of admissibility has been amply demonstrated, elsewhere, by the way that the European Court of Human Rights has used the threshold requirement of State jurisdiction as one of the principal means by which to regulate the extra-territorial application of the European Convention on Human Rights. See S. Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to', 25 *Leiden Journal of International Law* 2012, 857-884, at 862–64; and S. Allen, et al, (eds.), *The Oxford Handbook of Jurisdiction in International Law* (Oxford: Oxford University Press 2019).

EU/Morocco trade agreements to Western Sahara. *Polisario* v. *Council* involved a direct challenge to Council Decision 2012/497,[4] which approved the 2010 EU/Morocco Liberalization Agreement, which made amendments to the 1996 EU/Morocco Association Agreement in respect of tariff preferences relating to agricultural and fisheries products originating in Morocco.[5] The Polisario argued that these trade preferences were also being applied to products originating in Western Sahara and, during the proceedings, this *de facto* practice was conceded by the Council and Commission. The General Court found that the Polisario had standing to institute such proceedings and it held, on the merits, that the Council's Decision should be partially annulled.[6] However, on appeal, the CJEU overturned this decision because, in its view, the 2010 Agreement was not legally applicable to Western Sahara.[7] After the CJEU's judgment in this case, the Council enacted Decision 2019/217, which adopted a new EU/Morocco treaty extending EU/Morocco trade preferences to products originating in Western Sahara.[8]

The Polisario has already initiated a direct challenge to this Decision.[9] It may be supposed that the Polisario must have standing to commence such proceedings given this new development. However, as this paper shows, any confidence that an EU court will find such a challenge to be admissible may well be misplaced. In this respect, it highlights the danger that the outstanding challenge may be dismissed due to a combination of: (i) the prophylactic character of the extant jurisprudence regarding direct challenges to legislative acts; and (ii) the scope which exists to re-characterize a dispute involving the exploitation of natural resources, belonging to the people of Western Sahara by virtue of their right to self-determination, as a narrow dispute about commercial privileges where the principal stakeholders are deemed to be the exporters of qualifying products based in Moroccan-controlled Western Sahara. Such a potential reinterpretation of this dispute would have the effect of not only disaggregating any trade preferences dispute from the UN-sponsored process to determine Western Sahara's ultimate status, it would also ignore the strong correlation between Morocco's continuing occupation of this Non-Self-Governing Territory (NSGT)

---

[4] General Court, case T-512/12, *Front Polisario* v. *Council*, [2015], EU:T:2015:953.

[5] The 2010 EU/Morocco Liberalization Agreement, *OJ* [2012] L 241/4; and the 1996 EC/Morocco Euro-Mediterranean Association Agreement, *OJ* [2000] L70/2; and 2010 EU/Morocco Liberalization Agreement, *OJ* [2012] L 241/4.

[6] *Polisario* v. *Council*, Case T-512/12, *supra* note 4, para. 247.

[7] CJEU, C-104/16P, *Council* v. *Front Polisario*. 21 December 2016. EU:C:2016:973.

[8] Council Decision 2019/217 (28 January 2019) regarding the conclusion of an Agreement the amendment of Protocols 1 and 4 to the EU/Morocco Association Agreement, *OJ* L 34/2. Also see S. Allen, 'Exploiting Non-Self-Governing Territory Status: Western Sahara and the New EU/Morocco Sustainable Fisheries Partnership Agreement' 9(1) *Cambridge International Law Journal* 2020 (forthcoming).

[9] *Front Polisario* v. *Council* was initiated on 27 April 2019, General Court, Case T-279/19, OJ C 220/41, 1.7.2019. The Polisario has repeatedly instituted direct challenges against EU acts which affect Western Sahara. See General Court Order, Case T-180/14, *Front Polisario* v. *Council Fisheries* Case, 19 July 2018, which involved a challenge to the 2006 EC/Morocco Fisheries Partnership Agreement and its 2013 Protocol; and General Court Order , Case T-275/18, *Front Polisario* v. *Council*, 30 November 2018, which concerned a challenge to the 2006 EC/Morocco Aviation Agreement.

and the exploitation of its natural resources. Against this background, the Polisario's claims in the EU courts test the reality of the EU's commitment to contribute to the promotion of human rights and the strict observance of international law as far as its external actions are concerned.[10]

The following section provides an overview of the pivotal standing requirements for direct challenges to legislative acts and it outlines the barrier that *locus standi* presents in this regard. The third part examines the General Court's reasons for deciding that the Polisario had standing to challenge Council Decision 2012/497, in *Polisario v Council*, and the basis upon which the CJEU overruled this finding on appeal. The subsequent section considers the way in which the Council and Commission responded to the CJEU's judgment in *Council v Polisario*. The significance of the Polisario's outstanding challenge to Council Decision 2019/217 and the obstacles that it is likely to confront are then assessed in the essay's final substantive section.

2. STANDING REQUIREMENTS FOR DIRECT CHALLENGES TO EU LEGISLATIVE ACTS

The question of standing cannot be treated as a threshold matter which is isolated from the factual and legal context that gave rise to the challenge in the first place. Moreover, the structures of legal argumentation apply just as much to considerations about admissibility as they do to the articulation of substantive legal claims.[11] In order to institute a direct challenge to a legislative act, under Article 263(4) TFEU, a natural or legal person must show that s/he is directly and individually concerned by the legislative measure in question.[12] As to the requirement of direct concern, an Applicant must be able to prove that: (i) his/her legal situation is directly affected by the contested act; and (ii) its implementation is automatic rather than being dependent on the exercise of discretion by the authorities of the Member State in issue (i.e. the act must flow from the ap-

[10] Art 3(5) TEU provides that the EU shall contribute to the strict observance and development of international law. Art 21(1) adds that its international action is guided by respect for the principles of the UN Charter and international law. Nevertheless, it should be acknowledged that the EU's relationship with international law is a complex one. See J. Klabbers, 'Straddling the Fence: The EU and International Law' in A. Arnull and D. Chalmers, *The Oxford Handbook of European Union Law* (Oxford: Oxford University Press 2015), at 52-71.

[11] See M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press 2005 reissue); P. Wrange, 'Western Sahara, the European Commission and the Politics of International Legal Argument', in E. Kassoti and A. Duval (eds.), *Economic Activities in Occupied Territories* (Asser Institute, forthcoming). SSRN: available at <https://ssrn.com/abstract=3507037>; A. Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction', 46 *International and Comparatively Law Quarterly* 1997, 37-54, at 39; and S. Allen, 'Remembering and Forgetting – Protecting Privacy Rights in the Digital Age', 1(3) *European Data Protection Law Review* 2015, 164-177, available at <https://ssrn.com/abstract=2776048>.

[12] The standing requirements in relation to a 'regulatory act' are less stringent. Art 263(4) TFEU provides that: 'Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures'.

plication of EU legal rules alone). The operation of this requirement, particularly in relation to challenges brought by individuals situated outside the EU, was well-illustrated by *Inuit Tapiriit Kanatami*.[13] In this case, several Applicants brought a direct challenge against the EU Parliament and Council in response to the adoption of Regulation 1007/2009, which prohibited the placing of seal products on the EU market (subject to an exception in favour of Indigenous peoples engaged in the prohibited activity). The General Court acknowledged that the ban would have negative consequences for those persons working in the sealing industry whose economic activities were either 'upstream' or 'downstream' of the placing of seal products on the EU market. Nevertheless, the Court observed that such a negative factual impact did not affect the *legal* situation of these individuals.[14] Consequently, it held that only those Applicants who were directly involved in the act of placing seal products on the EU market were able to satisfy the requirement of direct concern.[15] This conclusion was upheld on appeal.[16]

The second requirement for establishing standing pursuant to a direct challenge to a legislative act, is that of individual concern. This test was first formulated by the ECJ in the case of *Plaumann v Commission*. It provides:

> 'Persons other than those to whom a decision is addressed may only claim to be *individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed*. In the present case the applicant is affected by the disputed Decision […], that is to say that, by reason of a commercial activity which may at any time be practised by any person and is not therefore such as to distinguish the applicant in relation to the contested Decision as in the case of the addressee.'[17]

The EU courts have consistently endorsed the *Plaumann* test in the post-Lisbon era.[18] It allows an Applicant to establish that s/he is in equivalent position to a person who is expressly identified in a contested measure by two overlapping routes. First, an Applicant can satisfy the requirement of individual concern by showing that s/he is in possession of exceptional attributes that enable him or her to be treated as though s/he is an unnamed addressee of the act in question. This approach works well in situations where an Applicant alleges that s/he is a member of a closed group of individuals who are affected by a con-

---

[13] General Court Judgment, Case T-18/10, *Inuit Tapiriit Kanatami* v. *Parliament and Council,* 6 September 2011.

[14] *Ibid*., para. 75.

[15] *Ibid*., paras. 79 and 81-85.

[16] See the CJEU's judgment in C-583/11 P, *Inuit Tapiriit Kantami* v. *Parliament and Council*, ECR, EU:C:2013:625, paras. 71-73. However, both Courts decided that even those individuals who could satisfy the requirement of direct concern had not shown they were individually concerned by the contested measure.

[17] *Plaumann* v. *Commission*, 25/62, ECR, EU:C:1963:17, 107. Italics added.

[18] Notwithstanding the strong criticism it has attracted from some influential scholars and practitioners. See, e.g. P. Craig and G. De Búrca, *EU Law: Text, Cases and Materials* (Oxford: Oxford University Press, 6th edition 2015), at 515-533.

tested measure. For example, in *Stichting Woonlinie*, the CJEU accepted the Applicants' argument that they were individually concerned by a Decision, which was addressed to the Netherlands, because they could show that they belonged to a closed group where membership was conferred on the basis of specific criteria (namely by royal decree).[19] In the Court's view, the existence of such a limited class rendered its members identifiable and it added that such an approach was particularly justifiable where established rights would be affected by the adoption of the contested measure.[20]

The *Plaumann* test also provides that the requirement of individual concern can be satisfied where an Applicant can prove that his or her factual situation is such that s/he is effectively distinguished from everyone else in connection with the implementation of the contested measure. The significance of this approach was demonstrated, in relation to challenges initiated by individuals located beyond the EU, by a series of cases which involved certain safeguarding measures, adopted by the EU Council and Commission, that had the effect of preventing certain undertakings, based in the Netherlands Antilles, from exporting rice products to the EC market. In *Antilles Rice Mills v Council*, the CJEU reached the conclusion, based on the *Plaumann* test, that the Applicant was engaged in an open commercial activity and that Regulation 304/97 applied to all Overseas Countries and Territories (OCTs) on an objective basis and so the requirement of individual concern was not satisfied.[21] In this context, the Court reiterated its settled position that even if a small number of undertakings were affected by the contested measure such that their identity could be ascertained as a result, this state of affairs was not enough to satisfy the test of individual concern.[22]

Subsequently, in *Commission v Nederlandse Antillen*, the CJEU overturned the Court of First Instance's ruling regarding an annulment challenge to Regulations 2352/97 and 2494/97.[23] On this occasion, the government of the Netherlands Antilles argued that the *Plaumann* test could be satisfied on the ground that most of the rice exported to the EC from the OCTs came from the Netherlands Antilles.[24] However, the Court held that this fact was not enough to satisfy the requirement of individual concern.[25] In arriving at its decision, the CJEU observed that the undertakings in issue were engaged in a commercial activity that was open to any economic operator in any OCT.[26] Moreover, it added that,

---

[19] ECR, C-133/12 P, *Stichting Woonlinie and Others* v. *Commission*, EU:C:2014:105.

[20] *Ibid*., paras. 46-47. This case was cited by the General Court in *Polisario* v. *Council, supra* note 4, para. 67.

[21] CJEU, C-451/98, *Antilles Rice Mills* v. *Council*, 22 November 2001, para. 51. The Overseas Countries and Territories Association includes many of the EU's special territories. The Netherlands Antilles was a Non-Self-Governing Territory until 1954.

[22] *Ibid*., paras. 51-52.

[23] CJEU, C-142/00P, *Commission* v. *Nederlandse Antillen*, 10 April 2003. This case was identified by Advocate-General Wathelet in his Opinion in *Council* v. *Polisario* Case C-104/16 P, 13 September 2016. However, surprisingly, he discounted it because he thought that this case was not sufficiently analogous to the dispute under consideration, paras. 206-210.

[24] *Ibid*., CJEU judgment, paras. 66.

[25] *Ibid*., paras. 70 and 77.

[26] *Ibid*., para.78.

as this specific activity accounted for only 0.9% of the Netherlands Antilles' GDP, the contested measure did not generate serious economic consequences for this Territory.[27] The Court accepted that the Commission and Council may be under a duty to take into account the negative consequences of adopting legislative measures where they was bound to observe pre-existing legal obligations.[28] However, it held that such potential duties did not displace the evidential burden on the Applicant to satisfy the requirement of individual concern.[29]

The jurisprudence discussed in this section shows that the threshold for establishing direct and individual concern pursuant to a direct challenge to EU legislative acts is very high, and this is particularly so where externally located Applicants are seeking to institute such proceedings. It may be argued that such individuals should initiate an indirect challenge instead.[30] To be sure, preliminary rulings have played an important role in the context of both tariff disputes and public interest actions concerning the exploitation of natural resources by third parties.[31] Nonetheless, this indirect route was devised as a means of co-ordinating the proper interpretation of EU Law rather than as a way of challenging the validity of EU acts. Moreover, it is apparent that preliminary rulings provide a highly contingent mode of redress, insofar as they may be used to establish the legality of such acts. The claim that such a route provides a thin form of justice is particularly true for externally located individuals who may have limited options for challenging any implementing measures that may exist through the national courts of a Member State. More broadly, it is suggested that an examination of the direct challenge route provides a better gauge of the EU's commitment to contribute to the development of international law and the protection of human rights.

3. THE POLISARIO'S CHALLENGE TO THE 2010 EU/MOROCCO LIBERALIZATION AGREEMENT

3.1 **The General Court's Approach in *Polisario v Council* (2015)**

As noted above, *Polisario v Council* involved a direct challenge to Council Decision 2012/497, which approved the 2010 EU/Morocco Liberalization Agreement that amended the 1996 EU/Morocco Association Agreement regarding the tariff preferences applicable to certain products originating in Morocco. The 2010 Agreement did not include a territorial application clause but Article 94 of the

[27] *Ibid*., paras. 67-68.
[28] *Ibid*., paras. 68 and 72-73.
[29] *Ibid*., para.76.
[30] See Art 267, TFEU. The criticisms of the persistently narrow interpretation of the standing requirements for direct challenges are discussed in P. Craig, *EU Administrative Law* (Oxford: Oxford University Press, 2nd edition 2016), 305-319.
[31] See e.g. *Brita GmbH* v. *Hauptzollamt Hamburg-Hafen* [2010] EU:C:2010:91; C-266/16, *R (Western Sahara Campaign UK)* v. *HMRC & Secretary of State for the Environment*, EU:C:2018:18; and CJEU, C-363/18, *Vignoble Psagot Ltd* v. *Ministre de l'Économie et des Finances*, 12 November 2019.

1996 Agreement specified that it was applicable in relation to 'the territory of the Kingdom of Morocco'. The Polisario argued that these preferences were being applied to products originating in Western Sahara, in contravention of international law and, during the proceedings, the Council and Commission conceded that the Agreements had, in fact, been applied to products coming from Western Sahara.[32]

The General Court ruled that the Council's Decision qualified as a legislative act, thereby requiring the Polisario to prove that it was both directly and individually concerned by the contested measure.[33] It also accepted that the Polisario constituted a legal person for the purpose of instituting the proceedings, notwithstanding the fact that it has not acquired this status by recourse to a (recognised) national legal system.[34] The Polisario argued that it was individually concerned due to its possession of certain attributes that singled it out as an unnamed addressee of the contested measure. Specifically, it claimed that, as the legitimate representative of the people of Western Sahara, (a quality confirmed by its status as a party to the UN sponsored process to determine the fate of this NSGT),[35] it could satisfy the *Plaumann* test.[36] The Polisario also contended that it was directly concerned because the contested measure was intended to generate legal effects for the people of Western Sahara.[37] In response, the Council argued that the 2010 Agreement produced legal effects only for its parties and that the political dispute between the Polisario and Morocco in respect of Western Sahara was unconnected to the trade preferences granted under the EU/Morocco Agreements.[38]

The General Court chose to address the question of admissibility by examining whether the 2010 Agreement applied to Western Sahara.[39] It sought to divine the meaning and scope of the territorial application clause contained in Article 94 of the 1996 Agreement by reference to the terms of Article 31 of the Vienna Convention on the Law of Treaties.[40] Ultimately, it arrived at the conclusion that the conduct of the EU and Morocco showed that their successive Agreements were intended to be applicable to Western Sahara.[41] The Court went on to decide that the terms of the 2010 Agreement were such that they generated legal effects for the part of Western Sahara controlled by Morocco.[42] As a result,

---

[32] Case T-512, *supra* note 4, para. 87.

[33] *Ibid* para. 72.

[34] *Ibid*., para. 60. It has been suggested that such a conclusion is without precedent: see P. Hilpold, 'Self-determination at the European Courts: The Front Polisario Case or The Unintended Awakening of a Giant', 2 *European Papers* 2017, 907–921, at 916. But see E. Kassoti, 'The Front *Polisario* v. *Council* Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (Part I)', 2 *European Papers* 2017, 1-17, at 11-15, for a more critical assessment of the General Court's approach.

[35] See Case T-512, *supra* note 4, paras. 61 and 73.

[36] The General Court recited the *Plaumann* test, *Ibid*., para. 112.

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

[38] *Ibid*., paras. 64-66.

[39] *Ibid*., para. 73.

[40] Vienna Convention on the Law of Treaties (VCLT)(1969) 1155 UNTS 331, *Ibid*., paras. 88 and 98.

[41] General Court judgment, *Ibid*., paras. 101-103.

[42] *Ibid*., paras.108-109.

it held that the Council's 2012 Decision, directly concerned the Polisario because Western Sahara's international status had yet to be determined.[43] For the same reasons, the Court found that the Polisario was individually concerned by the contested act.[44] Specifically, it took the view that the facts conferred a special quality on the Polisario, which was apparent from the Polisario's participation in the UN-led negotiations concerning the fate of the Western Sahara (along with Morocco). It ruled that this attribute had the effect of distinguishing the Polisario from all others.[45] Accordingly, pursuant to the *Plaumann* test, this had the effect of giving it membership of a closed group – along with the parties to the 2010 Agreement – on the basis that the treaty was applicable to Western Sahara. As a result, the General Court held that the Polisario's direct challenge to Council Decision 2012/497 was admissible.[46]

3.2 **The CJEU's Approach in *Council v Polisario* (2016)**

On appeal, the CJEU undercut the General Court's interpretation of direct concern by holding that the 1996 Association Agreement and the 2010 Liberalization Agreement were only applicable in respect of territory over which Morocco exercises sovereign authority in accordance with international law.[47] It added that these Agreements did not generate legal effects for the people of Western Sahara because they had not consented to them, in keeping with the customary norm *pacta tertiis nec nocent nec prosunt*.[48] In support of this reasoning, the CJEU noted Western Sahara's separate legal identity, arising from its NSGT status, and as a consequence of the customary right to self-determination, which belongs to its people, and which generates obligations *erga omnes* that bind the EU.[49] It is worth recalling that the CJEU chose not to address the matter of individual concern specifically in its judgment. This may have created the impression that it would have agreed with the General Court's finding on this facet of standing (in the event it had found that the EU/Morocco Agreements were lawfully applicable to Western Sahara); however, the basis for such a view is questionable. Indeed, it is notable that the CJEU took great care to assess the question of the Polisario's standing solely by reference to the arguments it had advanced during the proceedings.[50] Consequently, it should not be assumed that the CJEU would have necessarily found the Polisario to be individually

[43] *Ibid*., para. 110.
[44] *Ibid*., para. 111.
[45] *Ibid*., para. 113.
[46] *Ibid*., para. 114.
[47] Case C-104, *supra* note 7, para. 95.
[48] *Ibid*., para.106. It holds that a treaty cannot create rights and/or duties for a third State without its consent. The principle is now codified in Art 34, VCLT.
[49] *Ibid*., paras. 106-107. The Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations provides that: 'the territory of a […] Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it […]'. UNGA Res 2625 (XXV) 24 October 1970.
[50] See Case C-104, *supra* note 7, paras. 131 and 133.

concerned by the Council's Decision, especially given the stringent way in which the *Plaumann* test has been applied over the years.

4. THE RESPONSE OF THE EU'S POLITICAL INSTITUTIONS TO *COUNCIL V POLISARIO*

In *Council v Polisario*, the CJEU decided that the EU/Morocco Agreements could not be legally applicable to Western Sahara without the consent of the people of that Non-Self-Governing Territory – irrespective of whether any such application is likely to benefit (or harm) that Territory.[51] According to Hans Corell's widely-accepted formulation, the exploitation of Western Sahara's natural resources, by third parties, is permissible, if it can be shown that: (i) the consent of the people of Western Sahara has been obtained; and (ii) any benefits accruing from such activities are enjoyed by them.[52] However, the Council and Commission's interpretation of the relevant international legal requirements was much more qualified. In particular, rather than focusing on the requirement of consent, the Council instructed the Commission to undertake a process of consultation with 'the people concerned' to ensure that they are 'adequately involved' in the arrangements to extend the EU/Morocco trade agreements to Western Sahara. In addition, the Commission was given the task of evaluating the benefits that would be conferred on this constituency under the EU/Morocco trade preferences regime.[53] These arrangements were negotiated through an EU/Morocco Exchange of Letters by which amendments were made to Protocols 1 and 4 to the 1996 Association Agreement.[54] This treaty had the effect of extending those trade preferences relating to qualifying products originating in Morocco to those products coming from Western Sahara and it was subsequently adopted by Council Decision 2019/217.[55]

[51] *Ibid*., para. 106.

[52] Corell's widely accepted test is consistent with the approach adopted by the General Assembly in a series of resolutions addressing the exploitation of natural resources in NSGTs. H. Corell, 'Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council', 12 February 2002: UN Doc S/2002/161. Also see UNGA Res 73/104, 7 December 2018 for the General Assembly's current approach on this issue.

[53] The Council authorised the Commission to negotiate an amending treaty with Morocco on 29 May 2017, subject to these conditions. In this context, the Commission produced its 'Report on Benefits for the People of Western Sahara and Public Consultation on Extending Tariff Preferences to Products from Western Sahara', (2018) 346 (15 June 2018).

[54] See the Commission's Proposal for a Council Decision regarding the signing of an Agreement the amendment of Protocols 1 and 4 to the EU/Morocco Association Agreement: COM/2018/481 (15 June 2018). See E. Kassoti, 'The Empire Strikes Back: The Council Decision Amending Protocols 1 and 4 to the EU-Morocco Association Agreement', 4 *European Papers* 2019, 307-317; and Wrange, *supra* note 11.

[55] Council Decision 2019/217, *supra* note 7.

5. THE POLISARIO'S OUTSTANDING CHALLENGE TO COUNCIL DECISION 2019/217

The Polisario has instituted a challenge to the legality of this measure on various grounds, including that the amended arrangements contravene the CJEU's judgment in *Council v Polisario*. Its most important arguments, for the present purpose, are two-fold.[56] First, it contends that the revised arrangements violate the people of Western Sahara's right to self-determination; and, secondly, it claims that, according to the *pacta tertiis* principle, *its* consent is required for the *de jure* extension of such arrangements to Western Sahara. However, as outlined above, any direct challenge by the Polisario would confront two major obstacles at the admissibility stage, namely: (a) the serious difficulty it would encounter in establishing that it is directly and individually concerned by the contested measure; and (b) the risk that the dispute may re-characterized to its disadvantage during the preliminary phase of such proceedings.

5.1 **Characterising the Dispute**

A long-standing criticism of the CJEU is that it is not fully conversant with the priorities and processes of human rights adjudication.[57] There is now ample evidence in the Court's own jurisprudence to rebut this charge,[58] but there is little doubt that the EU courts remain far more attuned to the task of applying technical legal rules in relation to trade disputes than to the job of weighing the effect of broadly-articulated human rights norms against the backdrop of seemingly intractable legal-political disputes.[59] The different ways in which the General Court and CJEU approached the Polisario's direct challenge to Council Decision 2012/497 may be illustrative of this point. In *Polisario v Council*, the General Court seemed to view the Polisario's representative character, and the wider UN-sponsored process concerning Western Sahara, as a reason to treat it as a member of a closed group. To this end, it was willing to accept the connection between the people of Western Sahara's right to self-determination, which generated natural resource entitlements in their favour, and the application of the EU/Morocco trade preferences regime to that Territory. This was apparent from its concern that the EU should not be acting in a manner that encourages third parties to profit from the exploitation of natural resources

[56] The Polisario's challenge in Case T-279/19 is based on ten pleas. They are set out in OJ C 220/41, 1.7.2019., *supra* note 9.

[57] See G. de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' 20 *Maastricht Journal of European and Comparative Law* 2013, 168-184, at 176-178; and V. Perju, 'Reason and Authority in the European Court of Justice', 49 *Virginia Journal of International Law* 2009, 307-378, at 322-327.

[58] See, e.g. Case 131/12 Google Spain SL, *Google Inc* v. *Agencia Espanola de Proteccion de Datos and Mario Costeja Gonzalez* [1984] *OJ* [2014] C212/4.

[59] See, e.g., Brita, *supra* note 31; and G. Harpaz and E. Rubinson, 'The Interface between Trade, Law and Politics and the Erosion of Normative Power Europe: Comment on Brita', 35 *European Law Review 2010*, 551-570.

belonging to this NSGT.[60] The Court was not preoccupied with the question of the Territory's final legal status instead it was content to observe that Western Sahara's current status is 'undetermined'.[61] However, in sharp contrast, the CJEU's focus on analysing the text of the EU/Morocco Agreements, at the expense of how they were being applied in practice, was out of kilter with a more conventional approach to the adjudication of human rights norms.[62]

An EU court hearing the Polisario's current challenge to Decision 2019/217 may be willing to take the view that the Commission's consultation and evaluation exercise and the subsequent Council Decision are sufficient to satisfy international law's requirements regarding the extension of the EU/Morocco trade arrangements to Western Sahara. Accordingly, such a court might rule that the legal-political question, which underpinned the Polisario's challenge to Council Decision 2012/297 has now been answered. However, such a conclusion would only be tenable if, at the admissibility stage, it is shown that: (a) the people of Western Sahara have, prima facie, consented to the extension of the EU/Morocco arrangements to their Territory; and (b) the Polisario satisfies the admissibility requirements contained in Article 263(4) TFEU.

5.1.1 *The Consent of the People of Western Sahara*

As noted above, the CJEU mentioned that the EU/Morocco Agreements could be lawfully extended to Western Sahara by reference to the customary principle of *pacta tertiis*, if the consent of the people of Western Sahara had be secured. However, it chose not to set out the modalities by which such consent could be obtained. The Court evidently understood that Morocco controls the vast majority of Western Sahara. Accordingly, it must have known that any attempt to establish the consent of this constituency through direct means would not be feasible, especially given MINURSO's lack of success in organising a referendum regarding the Territory's final status. Conversely, the Court may be taken to have assumed that the Polisario is the only institutional actor capable of granting (or withholding) consent on behalf of the people of Western Sahara in this regard.[63] However, such a surmised viewpoint is not without its problems. Self-determination is a group right which is, typically, exercised through the holding of plebiscites.[64] Moreover, such processes of direct consultation are not

[60] See Case T-512, *supra* note 4, para. 231 and Wrange's reading of the way in which the General Court, and the other actors understood this dispute, *supra* note 11, 15-19.

[61] *Ibid*., judgment, para. 56.

[62] For detailed analysis of the decision's shortcomings from an international legal perspective, see E. Kassoti, 'The ECJ and the Art of Treaty Interpretation: Western Sahara Campaign UK', 56 *Common Market Law Review* 2019, 209-236.

[63] It is notable that international law has often taken a generous view regarding the international legal personality of National Liberation Movements. See A. Cassese, *International Law* (Oxford: Oxford University Press, 2nd edition 2002), at 141-142.

[64] This accords with the ICJ's general understanding of the principle of self-determination which it 'defined as the need to pay regard to the freely expressed will of peoples Western Sahara Advisory Opinion (1975) ICJ Rep 12, 59. Also see the Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV)(1960)(14 December 1960).

necessarily restricted to questions of independence, integration and/or association pursuant to decisions about postcolonial political arrangements.[65] Instead, they may also be required in connection with other decisions which have a significant impact on the people concerned.[66] This does raise the question of whether any decision regarding the extension of the EU/Morocco Agreements to Western Sahara is so important that it requires the directly expressed consent of the people concerned. This is a moot point but the application of the tariff preference to products originating in Western Sahara is not an inconsequential matter. Further, the standpoint that the Polisario qualifies as the sole representative of the people of Western Sahara is complicated by the fact that it does not control the vast majority of Western Saharan territory, or many of its people. Consequently, even though the Polisario is an established National Liberation Movement which is widely acknowledged to perform a representative function, the facts would militate against the assertion that the Polisario should be viewed as the sole interlocutor for this purpose.

Against this background, the Commission was in something of an invidious position. It was given the task of finding a way of engaging in direct consultations with the people of a third Territory despite its limited access, information and means. Clearly, the Commission's endeavours to ensure that the 'people concerned' were 'adequately involved' in the arrangements being devised for the application of EU/Morocco trade preferences to this NSGT is not the same thing as obtaining the consent of the people of Western Sahara for such an extension.[67] In the circumstances, the Commission adopted the stance that the consultation amounted to an 'exchange of views and comments' concerning the potential benefits of extension with 'a wide range of socio-economic and political operators' based in Western Sahara.[68] The results of the evaluation exercise were also ambiguous. In its 2018 Report, the Commission admitted that the absence of reliable statistics as well as the indirect nature of any benefits derived from the tariff privileges in question meant that concrete benefits for the indigenous (Sahrawi) inhabitants were hard to discern.[69] As a result, the Commission and the Council embraced the working assumption that any trade flows which benefited the Territory's economy would, benefit the people concerned in the long run, in terms of jobs, investment and development initiatives.[70] The Commission's Report concluded that the consultees were broadly in favour of extension, although it noted that some stakeholders, such as the Polisario, were

[65] See the provisions of 'Principles which should guide Members in deciding whether or not an obligation exists to transmit the information called for under Article 73(e) of the Charter', UNGA Res 1541(XV)(1960) (15 December 1960).

[66] For instance, the ICJ recently confirmed that the elected political leadership of the British colony of Mauritius did not possess the constitutional authority to agree to the excision of the Chagos Islands from the Mauritius without obtaining the consent of the people of this NSGT through a referendum or general election. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius* in 1965 (Advisory Opinion) 25 February 2019, para. 172.

[67] Wrange, *supra* note 11, at 7.

[68] See Report 346, *supra* note 52, at 10.

[69] *Ibid*., at 9; also see Wrange, *supra* note 11*, at* 23-25.

[70] Report 346, *ibid* 32-33; the Commission's proposal for a Council Decision, *supra* note 54, at 6; and the Council Decision 2019/217, *supra* note 8, recitals 9 and 10.

against this course of action and refused to participate in this exercise.[71] Nevertheless, the Commission and the Council took view that the proposed extension would have positive overall benefits for Western Sahara. Clearly, the Commission's consultation and evaluation process suffered from considerable weaknesses, especially as far as ascertaining the positive consent of the people of Western Sahara was concerned. However, it is possible that an EU court, hearing the Polisario's current challenge, would be prepared to accept that the Commission took 'all reasonable and feasible measures in the current context to properly involve the people concerned in order to ascertain their consent',[72] and that such limited direct consultations to establish some kind of validating assent to the extension of the EU/Morocco trade preferences regime to Western Sahara were the most that could be expected given the difficult circumstances on the ground. However, whether such a generous position would be enough to enable a court to uphold the legal validity of Council 2019/217 would depend on how the Polisario's outstanding challenge is characterised.

5.1.2 *The Separation Thesis*

A persistent argument, advanced by the Commission and Council in response to the Polisario's challenge to Council Decision 2012/297 was that the UN-led political process concerning the determination of Western Sahara's final international status is divisible from the issue of applying third party trade preferences to goods coming from this NSGT. This approach seeks to separate the protracted legal-political question from commercial activities undertaken by private economic operators, and it amounts to an attempt to characterise the dispute as being about trade flows rather than one involving human rights and international law.[73] This separation thesis is predicated on a widely-accepted view that the right to self-determination is a process right focused on the legitimacy of the conditions of its exercise rather than an entitlement which gives rise to substantive outcomes.[74] Indeed, this perspective is consistent with the way in which the UN Security Council and the Secretary-General have addressed the dispute about Western Sahara's fate. Specifically, in a series of resolutions, the Security Council has maintained its commitment to help Morocco and the Polisario to reach: 'a mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara'.[75] The EU Council has echoed and supported this commitment and it acknowledges Western Sahara's current NSGT status.[76] Nevertheless, because it does not want to disrupt established trade flows, the Council also accepts Morocco's *de facto* administra-

[71] Report 346, *Ibid*., at 28-32.

[72] Council Decision 2019/217, *supra* note 8, recital 10.

[73] Advocate-General Wathelet had some sympathy with this characterisation of the dispute in his Opinion in Case 104, *supra* note 23.

[74] See R. Higgins, *Problems and Process: International Law and How we Use It* (Oxford: Oxford University Press 1994), 111-128.

[75] See, e.g. UNSC Res 2468 (30 April 2019); and the UN Secretary-General's Report S/2019/282 (1 April 2019).

[76] Council Decision 2019/217, *supra* note 8, recital 3.

tion of Western Sahara, while declaring that there is nothing in its arrangements with Morocco that could amount to implied recognition of its sovereignty claim to this Territory.[77]

The procedural conception of self-determination breaks down when it encounters specific entitlements to natural resources belonging to the people of a NSGT, such as those generated by the doctrine of Permanent Sovereignty over Natural Resources, which is widely understood to be founded on the right self-determination.[78] However, one predictable response would be that if: (i) the people of Western Sahara have consented to the exploitation of the Territory's natural resources by third parties; and (ii) the resulting benefits have been passed on to them, then such activity is permissible under international law. Consequently, it is plausible that an EU Court could separate the broader self-determination dispute from the Polisario's challenge to Decision 2019/217. Notwithstanding the argumentative latitude which exists for the recharacterizing this direct challenge as a narrow technical tariff privileges case, any finding that the exploitation of Western Sahara's natural resources is divisible from the exercise of the right to self-determination and the question of the Territory's final status is deeply problematic as these matters are connected at a causal level. Clearly, Morocco's ability to extract valuable natural resources from Western Sahara provides the means, at least in part, by which its control can be maintained thereby frustrating the exercise of the right to self-determination by the people of this NSGT.[79] This connection was well understood by the General Court in *Polisario v Council*, when it expressed the view that the EU was contributing to the human rights violations being perpetrated by Morocco 'by encouraging and profiting' from the exploitation of Western Sahara's natural resources.[80]

5.2 **Direct Concern and Individual Concern**

As previously stated, the test for direct concern concentrates on whether the measure in question generates effects for an Applicant's legal situation. In the present context, it is worth noting that, in his 2016 Opinion in *Council v Polisario*, the Advocate-General agreed with the Council's submission that the Polisario's representative role had only been recognised, by the UN, in relation to the political process concerning the realisation of the people of Western Sahara's right to self-determination and not in connection with any commercial activities involving that Territory.[81] He went on to express the view that the trade prefer-

[77] *Ibid*., recitals 3, 6 and 10.

[78] See UNGA Res 1803 (XVII)(14 December 1962), which has since acquired the status of customary international law.

[79] For a detailed assessment of the relationship between the exploitation of natural resources and the perpetuation of Morocco's occupation of Western Sahara see J. Smith, 'The Taking of the Sahara: The Role of Natural Resources in the Continuing Occupation of Western Sahara', 27 *Global Change, Peace & Security* 2015, 263-284.

[80] Case T-512/12, *supra* note 4, para. 231.

[81] See Advocate-General Wathelet's 2016 Opinion, *supra* note 23, paras. 184-186.

ences dispute did not form part of the UN-sponsored process.[82] Consequently, he concluded that the link between the contested measure and the Polisario's representative role was not strong enough to satisfy the requirement of direct concern.[83] The way in which the CJEU approached this dispute in *Council v Polisario* and the subsequent extension of the EU/Morocco trade preferences regime to Western Sahara have markedly altered the Polisario's position since the Advocate-General delivered his Opinion. In such changed circumstances, the Polisario would be able to show that the Council's Decision has generated legal effects for the organisation in its representative capacity and, in particular, that it is directly affected by any contention that the Commission and Council have satisfied international law's requirements concerning the exploitation of Western Sahara's natural resources.

The issue of individual concern is complicated by the two background arguments discussed in the previous sub-sections. First, the dispute regarding Western Sahara's final status may be distinguishable from the trade preferences challenge on the basis that the former is the subject of an ongoing UN-sponsored process, while the latter could be seen as a dispute about commercial arrangements undertaken by private economic operators. Second, the exploitation of natural resources belonging to the people of a NSGT, by third parties, is permissible under international law, if certain conditions have been fulfilled. The Council's response here would surely be that EU/Morocco arrangements have ensured that these conditions have been met. An EU Court might be persuaded by this argument, especially if it is prepared to accept the way in which the Polisario's tariff privileges challenge can be characterised in a way that separates it from the wider self-determination/final status dispute.

Against this background, it is worth considering the way in which the available evidence, such as it is, might support such a characterisation of the Polisiario's outstanding action. In *Polisario* v. *Council*, the General Court noted that the list of approved exporters, pursuant to the EU/Morocco Association Agreement identified 140 undertakings established in Western Sahara.[84] According to the Commission's 2018 Report, 64,000 tonnes of early-growing crops were grown in an area covering approximately 900 hectares in Western Sahara in 2016.[85] It indicated that this form of agricultural production is export-driven and the EU is one of the key markets for such products.[86] The Report estimated that the savings generated by the application of EU/Morocco trade preferences to qualifying products would have amounted to €6.6million in the year in question.[87] It also noted the presence of a significant fish-processing industry in Western Sahara.[88] The Report also stated that 55,000 tonnes of processed fish products

[82] *Ibid*., para.186.

[83] *Ibid*., paras. 193-194 and 213-214. The Advocate-General repeated this manoeuvre in relation the requirement of individual concern.

[84] See Case T-512, *supra* note 4, paras. 80 and 86.

[85] Report 346, *supra* note 53, at 16.

[86] *Ibid*.

[87] *Ibid*., at 16-17. However, this figure was calculated on the assumption that all such products are exported to the EU. The Report also estimated that this activity generated some 14,000 jobs.

[88] *Ibid*., at 20.

were exported from Western Sahara to the EU in 2016 at a value of €134m (an amount that would attract EU customs duties of some €9-9.5m).[89]

It is possible to use this limited information to bolster the claim that a substantial number of economic operators exporting agricultural and processed-fish products to the EU from Western Sahara are direct stakeholders in a trade preference dispute about whether, or not, products originating in Western Sahara qualify for tariff privileges as a result of the extension of the EU/Morocco agreements to this NSGT. Moreover, it could be argued that the activity of producing and/or exporting such products amounts to a commercial activity which is open to any economic operator based in Western Sahara. In such circumstances, the claim that the Polisario is a member of a closed group and/or that it is distinguishable from all others does not seem to be sustainable on the facts, at least not by reference to the *Plaumann* test.

6. CONCLUSIONS

The analysis undertaken in this paper is not offered in support of a narrow reading of the Polisario's current challenge to Council Decision 2019/217. Instead, it sought to highlight the restrictive nature of the EU courts' established response to direct challenges to EU legislative acts, a jurisprudence which is facilitated by the considerable scope which exists for human rights cases to be characterized as narrow technical disputes. The way that the General Court resolved the question of the Applicant's standing in *Polisario* v. *Council* may have been out of step with previous rulings concerning the interpretation of individual concern but such a holistic approach is indicative of the way in which the EU courts should be adjudicating claims brought by externally located individuals who allege that their human rights have been violated by EU trade agreements. Any finding that the Polisario does not have the standing to institute a direct challenge to Council Decision 2019/217 would mean that the EU courts will not be able to address the substantive issues raised by the Western Sahara litigation, including the consequences, for the EU, of the *erga omnes* obligations generated by the right to self-determination belonging to the people of Western Sahara and whether the EU's trade agreements with Morocco amount to recognition of its sovereignty claim to this Territory. To reject such a challenge as inadmissible would clearly be at odds with the EU's solemn commitment, enshrined in Article 3(5) TEU, to contribute to the protection of human rights and the strict observance of international law. In order to ensure that that the full range of remedies is available to Applicants instituting direct challenges to EU acts, the EU courts must broaden their interpretation of the procedural prerequisites through which the legality of the EU's external actions can be challenged by affected individuals, especially those who are located beyond the combined territory of its Member States. A more generous approach is justifiable on practical grounds, as externally-situated individuals will invariably have few-

[89] *Ibid*., at 21-23. The Report claimed that an estimated 6,500 jobs were directly dependent exporting processed fish products to the EU.

er opportunities to instigate indirect challenges to any implementing measures through the national courts of Member States, but such a change is also attractive at a normative level since it would facilitate the advancement of the EU's constituent values.