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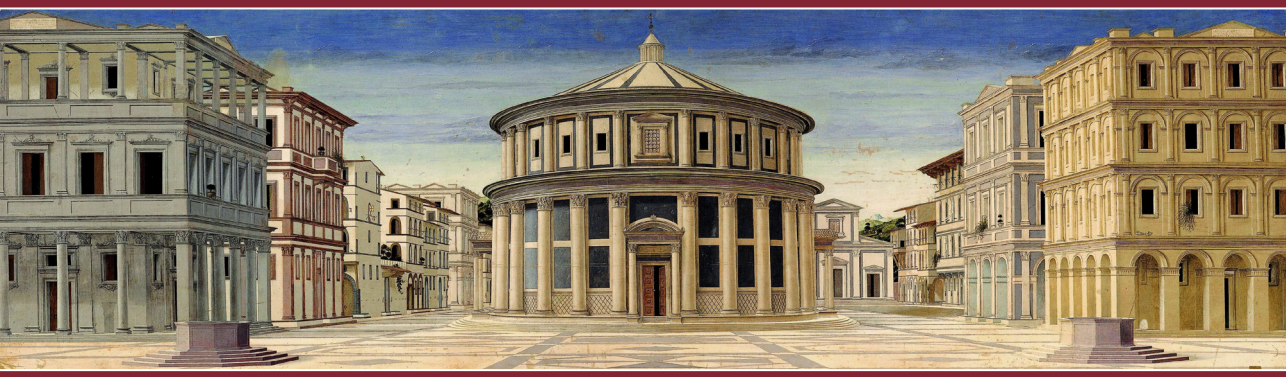

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European Papers

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EUROPEAN FORUM

EDITORIAL

WINTER IS COMING. THE POLISH WOODWORM GAMES

The political developments in Poland, which took place in course of the past two years, have brought very chilling eastern winds to Brussels. In a relatively short period of time, one of the success stories of economic (and seemingly of political) transformation and the EU enlargement policy has become a pariah and a tough cookie to crack for the many across Europe. The tsunami of right-wing populism, combined with an onslaught on rule of law, have turned into a major challenge for the European Union, its institutions and, with one exception, for its own Member States.[1] So far the EU's response has been relatively mild, yet it has also exposed the inherent limits of the existing system, whereby the members of the club, which dismantle constitutional courts and independent judiciary can go unpunished. Although views in this respect vary, some argue that the existing toolkit to handle recalcitrant Member States is not fit for purpose.[2] Interestingly enough the most recent episode in the polish saga is not related to any of its domestic constitutional issues but rather to a woodworm, which populates some of the Polish forests and, as it happens, it is the arch-enemy of the Poland's Minister of Environment. The latter decided to employ its strongest armoury and for months now has been proceeding with a large-scale logging of primeval *Białowieża* Forest, which is a UNESCO protected site and a habitat of many animals, including some of the endangered species. According to the European Commission, the actions of the Polish authorities constitute a breach of two EU environmental directives.[3] Not surprisingly, the Guardian of the Treaties, commenced the infringement pro-

[1] The only exception is Hungary, which, too, has a solid track record of anti-democratic reforms pursued by V. Orban and his Fidesz Party. See further, *inter alia*, Z. SZENTE, *Challenging the Basic Values – The Problems of the Rule of Law in Hungary and the Failure of the European Union to Tackle Them*, in A. JAKAB, D. KOCHENOV (eds), *The Enforcement of EU Law and Values*, Oxford: Oxford University Press, 2017.

[2] It is questionable whether so-called "rule of law" cases qualify for infringement proceedings envisaged in Arts 258-260 TFEU. See further, *inter alia*, D. KOCHENOV, L. PECH (eds), *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, in *European Constitutional Law Review*, Vol. 11, pp. 512-540; D. KOCHENOV, *Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool*, in *Hague Journal on the Rule of Law*, 2015, p. 153 *et seq.*; C. HILLION, *Overseeing the Rule of Law in the European Union Legal Mandate and Means*, SIEPS, European Policy Analysis, 2016, www.sieps.se.

[3] Directive 92/43/EEC of the Council of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora and Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.

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ceedings, which have reached the Court of Justice in July 2017.[4] Bearing in mind the scale of the cull and the pace of it, the European Commission filed for an *interim* order requesting suspension of the logging. This was entertained by the Court of Justice almost in an instant,[5] yet on temporary basis, until the judges conduct an in-depth enquiry whether the request made by the applicant has merits.[6] Thus far, this story seems nothing out ordinary, as, to put it simply, we've been there before. Not for the first, and definitely not for the last time a Member State is exercising its defiance. So, why a case of forest woodworm deserves an editorial? The truth is that *ips typographus*, as it is called, has proven to be a challenge not only to the *Białowieża* Forest but, arguably, also to the rule of law. It is one of many actions of the illiberal Polish Government, which is happy to accept cheques coming from Brussels and, at the same time, quite eager to disregard EU law and the values on which the EU is based. The woodworm case has exposed a number of interesting phenomena. For instance, it encapsulates the fact that the EU benefits from a much more robust procedural toolkit if a Member State is in breach of an environmental directive than when it acts in flagrant breach of values on which the EU is based.

In order to have the full picture of the situation at hand it is worth going briefly, though step-by-step, through the key facts. To begin with, the European Commission submitted its action as per Art. 258 TFEU on 20 July 2017. As already noted, the applicant requested interim measures arguing that the logging constitutes a serious and irreparable danger to animal habitats and integrity of protected 2000 Natura area *Puszcza Białowieska*. That request was entertained by the Vice-President of the Court of Justice already on 27 July 2017, yet – as alluded to above - that order was applicable until the proceedings on interim measures were completed. On 4 August 2017 Poland presented its written submission on Commission's request for interim measures. A hearing took place on 11 September 2017. Two days later the European Commission supplemented its original submission, requesting imposition of financial penalty. This was not surprising, bearing in mind the fact that Poland disregarded the first order and proceeded with logging of the *Białowieża* Forest, claiming that chopping of a large part of it was necessary and proportionate to protect the public security.[7] In turn, the case was referred to the Grand Chamber, which held a hearing on 17 October 2017. On 20 November 2017 the Court of Justice adopted its decision on *interim* measures and ruled that Poland shall, with an immediate effect, suspend logging until the Court rules as to the merits of the

[4] Court of Justice, case C-441/17, *European Commission v. Poland*, pending.

[5] Order of the Vice-President of the Court of Justice of 27 July 2017, case C-441/17 R, *European Commission v. Poland*.

[6] *Ibidem*.

[7] It should be noted that *Białowieża* Forest is not the only one affected by the actions of the Polish Government. These days logging of trees seems to be quite *en vogue* in governmental circles.

case.[8] As a matter of exception, Poland may continue cutting the trees, if it is unconditionally necessary for public security, especially in proximity of public roads or important infrastructure. Furthermore, such actions have to be proportionate and, will be permitted only if there are no other more environment friendly ways of protecting public security. Should the Polish Government fail to comply with the order in question within 15 days, the Court of Justice has reserved the right to impose a penalty of at least 100.000 Euro per day, counted from the day of delivery of the order of 20 November 2017 to the Polish Government. The initial reaction of the Polish Minister of Environment was a bit ambiguous, suggesting, however, that the Government may comply with the interim order. Irrespective of whether that happens or not, it is important to present the woodworm games in a broader perspective.

To call a spade a spade, the current Polish administration has an idiosyncratic attitude to law, the way it is made as well as the way it is interpreted or implemented. This is applicable not only to the national law but also to the EU legal order. The fact that the Parliament adopts laws in a rushed fashion, in the middle of the night and without meaningful merit-based debates is a matter of bad taste. In equally bad taste, those developments are reported by state-owned media, which employ propaganda tools characteristic for totalitarian regimes or, a contemporary pro-Kremlin TV outlet Russia Today. However, the disregard for the Polish Constitution and adoption of laws, which are contrary to the foundations of the legal system, undermine the rule of law.[9] Some of those practices have been now taken to the EU level, which not only put the credibility of the Polish authorities into question but also threaten the EU legal order. It is one thing to have a person holding the post of Prime Minister of a Member State[10] arguing that EU law should be optional for the Member States,[11] but quite another for the Government to openly disregard an interim order of the Court of Justice.[12] This is unprecedented, but sadly, it is at the heart of the woodworm games played by the Polish Government. As argued by the European Commission, and accepted by the judges at Kirchberg, the Polish Government ignored the order of 27 July 2017 and continued its onslaught on the *Białowieża* Forest. It claimed that culling a half of it is necessary on serious grounds of public security, even though more civilised ways of protecting the public security exist. The fact that the Government ignored the order of the Court, sends a

[8] Order of the Court of Justice of 20 November 2017, case C-441/17 R, *European Commission v. Poland*.

[9] See, *inter alia*, A. ŁAZOWSKI, *Time to stop the Polish danse macabre*, CEPS Commentaries, www.ceps.eu.

[10] It is commonly known that the current Polish Prime Minister holds the office but not the power, which is vested in the hands Jarosław Kaczyński, who is the chairperson of the leading party, Prawo i Sprawiedliwość. Thanks to this manoeuvre he remains legally unaccountable.

[11] *Allow countries to suspend EU law they don't like*, Polish PM argue's, in *Financial Times*, 9 November 2017.

[12] At the same time, the practice of ignoring judgments of the Court of Justice is not unheard of.

number of very worrying signals. Not only its actions are in breach of the principle of loyal co-operation laid down in Art. 4 para. 3 TEU, but also they amount to a textbook case of political vandalism. Furthermore, it undermines the authority of the Court of Justice and, in more general terms, the EU institutions. It is notable that in equal measure the Polish Government has been trying to question the authority of the European Commission and the Venice Commission, which is part of the Council of Europe system.[13] It is also a warning sign that Poland may take its defiance to the next levels and start treating EU law, including the jurisprudence of the Court of Justice, as optional. If that were to materialise, it would be a profound threat to uniformity and efficacy of EU law. Perhaps such general considerations were one of the reasons why the European Commission and the Court of Justice decided to follow the famous Al Capone's statement that one can achieve a lot with a nice talk but far more with a talk and a gun, which – in this case – has translated into the interim measures, including the financial penalty. This takes us, however, to the flip side of the rule of law coin. The question is if the current system envisaged by EU law is bulletproof.

Interim measures are vaguely regulated in Art. 279 TFEU, which provides as follows: "[t]he Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures".

In the case at hand, the key question is whether Art. 279 TFEU is broad enough to accommodate the financial penalties. If so, which rules govern their calculation and adoption. On the one hand, the provision in question says that "any necessary measures" can be prescribed. On the other hand, the question is how broad is the meaning of "any".[14] Unsurprisingly, the Polish Government argues that financial penalties may be imposed only as per Art. 260 TFEU. Equally unsurprisingly, the European Commission and the Court of Justice claim that it also encompasses a financial penalty. Thus, the Grand Chamber ruled accordingly, demonstrating that even without ruling on the merits, it is clear to a naked eye that the large-scale logging of the *Białowieża* Forest causes irreparable damage. This, however, raises numerous points, which the Court of Justice failed to address. To begin with, once again the Court of Justice engaged in very creative interpretation of Treaty provisions.[15] To make things worse, the reasoning of the Court is not particularly elaborate. In para. 114 the judges talk about the extraordinary circumstances surround-

[13] In the same vain, it has been emulating the Hungarian Government.

[14] See W. DOUMA, *A new and practical way of stopping EU law violations,* in *EU Observer*, 14 September 2017, euobserver.com.

[15] See, for instance, Court of Justice, judgment of 12 July 2005, case C-304/02, *Commission of the European Communities v. France* [GC]. In that case the Court of Justice ruled that the word "or" used in Art. 260 TFEU means "and", hence both types of financial penalties envisaged therein case be imposed in a single case. See further on financial penalties, *inter alia*, A. SIKORA, *Financial penalties for non-execution of judgments of the Court of Justice*, in A. ŁAZOWSKI, S. BLOCKMANS (eds), *Research Handbook on EU Institutional Law*, Cheltenham, 2016, pp. 324-352.

ing the case at hand, yet they fall short of employing the key principle that Poland is in breach of, that is the principle of loyal co-operation laid down in Art. 4 para. 3 TEU. While it is debatable, whether Art. 279 TFEU is broad enough to accommodate the financial penalties, the conclusion of the Court would be more persuasive if the judges applied both provisions jointly. Secondly, as noted above, the Court rules in para. 118 that the penalty would amount to at least 100 000 Euro per day. If not dubious, it is definitely very much unclear how the Court of Justice calculated that amount and whether the penalty would be proportionate to the breach of EU law at stake. What if, following the Court's order, the Government partly suspends the logging, yet still not to the satisfaction of the European Commission and the Court. Would the judges then still impose the penalty but use a lower minimum amount? The language employed by the Court seems to preclude lowering of the daily amount of the penalty, while leaving the door open only for its increase. In Court's defence one has to acknowledge that it is stepping into uncharted territory, as such a scenario has materialised for the first time in over six decades of Court's history. Furthermore, financial penalties as interim measures are not envisaged in any of the European Commission's Communications on penalties based on Arts 258 and 260 TFEU.[16] Hence, it has had no point of reference to rely on. Thirdly, as elaborated by the Court of Justice in its order, the interim measures do not prejudice the final outcome of this litigation. So, a question emerges what would happen if the Court imposed the penalty for non-compliance with the interim order but then ruled that Poland was not in breach of the directives in question. On the one hand, it is true that the financial penalty would be imposed for breach of an interim order, not the directives themselves. On the other hand, it would create a rather ambiguous situation. While it would exceed the limits of this editorial to analyse this case in greater depth, those four key points demonstrate rather well the breadth of legal issues at stake. Furthermore, they prove that the current system governing the interim measures is not exactly bulletproof.

The story of Polish woodworm games not only encapsulates the weaknesses of the EU law enforcement machinery but it also unveils, once again, a paradox. The EU's toolbox provides ammunition that can be used in case of breach of EU legislation proper. However, it leaves the EU almost toothless when it comes to cases of flagrant breaches of rule of law. To put it differently, the European Commission may take a Member State to the Court of Justice, and have the latter impose penalties for logging of a forest in breach of EU environmental law. Yet, when the Member State undermines the independence of judiciary, by making its Minister of Justice a key player in judicial appointments and dismissals and, at the same time, a chief public prosecutor, the European Commission can only trigger its Rule of Law Mechanism and adopt non-binding recommendations or rea-

[16] See, for instance, Communication of 15 December 2017 from the Commission on *Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings*.

soned opinions. As the case of Poland proves, such acts are very much ignored and legitimacy of the European Commission questioned by the Polish ruling party (called "Law and Justice", *sic!*). Although it is debatable, one can argue that the *modus operandi* envisaged in Art. 7 TEU is too fortified with the Member States involvement to serve any purpose. Hence, it is very unlikely that a Member State would be deprived of its voting rights in the Council, as theoretically possible under Art. 7 TEU.[17] Consequentially, a country which undermines the foundations on which the EU is based can get away with it unsanctioned. But, if it uses proverbial tanks to kill butterflies, that can lead to financial penalties. This undermines EU's credibility not only internally but also in its external relations, where in some cases it pursues policies heavily based on political conditionality.[18]

It is unclear how this story will end. For now, it is yet another warning sent to the European Union that it has on board some recalcitrant Member States, which will have recourse to defiance whenever they find it fit. In the case at hand, it is not the question of who is right or wrong in nuts and bolts of application of EU environmental law. This will be decided by the Court of Justice. Yet, it is a matter of principle that the Member States should not ignore the interim orders of the Court of Justice. The road from there to complete disrespect of judgements of the Court, in particular those imposing penalties as per Art. 260 TFEU, is short. To put it differently, if Poland is happy to ignore an *interim* order of the judges at Kirchberg, it may with equal ease ignore a judgment of the Court imposing a penalty for breach of EU law. This would, arguably, amount to a serious and persistent violation of the rule of law. The disregard by the party running Poland of authority of its own Constitutional Tribunal and the Supreme Court is a clear sign of trajectory it moves on. As 2017 is nearing its end, the EU is currently facing a plethora of crises but it is its legal order that keeps the integration endeavour together. If we start dismantling it bit by bit, the decline of the EU as we know it, may follow. One should have in mind, though, that the EU integration dividend is simply too great to lose. Never before Europe has experienced decades of peace and prosperity. This is even so, despite the doom and gloom of the Eurozone crisis. In the great scheme of things, the EU is not perfect, yet definitely worth fighting for.

A.L.

[17] For instance, Hungary and Poland joined forces, and if one is to believe political declarations, should the European Council wish to adopt a decision as per Art. 7 para. 2 TEU, either Poland or Hungary would block it. Without such a decision of the European Council it would be impossible to impose sanctions in accordance with Art. 7 para. 3 TEU.

[18] See, for instance, EU-Georgia Association Agenda adopted on 21 November 2017. One of the main priorities for Georgia is compliance with the rule of law and independence of judiciary. This, bearing in mind the current situation in Poland looks as if the European Union pursued "do as I say, don't do as I do" philosophy.

Overviews

Opinion 1/15: The Court of Justice Meets PNR Data (Again!)

Table of Contents: I. Introduction. – II. Legal and factual background. – III. Opinion of AG Mengozzi. – IV. Opinion of the Court of Justice. – V. Analysis. – VI. Conclusion.

I. In July 2017 the Court of Justice handed down its eagerly awaited Opinion 1/15[1] on the compatibility of the envisaged EU-Canada Passenger Name Record (PNR) Agreement, that had been sought by the European Parliament.[2] The Court's careful analysis of the Agreement and its conclusion that it was not compatible with the Charter of Fundamental Rights of the European Union (Charter) is to be commended for continuing with the high level of privacy and data protection standards articulated in recent case-law. The ramifications of the Opinion are considerable. Steps are already afoot to renegotiate the Canada PNR Agreement to address the many concerns expressed by the Court of Justice in Opinion 1/15 so that this Agreement could eventually enter into force and potentially provide a template for all future PNR Agreements. Crucially the only existing PNR Agreements that are in force, with the US and Australia,[3] cannot be considered compatible with the standards articulated in Opinion 1/15 and are thus in need of renegotiation. This will be no small feat given the diverging approach to privacy and data protection in the US, to say nothing of the current US administration's more isolationist stance. Furthermore, it is submitted that the EU's own recently adopted General Data Protection Regulation[4] does not meet the standards articulated in Opinion 1/15 and will need revising.

[1] Court of Justice, opinion 1/15 of 26 July 2017.

[2] European Parliament Resolution P8_TA(2014)0058 of 25 November 2014 on seeking an opinion from the Court of Justice on the compatibility with the Treaties of the Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data. The Canada PNR Agreement was signed on 25 June 2014.

[3] Council Decision 2012/472/EU of 26 April 2012 on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security; Council Decision 2012/381/EU of 13 December 2011 on the conclusion of the Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service.

[4] 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 (General Data Protection Regulation).

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II. PNR data is information provided by airline passengers and collected by air carriers to enable reservations to take place. This is an expansive category of data that can include, amongst other things, payment information, e-mail addresses, contact telephone numbers, passport information, baggage information, travel itinerary, frequent flier information, special health requirements and meal preferences (the latter category is considered particularly controversial due to its potential use as a proxy for ethnicity and religious beliefs).

PNR data gave rise to major transnational controversy when, in the immediate wake of the terrorist attacks on 11 September 2001, the US passed legislation requiring airlines flying into US territory to provide the Bureau of Customs and Border Protection with electronic access to PNR data. The failure of airlines to comply with these rules could lead to substantial fines and potentially even the loss of landing rights. Given the radically different approach to privacy and data protection taken by the US as compared to the EU,[5] the transfer of PNR data by airlines flying from Europe raised an obvious conflict with the Data Protection Directive which, subject to certain exceptions, only permits data transfers to a third country which "ensures an adequate level of protection".[6]

Negotiations ensued between the European Commission and the US that culminated in an international agreement that contained a range of commitments in relation to the PNR data and in a Commission finding that the US ensured an adequate level of data protection in relation to the PNR data.[7] The Council had concluded this EU-US PNR Agreement even though the European Parliament had sought an opinion from the Court of Justice, under what is currently Art. 218, para. 11, TFEU, as to the appropriate legal basis for the agreement and whether it was compatible with the right to protection of personal data.[8] The European Parliament accordingly withdrew its request under the opinion procedure and brought annulment proceedings against both the Adequacy Decision and the Decision concluding the PNR Agreement. Prior to the Court's ruling, another transatlantic PNR Agreement was concluded, this time with Canada and with clearly higher data protection standards than was the case in the EU-US Agreement as made clear in an opinion by the European Data Protection Supervisor (EDPS).[9] The Court itself was able to wholly avoid commenting on the compatibility of the EU-US PNR Agreement with fundamental rights standards by finding it to have been concluded

[5] See briefly on these differences: P.M. SCHWARTZ, *The EU-US Privacy Collision: A Turn to Institutions and Procedures,* in *Harvard Law Review*, 2013, pp. 1973-1979.

[6] Art. 25, para. 1, of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive).

[7] An Adequacy Decision under the Data Protection Directive.

[8] Registered as Court of Justice, opinion 1/04.

[9] Council Decision 2006/230/EC of 18 July 2005 on the conclusion of an Agreement between the European Community and the Government of Canada on the processing of API/PNR data, and the EDPS opinion (2005/C 218/06).

on the wrong legal basis.[10] The first EU-US PNR Agreement was then replaced with an *interim* third pillar agreement in 2006 with even lower data protection standards than its predecessor, and that in turn was replaced by another third pillar agreement in 2007 with yet lower standards.[11] In the immediate wake of the signing of the 2007 EU-US Agreement, a proposal for a third pillar EU wide PNR scheme for law enforcement purposes emerged which shared at least some disconcerting parallels with its EU-US counterpart, not least in relation to lengthy retention periods.[12]

The context for PNR schemes was transformed with the entry into force of the Lisbon Treaty in late 2009. PNR Agreements would now need, pursuant to Art. 218, para. 6, let. a), sub-let. v), TFEU, the European Parliament's approval and, as the Charter was now in force its specific provision on the right to the protection of personal data (Art. 8 of the Charter), as well as a nearly textually identical provision to that in Art. 8 of the European Convention on Human Rights (ECHR) concerning the right to respect for private and family life (Art. 7 of the Charter), would need to be complied with.[13] Notwithstanding this changed environment, the European Parliament still gave its approval to the latest iteration of the EU-US PNR agreements in 2012 despite the Agreement being riddled with data protection shortcomings.[14]

It would not be possible to remain as cavalier about the compatibility of PNR schemes with EU fundamental rights following the Court of Justice's seminal *DRI* ruling in April 2014, that invalidated the Data Retention Directive due to non-compliance with the Charter rights to private and family life and personal data protection.[15] Accordingly, the European Parliament relied on this ruling when invoking the Art. 218, para. 11, TFEU procedure in relation to a new PNR Agreement with Canada that was signed shortly after the *DRI* rul-

[10] Court of Justice, judgment of 30 May 2006, joined cases C-317/04 and C-318/04, *European Parliament v. Council and Commission*. See on this ruling, including criticism of the opinion of AG Léger delivered on 22 November 2005 that surprisingly found the US PNR Agreement compatible with the standards of Art. 8 ECHR: M. MENDEZ, *Passenger Name Record Agreement*, in *European Constitutional Law Review*, 2007, p. 127.

[11] See V. PAPAKONSTANTINOU, P. DE HERT, *The PNR Agreement and Transatlantic Anti-Terrorism Cooperation: No Firm Human Rights Framework on Either Side of the Atlantic*, in *Common Market Law Review*, 2009, p. 885; see also for criticism of the *interim* Agreement, M. MENDEZ, *Passenger Name Record Agreement*, cit., pp. 140-147.

[12] Commission Proposal for a Council framework decision on the use of Passenger Name Record (PNR) for law enforcement purposes, COM(2007) 654 final. See for discussion including citations to criticism from the Article 29 Working Party, the European Parliament, the EDPS and the Fundamental Rights Agency: M. TZANOU, *The Fundamental Right to Data Protection*, Oxford: Hart Publishing, 2017, pp. 156-157.

[13] Art. 16, para. 1, TFEU, essentially replicates Art. 8, para. 1, of the Charter.

[14] See M. TZANOU, *The Fundamental Right to Data Protection*, cit., pp. 134-137.

[15] Court of Justice, judgment of 8 April 2014, joined cases C-293/12 and C-594/12, *Digital Rights Ireland* [GC]. For detailed discussion see O. LYNSKEY, *The Data Retention Directive Is Incompatible with the Rights to Privacy and Data Protection and Is Invalid in Its Entirety: Digital Rights Ireland*, in *Common Market Law Review*, 2014, p. 1789.

ing and then put to the Parliament for approval.[16] Nevertheless while Opinion 1/15, which is the focus of this *Overview*, was pending, Parliamentary approval was forthcoming for the EU's own controversial PNR scheme.[17] The EU's PNR Directive was passed in 2016,[18] notwithstanding a EDPS opinion, drawing on the *DRI* ruling, that found the proposal failed to satisfy the Charter, Art. 16 TFEU and Art. 8 ECHR, and which invited the legislator to wait for the ruling on the Canada PNR Agreement since "the answer of the Court may have a significant impact on the validity of all other PNR instruments".[19]

Before the Court of Justice itself came to deal with the Canada PNR Agreement it handed down two seminal rulings, drawing on its *DRI* ruling, which left little doubt that the Agreement could not emerge unscathed. In October 2015 the Grand Chamber's *Schrems* ruling invalidated the long-standing Adequacy Decision for the Safe Harbour Principles with the US whereby personal data transfers to US based companies were permissible where the companies had signed up to comply with a set of data protection principles.[20] Crucially the Court concluded that "an adequate level of protection" under Art. 25 of the Data Protection Directive required "a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union" and "that review of the[se] requirements [...] should be strict".[21] This pointed to a higher threshold than might have been anticipated given that, as has been pointed out, when the Data Protection Directive was adopted the EU legislator had specifically preferred the term "adequate protection" over "equivalent protection".[22]

The second Grand Chamber ruling came in December 2016 in *Tele2/Watson* dealing with national data retention legislation.[23] The Court continued with the demanding privacy and data protection standards under the Charter that it had articulated in the *DRI* and *Schrems* cases and even set itself against "general and indiscriminate [data] reten-

[16] See footnote no. 2.

[17] The Directive was adopted in April 2016, the joint position having been agreed in December 2015, long after the Parliament had invoked the Art. 218, para. 11, TFEU procedure.

[18] Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

[19] EDPS, opinion 5/2015 of 24 September 2015 on the Canada PNR Agreement (2014/C 051/6).

[20] Court of Justice, judgment of 6 October 2015, case C-362/14, *Schrems v. Data Protection Commissioner* [GC]. For detailed commentary, see C. KUNER, *Reality and Illusion in EU Data Transfer Regulation Post Schrems*, in *German Law Journal*, 2017, p. 881.

[21] *Schrems* [GC], cit., para. 73.

[22] See C. KUNER, *Reality and Illusion*, cit., p. 899 (citing S. SIMITIS, U. DAMMANN, *EG-Datenschutzrichtlinie*, Baden-Baden: Nomos, 1997, p. 273).

[23] Court of Justice, judgment of 21 December 2016, joined cases C-203/15 and C-698/15, *Tele2 Sverige and Watson* [GC].

tion".[24] PNR schemes are arguably a form of general and indiscriminate data retention and the signs accordingly looked ominous for the Canada PNR Agreement.

III. The Advocate General's opinion on the Canada PNR Agreement emerged before the *Tele2/Watson* ruling.[25] He dealt first with the Parliament's second question which queried whether Arts 81, para. 1, let. d), and 87, para. 2, let. a), TFEU "constitute the appropriate legal basis for the act of the Council concluding the envisaged agreement or must that act be based on Article 16 TFEU?". AG Mengozzi concluded in light of the aim and content of the Agreement that it pursued two inseparably linked objectives, Canadian processing of passenger data for combatting terrorism and other serious transnational crime, and safeguarding the right to respect for privacy and the right to protection of personal data, and that it should accordingly have been based on Art. 16, para. 2, TFEU and Art. 87, para. 2, let. a), TFEU. On the Parliament's second question, whether the Agreement was "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 protection of personal data?", the Advocate General in a detailed and careful analysis, that drew frequently on the *DRI* and *Schrems* rulings, concluded that it was indeed incompatible with these provisions of the Charter.[26]

IV. Like the Advocate General, the Court of Justice dealt first with the Parliament's second question concerning the appropriate legal basis and commenced by reiterating the standard line that the choice of legal basis "must rest on objective factors amenable to judicial review, which include the aim and content of that measure".[27] Following an assessment of both the aim and content of the envisaged Agreement, the Court in line with the Advocate General's opinion, concluded it had two inextricably linked components, "one relating to the necessity of ensuring public security and the other to the protection of personal data".[28] And like AG Mengozzi, the Court of Justice held that the Council Decision concluding the envisaged Agreement would have to be based jointly on Arts 16, para. 2, and 87, para. 2, let. a), TFEU.[29]

Turning to the second question, a detailed analysis resulted in the conclusion that the envisaged Agreement was incompatible with Arts 7, 8, 21 and 52, para. 1, of the

[24] *Ibid.*, para. 103.

[25] Opinion of AG Mengozzi delivered on 8 September 2016, opinion 1/15.

[26] *Ibid.* Curiously in dealing with this question, the Advocate General only referred to Art. 16 TFEU, when underscoring its second paragraph and the need for independent control (*ibid.*, para. 306).

[27] Opinion 1/15, cit., para. 76.

[28] *Ibid.*, paras 80-94.

[29] *Ibid.*, paras 95-118.

Charter,[30] the Court having first explained that it would not refer to Art. 16, para. 1, TFEU, as only Art. 8 of the Charter laid down in a more specific manner the conditions under which personal data may be processed. The Court unsurprisingly concluded that the transfer and processing of the PNR data, which included information on identified individuals, would interfere with the fundamental rights to respect for private life guaranteed by Art. 7 and the protection of personal data guaranteed in Art. 8 of the Charter. As with the Advocate General, the key issue turned on the justification for any such interference. The Court first rejected the Parliament's contention that the Agreement could not fall within the notion of "law" under Art. 8, para. 2, of the Charter, and therefore also Art. 52, para. 1, of the Charter, in that it did not constitute a "legislative act". Here the Court highlighted the symmetry between the procedure for adopting EU measures internally and international agreements in given fields, agreements thus being the equivalent externally of a legislative act internally, and the fact that it had not been argued that the Agreement might not meet the accessibility and predictability requirements to be regarded as being laid down by law for the purposes of Arts 8, para. 2, and 52, para. 1, of the Charter. The Court also accepted that the interferences entailed by the Agreement were capable of being justified by an objective of general interest of the EU, namely ensuring public security and the fight against terrorist offences and serious transnational crime, and were not "liable adversely to affect the essence of the fundamental rights enshrined in Articles 7 and 8 of the Charter".[31] The transfer of the PNR data to Canada and its subsequent processing was also regarded as being appropriate for achieving the objective of protecting public security and safety.

The Agreement fell short at the necessity hurdle, which required that the interferences were limited to what was strictly necessary and that the Agreement "lays down clear and precise rules governing the scope and application of the measures provided for".[32] Numerous shortcomings were identified with the Agreement in this respect. Firstly, the PNR data to be transferred was not sufficiently clearly and precisely defined. The Court took issue with three of the 19 PNR data headings.[33] In relation to heading 5, which refers to "available frequent flyer and benefit information (free tickets, upgrades, etc.)", the term "etc." was held not to "specify to the requisite standard the scope of the data to be transferred", nor was it clear from heading 5 whether it covered all information relating to air travel and transactions carried out in the context of customer loyalty programmes.[34] In relation to heading 7, the use of the terms "all available contact information" did not specify what type of contact information is covered nor whether it

[30] *Ibid.*, paras 119-231.

[31] *Ibid.*, para. 151.

[32] *Ibid.*, para. 154.

[33] Whilst other headings (8 and 18) could, if construed as outlined by the Court, be regarded as meeting the clarity and precision requirements (Opinion 1/15, cit., paras 159 and 161).

[34] Opinion 1/15, cit., para. 157.

also covered "the contact information of third parties who made the flight reservation for the air passenger, third parties through whom an air passenger may be contacted" or "who are to be informed in the event of an emergency".[35] Heading 17, which refers to "general remarks including Other Supplementary Information (OSI), Special Service Information (SSI) and Special Service Request (SSR) information", was considered to provide "no indication as to the nature and scope of the information to be communicated, and it may even encompass information entirely unrelated to the purpose of the transfer of PNR data", and because the information referred to in heading 17 was only listed by way of example, it set no "limitation on the nature and scope of the information that could be set out thereunder".[36] Crucially heading 17 was also problematic because sensitive data revealing "racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, or information about a person's health or sex life"[37] could fall within its scope. And the risk of such data being processed contrary to the non-discrimination clause in Art. 21 of the Charter required "a precise and particularly solid justification, based on grounds other than the protection of public security against terrorism and serious transnational crime" and there was no such justification.[38]

Secondly, the Court underscored the need for the automated processing of PNR data via pre-established models and criteria to be specific and reliable, making it possible to arrive at results targeting individuals under a reasonable suspicion of participation in terrorist offences or serious transnational crime, and non-discriminatory.[39] Any cross-checking of the PNR data would have to be limited to reliable and up to date databases used by Canada in the fight against terrorism and serious transnational crime. And any positive result obtained from automated processing must be subject to an individual re-examination by non-automated means before an individual measure adversely affecting air passengers is adopted.

A third deficiency concerned the purposes for which PNR data may be processed, notably the authorisation "on a case-by-case basis" in order to "ensure the oversight or accountability of the public administration" and to "comply with the subpoena or warrant issued, or an order made, by a court" (Art. 3, para. 5, let. a) and b), of the Agreement) which was considered too vague and general.[40]

A fourth shortcoming concerned the retention and use of PNR data. Here the Court distinguished between the retention and use of PNR data before the arrival of air passengers, during their stay and on their departure, as contrasted with after their departure. In relation to the former, the Court concluded that the retention and use of PNR

[35] *Ibid.*, para. 158.
[36] *Ibid.*, para. 160.
[37] As defined by Art. 2, let. e), of the Canada PNR Agreement.
[38] Opinion 1/15, cit., para. 165.
[39] *Ibid.*, paras 168-174.
[40] *Ibid.*, paras 175-179.

data of all passengers up to departure does not exceed the limits of what is strictly necessary as the necessary connection between the PNR data and security checks and border control checks exists. However, in relation to cases in which the Canadian Competent Authority has information collected during passengers' stay indicating that use of their data might be necessary to combat terrorism and serious transnational crime, rules laying down the substantive and procedural conditions governing use of that data are required and, except in cases of validly established urgency, should be subject to prior review either by a court or an independent administrative body. The Court concluding in this respect that "where there is objective evidence from which it may be inferred that PNR data of one or more air passengers might make an effective contribution to combating terrorist offences and serious transnational crime, the use of that data does not exceed the limits of what is strictly necessary".[41]

In relation to the retention of the PNR data of all passengers after their departure from Canada, this was found not to be limited to what was strictly necessary as contrasted with specific cases in which "objective evidence is identified from which it may be inferred that certain air passengers may present a risk in terms of the fight against terrorism and serious transnational crime even after their departure from Canada".[42] As with the use of such data in relation to the duration of a passengers stay, the Court underscored the need for such use to be based on objective criteria and, except in cases of validly established urgency, to be subject to a prior review by a court or independent administrative body.

A fifth problem concerned the disclosure of the data to both government authorities and individuals, neither of which was acceptable to the Court in the manner permitted by the Agreement. In relation to disclosure by the Canadian Competent Authority to other Canadian government authorities and government authorities of third countries, the Court underscored that this must comply with the conditions governing use of such data that it had outlined which included the rules based on objective criteria, objective evidence and, except in cases of validly established urgency, prior review by a court or independent administrative body. The Court also highlighted that the Agreement accorded "the Canadian Competent Authority a discretionary power to assess the level of protection guaranteed in [third] countries".[43] It reiterated the *Schrems* case holding that a transfer of personal data to a non-member country can only take place if that country ensures a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the EU. And that any disclosure required either an agreement between the EU and the third country or an adequacy decision under the Data Protective Directive. In relation to data disclosure to individuals, the Court was

[41] *Ibid.*, para. 201.
[42] *Ibid.*, paras 206-207.
[43] *Ibid.*, para. 213.

rightly troubled by the absence of constraints. It noted that the "agreement does not delimit the nature of the information that may be disclosed, nor the persons to whom such disclosure may be made, nor even the use that is to be made of that information", and underscored that there was no requirement that the disclosure "be linked to combating terrorism and serious transnational crime or that the disclosure be conditional on the authorisation of a judicial authority or an independent administrative body".[44]

In the penultimate section of the Opinion the Court found further failings in that to ensure that guarantees under Arts 7 and 8 of the Charter concerning access to personal data and the right to rectification were complied with, passengers must be individually notified of the transfer of their data to Canada and its use as soon as the information was no longer liable to jeopardise investigations being carried out by government authorities. Finally, and again in line with the Advocate General's opinion, the Agreement did not guarantee in a sufficiently clear and precise manner that oversight of compliance with its data protection rules would be carried out by an independent authority within the meaning of Art. 8, para. 3, of the Charter.

V. It was unsurprising that the Court found the Agreement wanting *vis-à-vis* the standards articulated in the Charter, as developed by the Court itself in its trilogy of rulings between 2014 and 2016 (*DRI*, *Schrems* and *Tele2/Watson*) and also in light of the Advocate General's opinion. It is noteworthy that, as recounted in the Advocate General's opinion, some governments had specifically argued for a limited scope of review and broader discretion for institutions for the adoption of an act forming part of the context of international relations.[45] This was given short shrift by the Advocate General and although not expressly commented on by the Court it clearly and rightly proceeded to adopt a rigorous standard of review and went through relevant provisions of the Agreement with something of a fine comb. Taking issue with "etc." in heading 5 might be thought to be a clear illustration of this. And one noted privacy expert has queried "how many international agreements of the EU could withstand this degree of second-guessing", suggesting that "some third countries may be hesitant to invest the time and resources necessary to conclude an international agreement on data protection with the EU knowing that it may later be picked apart by the Court".[46] There are a few points worth noting in this respect. It always seemed inevitable that there would be a considerable "degree of second-guessing" involved because we were dealing with an agreement that was negotiated prior to key jurisprudential developments. Indeed the key trigger for use of the opinion procedure was the *DRI* ruling. We might accordingly hope

[44] *Ibid.*, paras 216-217.

[45] *Ibid.*, paras 197-204.

[46] C. KUNER, *Data Protection, Data Transfers, and International Agreements: the CJEU's Opinion 1/15*, in *Verfassungsblog*, 26 July 2017, verfassungsblog.de.

that future data protection related agreements will be sensitive to various key traits in the jurisprudence enunciated between the *DRI* ruling and Opinion 1/15, and it thus does not follow that future agreements would not withstand the scrutiny displayed in Opinion 1/15, nor as a result that countries should be hesitant to invest the time and resources to conclude them.

It is worth also reiterating the much repeated justification for the *ex ante* review procedure deployed since Opinion 1/75,[47] and underscored by the Court in Opinion 1/15 at paras 69 and 74, namely, to forestall complications that would arise from disputes concerning the compatibility with the EU Treaties of binding EU Agreements. In other words, the Court was dealing with an agreement that was not yet in force, and with appropriate political will changes could be made to it, matters are more complicated where instead a legal challenge takes place to an agreement that is already binding on the EU. In this sense we should be grateful for the presence of the opinion procedure which not only allows for review to take place, but allows it to take place in an arguably less charged political setting than would be the case if we were to allow exclusively *ex post* type review.[48] It can, however, be argued that this is all well and good, one can be supportive of the opinion procedure in principle, but contest instead the demanding standards for international data transfers being deployed by the Court. However, as the Court already made clear in *Schrems* when first articulating the essential equivalence standard in the level of fundamental rights protection, to do otherwise would disregard the Data Protection Directive purpose of ensuring a high level of data protection where personal data is transferred to a third country. Indeed the elements to be taken into account in an adequacy assessment have if anything become more demanding under the General Data Protection Regulation, which was itself shaped by the *Schrems* ruling.[49] Thus rather than criticise the Court for its detailed scrutiny of the Canada PNR Agreement, we should praise it for seeking to ensure that the privacy and data protection standards in the Charter are taken seriously and that, despite the very real threat of terrorism and serious crime, international agreements cannot simply be used in a manner that rides roughshod over these fundamental rights. The Court of Justice is in a privileged position in this respect, as the Constitutional Court for a politically and economically powerful organisation. It is well known that EU data protection law, and particularly the constraints on international data transfers under the Data Protection Directive, have served to shape and increase data protection standards in many other countries and even to some extent in a reluctant United States with its very different privacy philosophy.[50]

[47] Court of Justice, opinion 1/75 of 11 November 1975.

[48] See also M. MENDEZ, *Constitutional Review of Treaties: Lessons for Comparative Constitutional Design and Practice*, in *International Journal of Constitutional Law*, 2017, p. 84, making the case for constitutional systems to deploy both *ex ante* and *ex post* constitutional review of treaties.

[49] Art. 45, para. 2, of Regulation 2016/679, cit.

[50] See briefly A. BRADFORD, *The Brussels Effect*, in *Northwestern University Law Review*, 2012, pp. 22-26.

Opinion 1/15 is to be welcomed to the extent that it bolsters the aforementioned dynamic in a manner that constrains measures of "pre-emptive surveillance".[51]

An alternative line of criticism would be to suggest that in fact Opinion 1/15 might not go far enough. We have seen that the Court accepted that the Agreement does not "exceed the limits of what is strictly necessary merely because it permits the systematic retention and use of the PNR data of all air passengers".[52] And yet PNR schemes do *prima facie* seem to fall within the remit of the "general and indiscriminate [data] retention" with which the Court took issue in *Tele 2/Watson* and Opinion 1/15 does not actually make clear how the general and indiscriminate retention of PNR data is different. As Woods noted, the difference may be in the nature of the data but, even if this is so, the Court does not make the argument and rather weakly accepts the need for the data.[53] The EDPS would surely have expected more by way of justification given that it has consistently underscored that it "has not seen convincing elements showing the necessity and proportionality of the massive and routine processing of data of non-suspicious passengers for law enforcement purposes".[54] In short, we can also expect criticism of Opinion 1/15 for essentially giving the green light to PNR schemes, subject to certain significant safeguards and constraints being in place. Perhaps this is the most that can have realistically been expected given the rapid and growing deployment of PNR schemes, including crucially within the EU itself, especially in light of access to PNR data becoming a central aspect of the US's counter terrorism strategy since 11 September 2001. Put another way, the PNR ship is one that has already sailed both outside and now also within the EU, and a full on assault on PNR schemes, as contrasted with shaving off some of the worst excesses, thus always seemed unlikely.

Turning now to the immediate ramifications of Opinion 1/15, firstly and most obviously it means that the Agreement will need significant revisions before it can be concluded.[55] Already by October 2017 the Commission had submitted a recommendation to the Council to authorise the opening of negotiations for a revised Agreement,[56] a recommendation which noted that Canada had expressed its wish to enter negotiations

[51] See on the new era of pre-emptive surveillance, V. MITSILEGAS, *The Transformation of Privacy in an Era of Pre-Emptive Surveillance*, in *Tilburg Law Review*, 2015, p. 35.

[52] Opinion 1/15, cit., para. 197.

[53] L. WOODS, *Transferring Personal Data Outside the EU: Clarification from the ECJ?*, in *EU Law Analysis*, 4 August 2017, eulawanalysis.blogspot.co.uk.

[54] EDPS, opinion 5/2015 of 24 September 2015 on the Canada PNR Agreement (2014/C 051/6).

[55] Art. 218, para. 11, TFEU expressly stipulates "[w]here the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised". The Treaties have never been revised to accommodate an adverse opinion (unless we include the addition of Art. 6, para. 2, TEU as a belated response to Court of Justice, opinion 2/94 of 28 March 1996).

[56] Recommendation for a Council Decision authorising the opening of negotiations on an Agreement between the European Union and Canada for the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime, COM(2017) 605 final.

again to find mutually acceptable terms consistent with the Court's findings. Opinion 1/15 also had implications for existing negotiations on PNR Agreements, thus Mexico, with which negotiations on a PNR Agreement had commenced in 2015, was informed by the Commission that negotiations could not be finalised until Opinion 1/15 had been delivered.[57] The Commission had also made clear in 2015 that once Opinion 1/15 was issued it would "finalise its work on legally sound and sustainable solutions to exchange PNR data with other third countries, including by considering a model agreement on PNR setting out the requirements third countries have to meet to receive PNR data from the EU".[58] A revised Canada PNR Agreement may well provide the basis for a model PNR Agreement given that the new negotiations are precisely about ensuring compliance with the standards articulated in Opinion 1/15.

The second obvious ramification of Opinion 1/15 concerns the two existing PNR Agreements with respectively the US and Australia. The focus here is on substantive compatibility, however, both Agreements suffer from the same legal basis problem as the Canada PNR Agreement because they are also based on Arts 82, para. 1, let. d), and 87, para. 2, let. a), TFEU. Both Agreements are clearly incompatible with the standards enunciated in Opinion 1/15 which should be wholly unsurprising given that like the Canada Agreement they also predate the case-law developing the Charter standards in this respect that began with the 2014 *DRI* ruling. It is only necessary here to highlight a few of these shortcomings by analogy with those found *vis-à-vis* the Canada Agreement to demonstrate the incompatibility. Firstly, both Agreements are based on exactly the same PNR data headings as in the Canada Agreement, which as the Court noted correspond to the Guidelines of the International Civil Aviation Organisation on PNR data.[59] In this respect, the US and Australia Agreements will both fall foul of the requirement that the PNR data to be transferred be sufficiently clearly and precisely defined (specifically because of headings 5, 7 and 17). The Australia Agreement does however contain an express prohibition on the processing of sensitive data,[60] which the Advocate General had underscored as suggesting that the Canada Agreement's objectives could be attained just as effectively without any sensitive data being transferred. Whilst we have seen that the Court itself did not rule out transfers of sensitive data, it did require a "precise and particularly solid justification, based on grounds other than the protection of public security against terrorism and serious transnational crime" which would thus

[57] See the Commissioner response of 5 October 2015 to MEP question E-009612/15 of 11 June 2015.

[58] Communication COM(2015) 185 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Agenda on Security*.

[59] See the annexes to all three Agreements.

[60] Art. 8, and also a provision on the deletion of any such data that is transferred: Art. 15, para. 2. The EDPS opinion (2011) on the proposal pointed out that the sending of any such data by "airlines is an act of processing [… and] that the airlines should be obliged to filter sensitive data at the source of the processing".

certainly catch the US Agreement. Indeed, the Court highlighted that the EU's own PNR Directive prohibited the processing of sensitive data, which suggests a very high threshold would need to be met to justify the transfer of such data in PNR Agreements.[61]

Secondly, there are purpose limitation shortcomings in the PNR Agreements. The Australia Agreement might well be satisfactory in relation to "terrorist offences" and "serious transnational crime" (as defined in Art. 3, paras 2 and 3) and processing of PNR data "[i]n exceptional cases [...] for the protection of the vital interests of any individual" (Art. 3, para. 4), given the similarity with the Canada PNR Agreement (Art. 3, para. 4) in this respect. But there is a not dissimilar provision to Art. 3, para. 5, of the Canada Agreement concerning processing of PNR data on a case-by-case basis for oversight and accountability of the public administration that was found wanting in terms of clarity and precision.[62] If the Canada Agreement was found wanting in this respect, there is no way that the US Agreement could be acceptable. It includes not just terrorist offences but also other "related crimes"; transnational crimes are extremely broadly defined (see Art. 4, para. 1); PNR data may also be "processed on a case-by-case basis where necessary in view of a serious threat and for the protection of vital interests of any individual or if ordered by a court" (Art. 4, para. 2), and may also be used and processed "to identify persons who would be subject to closer questioning or examination upon arrival to or departure from the United States or who may require further examination" (Art. 4, para. 3). If paras 2 and 3 of Art. 4 of the US Agreement do not alone demonstrate a relative absence of meaningful purpose limitations here, para. 4 proceeds to stipulate that "[p]aragraphs 1, 2, and 3 shall be without prejudice to domestic law enforcement, judicial powers, or proceedings, where other violations of law or indications thereof are detected in the course of the use and processing of PNR".

Thirdly, in relation to the retention of PNR data, the Agreements do not of course distinguish between the retention of PNR data before arrival, during the stay of passengers and on their departure, on the one hand, and after their departure on the other, as the Court is requiring in Opinion 1/15, nor do they provide for the substantive and procedural constraints on use of such data that were outlined by the Court. The Australian retention period of five and a half years (Art. 16 of the Australia Agreement) might be thought not especially objectionable in light of the five years retention period of the Canada Agreement having been found not to "exceed the limits of what is strictly necessary for the purposes of combatting terrorism and serious transnational crime".[63] But it is hard to believe that the Court could ever accept as strictly necessary the 15 years

[61] Opinion 1/15, cit., para. 166.

[62] Art. 3, para. 5, of the Australia PNR Agreement.

[63] However, the Canada PNR Agreement provided for masking of the names of all passengers 30 days after Canada receives them (Art. 16, para. 3), whereas the Australia Agreement only provides for masking of data after three years (Art. 16, para. 1, let. b)).

retention period outlined in Art. 8 of the US Agreement, not least when one considers that the EU's PNR Directive has a five years retention period (Art. 12).

Fourthly, both Agreements provide for the transfer of PNR data to third country authorities,[64] and following the logic of the Court in Opinion 1/15 such disclosure would require an agreement between the EU and the third country or an adequacy decision under the Data Protection Directive. And as far as oversight of PNR data protection authorities is concerned, this would be particularly problematic under the US Agreement where pride of place is given to the Department for Homeland Security (DHS) "privacy officers, such as the DHS Chief Privacy Officer".[65] This is most unlikely to satisfy the independence threshold used by the Court of Justice given that the DHS is the very authority to which the data is transferred under the PNR Agreement.[66]

Clearly there is no difficulty in establishing that the two existing PNR Agreements do not meet the privacy and data protection standards outlined in Opinion 1/15. They have long been in force and so annulment actions are no longer a possibility.[67] However, a challenge could still take place domestically with a view to a preliminary ruling on the validity of these Agreements.[68] Such proceedings would take years and even if successful one would expect the Court to maintain in force the decisions concluding these PNR Agreements to take place; when the Parliament succeeded in annulment proceedings in relation to the first EU-US PNR Agreement it was the separate adequacy decision that was preserved.[69] The Agreements are based on a seven year duration from their entry into force in mid 2012, however, they automatically renew in the absence of a notice of intention not to renew being sent by either party at least 12 months before the expiry of the seven year period.[70] It is clearly now up to the Commission to seek to renegotiate these two PNR Agreements in light of the Opinion 1/15 findings and for them to be terminated in line with their provisions if this is not possible.[71] Indeed, if the Commission does not pursue a renegotiation of these Agreements, a challenge for a failure to act under Art. 265 TFEU would be conceivable.

[64] Art. 17 of the US Agreement, Art. 19 of the Australia Agreement.

[65] Art. 14, para. 1, of the US Agreement.

[66] See further F. Boehm, M.D. Cole, *Data Retention after the Judgement of the Court of Justice of the European Union*, 2014, p. 64, www.janalbrecht.eu.

[67] Art. 263, para. 6, TFEU.

[68] For a pending example of a preliminary ruling involving challenges to EU Agreements, see Court of Justice, case C-266/16, *Western Sahara Campaign UK*, in which the Court is being asked questions as to the validity of an Association Agreement with Morocco and a Fisheries Agreement with Morocco.

[69] See generally on how the CJEU has dealt with challenges to concluded EU Agreements including the first EU-US PNR Agreement, M. Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, Oxford: Oxford University Press, 2013, pp. 76-93.

[70] Art. 26 of both Agreements.

[71] Art. 25 of both Agreements stipulates that termination takes effect 120 days after notification or as the parties otherwise agree.

Opinion 1/15 will not however only be of relevance to international data transfers via PNR Agreements. The Safe Harbour replacement, the EU-US Privacy Shield that came into effect in August 2016, is currently the subject of annulment actions.[72] One would expect heavy reliance by the applicants on Opinion 1/15 not least in relation to onward transfers to third countries, the issue of effective remedies, and the independence of the newly created Privacy Shield Ombudsperson.[73]

Finally we must consider the ramifications of Opinion 1/15 for the EU's own PNR regime. The Advocate General rightly made clear that how the Court answered the questions before it would necessarily also have implications for the EU's PNR system. There are at least two particularly obvious shortcomings with the PNR Directive in light of Opinion 1/15. Firstly, although a number of the 19 data headings are phrased differently from the Canada Agreement, the reference in data heading 12 to "General remarks" corresponds to data heading 17 of the Canada PNR Agreement with which the Court took issue. Thus one can equally say that heading 12, as the Court held in relation to heading 17, provides "no indication as to the nature and scope of the information to be communicated, and it may even encompass information entirely unrelated to the purpose of the transfer of PNR data", and because the information referred to in heading 12 was only listed by way of example (it stipulates "including all available information on unaccompanied minors under 18 years"), it sets no "limitation on the nature and scope of the information that could be set out thereunder".[74] Secondly, and much more significantly, the PNR Directive does not of course distinguish, as required by Opinion 1/15, between the retention of PNR data before arrival, during the stay of passengers and on their departure, on the one hand, and after their departure, on the other.

The time-limit for annulment proceedings against the PNR Directive has now passed, but as with the two existing PNR Agreements, a domestic challenge leading to a preliminary ruling would be possible. Given the obvious implications of Opinion 1/15 for the PNR Directive one would, however, expect the Commission to prioritise taking steps towards a revision of the Directive particularly as third countries will need to be asked to meet certain standards pertaining to PNR Agreements that the EU's own regime does not yet meet.

VI. Opinion 1/15 is to be welcomed for continuing with the high privacy and data protection standards that the Court had articulated in the seminal earlier trilogy of cases (*DRI*, *Schrems* and *Tele2/Watson*). Crucially it is also to be welcomed for the Court showing,

[72] General Court: case T-670/16, *Digital Rights Ireland v. Commission* and case T-738/16, *La Quadrature du Net v. Commission*, both still pending.

[73] Points of controversy, amongst many others, already raised in the opinions by the EDPS (4/2016) and the Article 29 Working Party (01/2016) on the EU-US Privacy Shield draft Adequacy Decision, as well as more recently by the European Parliament: European Parliament Resolution P8_TA(2017)0131 of 6 April 2017 on the adequacy of the protection afforded by the EU-US Privacy Shield.

[74] Opinion 1/15, cit., para. 160.

as it has had occasion to do previously in *Schrems*, that it will not allow the EU's bilateral relations with other States to be used to simply ride rough shod over fundamental rights.[75] To be sure, for some the Court will not have gone far enough in that it essentially gives the green light to PNR schemes subject to certain constraints and safeguards, but for others it will have probed the substance of an agreement in excessive detail with troublesome consequences for the EU's international relations. It remains to be seen whether the Commission will be able to persuade third States of the need to meet the high standards set out in Opinion 1/15, the US will no doubt be the hardest to persuade given its diverging approach towards privacy. But, in any event, the EU's PNR Directive will not be able to remain wedded to lower standards than those outlined in Opinion 1/15. Whether we are dealing with the EU's internal PNR scheme or PNR Agreements with third countries, it will be a particularly formidable challenge to devise schemes that are able to give effect to the Court's proposed distinctions relating to the retention and use of PNR data before the arrival of air passengers, during their stay and on their departure, and after their departure.

Mario Mendez*

[75] A cautionary note has however been sounded as to the capacity to deliver on the high standards proclaimed, thus Kuner argued, while commenting on *Schrems* [GC], cit., that EU data protection law "maintains the illusion that it can provide seamless effective protection of EU personal data transferred around the world": C. KUNER, *Reality and Illusion*, cit., pp. 884-885.

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OVERVIEWS

OPINION 2/15: SUSTAINABLE IS THE NEW TRADE. RETHINKING COHERENCE FOR THE NEW COMMON COMMERCIAL POLICY

TABLE OF CONTENTS: I. Introduction: objectives v. policies, a new balance for coherence. – II. General v. policy-linked objectives: into the logics of constructive interpretation. – III. The new policy stretch: "effects" and "special link" reloaded. – IV. Objectives v. competences: material coherence without substance.

I. Opinion 2/15 of 16 May 2017 on the EU-Singapore Free Trade Agreement[1] raises a variety of legal issues that are key to the global trade model the EU wants to develop with its partners in the future.[2] It has triggered immediate commentaries online, focusing on the scope of the common commercial policy and the consequences of Opinion 2/15 on both *Brexit* and future EU free trade agreements.[3]

Opinion 2/15 is a clear illustration of the new balance to be struck between the general objectives of EU external action, EU policies and the underlying powers at stake. Taking ground on the "fair trade" and "sustainable development" objectives in the new treaties, the Court of Justice (the Court) continues its classically broad interpretation of the scope of the common commercial policy. Is there anything new under the sun? Arguably, Opinion 2/15 might announce the emergence of a recurrent issue in the law of EU external action: *where does the use of general objectives end, and where does mixity start?*

Needless to recall, that guaranteeing the material coherence of the European Union external action is an evolving challenge. A crucial step was taken with the introduction

[1] Court of Justice, opinion 2/15 of 16 May 2017.

[2] Communication COM(2015) 497 final of 14 October 2015 from the Commission, *Trade for all – towards a more responsible trade and investment policy*.

[3] R. BISMUTH, *3 questions à Régis Bismuth sur l'avis 2/15 rendu par la CJUE sur le traité commercial conclu entre l'UE et Singapour*, in *Le Club des Juristes*, 19 May 2017, www.blog.leclubdesjuristes.com; S. GÁSPÁR-SZILÁGYI, *Opinion 2/15: Maybe it is Time for the EU to Conclude Separate Trade and Investment Agreements*, in *European Law Blog*, 20 June 2017, www.europeanlawblog.eu; L. GROZDANOVSKI, *L'avis 2/15: les accords de libre-échange 'nouvelle generation' sont désormais des accords mixtes*, in *Centre d'études Juridiques Européennes*, 29 May 2017, www.ceje.ch; J. LARIK, *Trade and Sustainable Development: Opinion 2/15 and the EU's Foreign Policy Objectives*, in *Europe and the World – a law review blog*, 30 May 2017, blogs.ucl.ac.uk; S.GARBEN, *Opinion 2/15: Competence Creep through International Trade?*, in *Europe and the World – a law review blog*, 1 June 2017, blogs.ucl.ac.uk; F. MARTUCCI, E. DUBOUT, E. CASTELLARIN, A. DE NANTEUIL, *L'avis 2/15 de la Cour de Justice de l'Union européenne: quelles conséquences pour le CETA et le Brexit?*, Conférence-débat du 19 juin 2017, Université Paris-Panthéon-Assas, in *Blog droit européen*, July 2017, blogdroiteuropeen.files.wordpress.com.

into primary law of a set of general objectives guiding the EU external action, which was considered a key answer to the fragmentation of EU action amongst different policies.[4] Listed in Arts 3, para. 5, and 21, para. 2, TEU, these general objectives must also be read in combination with the policy-specific objectives that eventually remain in force throughout the treaties.[5] As some have quickly noticed,[6] the material harmonisation deriving from this new set of transversal objectives of the EU external action might also have the inconvenience of making it more difficult to distinguish between the different EU policies and legal bases at stake. An illustration of this can be found in the 2016 *EU-Tanzania Agreement* case,[7] where the Parliament argued that the EU-Tanzania Agreement should have been concluded under the Area of Freedom, Security and Justice (AFSJ) instead of the Common Foreign and Security Policy (CFSP), because of the presence of human rights provisions in the Agreement. The Court recalled that:

> "[...] the fact that certain provisions of such an agreement, taken individually, have an affinity with rules that might be adopted within a European Union policy area is not, in itself, sufficient to determine the appropriate legal basis of the contested decision. As regards, in particular, provisions of the EU-Tanzania Agreement *concerning compliance with the principles of the rule of law and human rights, as well as respect for human dignity*, it must be stated that such compliance is required of all actions of the European Union, including those in the area of the CFSP, as is clear from the provisions, read together, set out in the first subparagraph of Article 21(1), Article 21(2)(b) and (3) TEU, and Article 23 TEU. That being the case, the Court must also assess that agreement in the light of its aim".[8]

The same difficulty to identify the policy under which a specific external action must be undertaken, may arise from the ancillary pursuit of any objective listed in Art. 21, para. 2, TEU which includes amongst others: support to the rule of law,[9] to international security,[10] to sustainable development,[11] or to the abolition of international trade restrictions.[12]

[4] See, amongst others: M. CREMONA, *Coherence in European Union Foreign Relations Law*, in P. KOUTRAKOS (ed.), *European Foreign Policy: Legal and Political Perspectives*, Cheltenham: Edward Elgar Publishing, 2011, p. 55 *et seq*.

[5] *E.g*. the progressive elimination of restrictions to international trade is a specific objective of the common commercial policy (Art. 206 TFEU), or the eradication of poverty is a specific objective of the development cooperation policy (Art. 208 TFEU).

[6] C. HILLION, *Cohérence et action extérieure de l'Union*, in E. NEFRAMI (dir.), *Objectifs et compétences dans l'Union européenne*, Bruxelles: Bruylant, 2013, p. 229 *et seq*.

[7] Court of Justice, judgment of 14 June 2016, case C-263/14, *European Parliament v. Council of the European Union* [GC].

[8] *Ibidem*, para. 47. Emphasis added.

[9] Art. 21, para. 5, let. b), TEU.

[10] Art. 21, para. 2, let. c), TEU.

[11] Art. 21, para. 2, let. d) and let. f), TEU.

[12] Art. 21, para. 2, let. e), TEU.

Going back to Opinion 2/15, the question was whether Chapter 13 of the Agreement, entitled "Sustainable Development", could be concluded under the EU exclusive competences governing the Common Commercial Policy (CCP). At first sight, the method followed by the Court seems rather classical. First, it demonstrated that sustainable development is an objective that the EU can pursue through the CCP.[13] Second, it examined the content of the Agreement Chapter at stake and stressed that it "essentially"[14] refers to pre-existing international obligations of the Parties.[15] Third, it concluded that the provisions of Chapter 13 of the Agreement "affect" and have a "special link" with the CCP.[16] Fourth, it confirmed its reasoning in stating that the substance of Chapter 13 does not affect the distribution of powers between the EU and its Member States, considering that the EU and Singapore did not intend to harmonise their social and environmental legislations.[17] This fourfold reasoning illustrates the mindset of the Court when examining the scope of the CCP: it leans towards a broad interpretation aiming at guaranteeing the exclusivity of EU competences in the conduct of the policy. This corresponds to the spirit[18] and the letter[19] of new Art. 207 TEU, and has been clearly stated in the 2013 *Daiichi Sankyo and Sanofi Adventis* case.[20]

This raises a number of issues that will be discussed below. First, there is no denying the fact that the effectiveness of the set of general objectives guiding EU external action largely depends on their interpretation by the CJEU, which focuses on both their binding nature and their concrete scope (section II). Second, Opinion 2/15 illustrates that a broad interpretation of the ancillary objectives of the CCP may be combined with a similarly broad examination of the "specific link" and "effects" criteria. Hence, paving the way for another policy stretch (section III). Third, the Court based its reasoning on the consideration that the agreement Chapter at stake has a weak normative content and therefore does not encroach on the repartition of powers between the EU and its Member States. It is not clear yet whether Opinion 2/15 will be a precedent for the appreciation of future free trade agreements, which may have different normative contents. However, one can already wonder to what extent could material coherence be achievable without addressing the substance of the ancillary objectives pursued through the CCP (section IV).

[13] Opinion 2/15, cit., paras 139-147.

[14] *Ibidem*, para. 152.

[15] *Ibidem*, paras 148-154.

[16] *Ibidem*, paras 155-163.

[17] *Ibidem*, paras 164-167.

[18] In contradistinction, see the situation before the Lisbon revision as illustrated by Court of Justice, opinion 1/08 of 30 November 2009.

[19] Art. 207 TFEU, esp. paras 1 and 4.

[20] Court of Justice, judgment of 18 July 2013, case C-414/11, *Daiichi Sankyo and Sanofi Adventis Deutschland* [GC]. Emphasis added.

II. As recalled above, the reasoning of the Court in Opinion 2/15 begins with the interpretation of sustainable development as a transversal objective guiding EU external action. This interpretation is twofold, and can be dealt with in terms of both normative nature and material scope considerations.

On the normative nature of the general objectives guiding EU external action, the Court has taken a clear stance:

> "One of the features of that [CCP] development is the rule laid down in the second sentence of Article 207(1) TFEU that 'the common commercial policy shall be conducted *in the context of the principles and objectives of the Union's external action*'. [...]
> The *obligation* on the European Union to integrate those objectives and principles into the conduct of its common commercial policy is apparent from the second sentence of Article 207(1) TFEU read in conjunction with Article 21(3) TEU and Article 205 TFEU. [...]
> It follows that *the objective of sustainable development* henceforth forms *an integral part* of the common commercial policy".[21]

This is perhaps the clearest judicial recognition of the normative nature of the objectives guiding EU external action, the pursuit of which is therefore compulsory for the Union.

This finding rests on a voluntarily rigorous demonstration. The Court indeed gave a significant importance to the cross-references in Arts 205 and 207 TFEU to Art. 21 TEU (and *vice versa*), in order to justify the obligation of the EU to integrate Art. 21, para. 2, TEU objectives into the conduct of the CCP.

One could wonder whether such an obligation to pursue Art. 21, para. 2, TEU objectives while implementing another external policy could be confirmed in the future, in case one of the elements of this threefold equation would be missing. For instance, the specific policy provision (here Art. 207 TFEU) could lack the express statement that it "shall be conducted in the context of the principles and objectives of the Union's external action". Similarly, the policy at stake may not be part of Part V TFEU and would therefore not be covered by the broad reference of Art. 205 TFEU to Art. 21 TEU. Denying any effect to Art. 21 TEU in these instances would deprive the provision of its *raison d'être*. Indeed, Art. 21, para. 3, TEU clearly states that "the Union shall respect" these objectives "in the development and the implementation of" Title V of the TEU and Part V of the TFEU, as well as the "external aspects" of other EU policies. Considering Art. 21 TEU opens the general chapter of the TEU governing the Union's external action,[22] single cross-references to it by other TEU and TFEU articles are complementary and do not condition its effectiveness. The Court's prudent enumeration in this case relating to the CCP should therefore be considered more pedagogical than restrictive of the future ju-

[21] Opinion 2/15, cit., paras 142, 143 and 147. Emphasis added.
[22] Chapter 1, Title V, TEU.

risprudence concerning the Union's obligation to pursue the general objectives guiding its external action when implementing a specific policy.

On the material scope of the sustainable development objective, the Court opted for a rather dynamic interpretation. Following the letter of Art. 21, para. 2, TEU, sustainable development is either envisaged in the perspective of the cooperation with developing countries,[23] or in the perspective of the sustainable management of natural resources and environment.[24] Given Singapore clearly does not fit the first case, the Court went for the second option. More precisely, Art. 21, para. 2, let. f), TFEU states that the Union will "help to develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development". The social obligations at stake in Chapter 13 of the EU-Singapore Agreement, however, are not covered by this objective as it stands. This is probably why the Court has consolidated the construction of the notion of sustainable development with the addition of both the transversal Arts 9 and 11 TEU relating to social and environmental protection, and the general objective to engage into "free and fair trade" stated in Art. 3, para. 5, TEU.[25] From this perspective, Opinion 2/15 exemplifies the interpretation issues arising from the concrete operation of general objectives of EU external action. In this case, up to four treaty articles were needed to encompass the notion of sustainable development as it was defined in the EU-Singapore Free Trade Agreement. It stems from the above, that the Court's interpretation of the scope of Union objectives will reveal crucial and might lead to some unforeseen combinations of articles, depending on the complexity of the external action at stake.

Another interpretation issue that the Court will have to address in the future touches upon the legal nature of the Union's obligation to support the objectives set up in Art. 21, para. 2, TEU. In the present case, it is debatable whether "developing international measures", which is the action foreseen in Art. 21, para. 2, let. f), TEU dealing with sustainable development, could require taking a more active role in the further development of international law, than merely referring to the state of the art between the Parties to a Free Trade Agreement in a Chapter that the Court has considered normatively weak. We will go back to this point later.[26]

III. Once accepted that sustainable development is fully part of the CCP as one of the objectives of EU external action, the concrete question at stake in Opinion 2/15 remains to determine to what extent the provisions of Chapter 13 of the EU-Singapore Free Trade Agreement are contributing to the development of the CCP. To this end, the

[23] Art. 21, para. 2, let. d), TEU.
[24] Art. 21, para. 2, let. f), TEU.
[25] Opinion 2/15, cit., para. 146.
[26] See *infra*, section IV.

Court engages into a classical examination based on two criteria: the *effects on* and the *special link with* the CCP. Developed in earlier case law on the scope of the CCP,[27] this test illustrates the underlying intertwinement of objectives and competences at the stage of the examination of a concrete action of the Union.

To the Court, the effects that Chapter 13 on sustainable development may have on the CCP are threefold. First, they condition the conduct of the policy insofar as the Parties agree both not to encourage trade through the diminution of social and environmental protection under an internationally agreed threshold, and not to use the latter for protectionist purposes.[28] Second, insofar as it reduces the risk of divergent production costs between the Parties and promotes equality between both Parties entrepreneurs, Chapter 13 favours free trade.[29] Third, the commitment to introduce documentation, verification and certification systems to fight against the illicit trade of wood and halieutic resources, will affect the trade in these products between the Parties.[30] It stems from the above that the Court was satisfied with broadly appreciated effects on the policy, which can either be sector-oriented or, on the contrary, rather transversal.

The specific link of Chapter 13 with the EU-Singapore trade relationship was twofold in the Court's reasoning. First, it derives from the reciprocal commitment of the Parties that they will not take advantage of their international social and environmental obligations to introduce arbitrary discriminations or disguised restrictions into their trade relations.[31] Second, the Court argued that a specific link would result from the fact that the Parties could suspend the execution of other provisions of the Free Trade Agreement, in the event of a violation of Chapter 13.[32] This argument seems to be based on an excessively broad appreciation of the customary rule of *exceptio non adimpleti contractus.* The Court based its reasoning on Art. 60, para. 1, of the 1969 Vienna Convention on the Law of Treaties, which states that: "A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part".

This paragraph must be read in combination with paras 3, let. b), and 4 of the same provision:

> "3. A material breach of a treaty, for the purposes of this article, consists in: (b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.

[27] "[...] a European Union act falls within the common commercial policy if it *relates specifically* to international trade in that it is essentially intended to *promote, facilitate or govern* trade and has *direct and immediate effects* on trade": *Daiichi Sankyo and Sanofi Adventis Deutschland*, cit., para. 51. Emphasis added.

[28] Opinion 2/15, cit., para. 158.

[29] *Ibidem*, para. 159.

[30] *Ibidem*, para. 160.

[31] *Ibidem*, para. 156.

[32] *Ibidem*, para. 161.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach".

This being recalled, there is no denying the fact that the EU and Singapore have agreed on specific treaty provisions applicable in the event of a breach. *Lex specialia generalibus derogat*: the EU-Singapore treaty provisions derogate from customary international law.[33]

First, in the EU-Singapore relations, the definition of what is an essential element, the violation of which can trigger the partial suspension of the Free Trade Agreement, is governed by the "human rights clause" of Art. 1, para. 1, and the "weapons of mass destruction clause" of Art. 7, para. 2, of the 2014 EU-Singapore Partnership and Cooperation Agreement. Indeed, the Partnership and Cooperation Agreement plays the role of a framework agreement between the EU and Singapore: it is foreseen in its "linkage clause" that the Free Trade Agreement at stake in Opinion 2/15 is fully part of the general bilateral relations it governs.[34]

Second, it derives from the above that the provisions of Chapter 13 of the EU-Singapore Free Trade Agreement are not part of the "essential elements" defined conventionally by the Parties, the violation of which can trigger the immediate partial suspension of the agreement in case of in execution.[35]

Third, it furthermore results from Chapter 13 of the EU-Singapore Free Trade Agreement, that would a dispute arise on its execution, the Parties would be bound to solve their different through procedurally pre-organised Government Consultations[36] and, when necessary, the constitution of a Panel of Experts.[37] Given these provisions, it is only in case those specific procedures would fail to extinguish the different, that the Parties might envisage adopting partial suspension measures.[38]

To say the least, the Court has not chosen the most unequivocal formulation possible when concluding that Chapter 13 "plays an *essential* role in the envisaged Agreement".[39] This case exemplifies the interpretation and execution problems that the EU

[33] For an analysis of the EU treaty practice in respect of the inclusion and activation of essential elements clauses, see: C. BEAUCILLON, *Les mesures restrictives de l'Union européenne*, Bruxelles: Bruylant, 2014, esp. the section on cases where restrictive measures are linked to the prior violation of an EU agreement, pp. 265-301.

[34] Arts 9, para. 2, and 43, para. 3, of the EU-Singapore Partnership and Cooperation Agreement; see also, *vice versa*, Art. 17.17 of the EU-Singapore Free Trade Agreement. On recent treaty practice, see: European Parliament, Directorate General for External Policies of the Union, Policy Department, *The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements*, Study, Belgium: European Union, 2014, www.europarl.europa.eu.

[35] Art. 44, para. 4, let. b), of the EU-Singapore Partnership and Cooperation Agreement.

[36] Art. 13, para. 16, of the EU-Singapore Partnership and Cooperation Agreement.

[37] Ibid., Art. 13, para. 17.

[38] In the sense of Art. 44, para. 4, let. b), of the EU-Singapore Partnership and Cooperation Agreement.

[39] Opinion 2/15, cit., para.162. Emphasis added.

bilateral relations with third countries may raise in the future, given they rest on multiple interconnected conventional instruments that must be construed together.

All in all, the articulation of objectives and policies in Opinion 2/15 sheds light on what might become the new balance for material coherence in EU external action. It shows the Court's will to give effect to Art. 21 TEU through a broad and constructive interpretation, combined with a low threshold as regards the effects and links of the examined provisions with the main policy at stake. As it stands, it seems that having recourse to general objectives of EU external action such as sustainable development may become a pragmatic tool to avoid mixity in the future developments of the common commercial policy.

IV. The core underlying condition to the reasoning of the Court in Opinion 2/15 is simple: Chapter 13 provisions do not encroach upon the shared competences governed by the social and environmental policies. Putting it differently, Chapter 13 of the EU-Singapore Agreement would have almost no normative scope. This is indeed what the Court demonstrated at the stage of the examination of the content of Chapter 13:[40]

> "By the above provisions of Chapter 13 of the envisaged agreement, the European Union and the Republic of Singapore undertake, *essentially*, to ensure that trade between them takes place in compliance with the obligations that stem from the international agreements concerning social protection of workers and environmental protection to which they are party".[41]

This approach is surprising, since the Court seems to simplify competence issues through their global and abstract appreciation. Indeed, the term "essentially" implies that minor parts of Chapter 13 might not be mere references to existing international law, but might consist in new social and environmental commitments by the Parties. It is not the place here to undertake this demonstration, which has already been made by AG Sharpston in her conclusions.[42] Also, contrary to what the Court argued,[43] it is debatable whether the reference to specific international agreements and their interpretation by the corresponding international bodies in Chapter 13 would not create new obligations for the EU and Singapore in these environmental and social fields, which could materialise substantially in the future. Similarly, the systematic inclusion of references to international agreements binding on both the EU and a partner to a free trade

[40] *Ibidem*, paras 148-151.
[41] *Ibidem*, para. 152, emphasis added.
[42] Opinion of AG Sharpston delivered on 21 December 2016, opinion 2/15.
[43] Opinion 2/15, cit., paras 153-154.

agreement could be analysed as a way to fulfil another general objective of EU external action: the promotion of strong multilateralism.[44]

These considerations must be read in combination with the last part of the reasoning of the Court, when it demonstrated that the conclusion of Chapter 13 under the CCP does not affect the repartition of the competences between the EU and its Member States.[45] To that end, the Court stressed that the purpose of Chapter 13 is not to harmonize the social and environmental legislations of the Parties, who remain free to establish their own protection levels and to change their policies accordingly.[46] To the Court, it is therefore clear that the object of Chapter 13 is limited to conditioning trade relations between the Parties to the necessary social and environmental requirements.[47]

However, is material coherence achievable at all if the Court solves competence issues without entering the substance? On the one hand, it is not sure that the provisions of Chapter 13 will not have an impact on the Parties' social and environmental legislations, considering that their trade relations will in turn influence their common reading of their international obligations, including through the specific dispute resolution mechanisms described above.[48] On the other hand, should effective coherence mean synergy between the objectives and policies, one could expect that the conclusion of a free trade agreement could give the opportunity to discuss the merits of social and environmental issues with the partner, and eventually lead to new commitments in these ancillary fields. Such a reading would rest on a further interpretation by the Court of the nature of the Union's obligation to fulfil its external action objectives while implementing external policies.

Finally, one can wonder what precedent Opinion 2/15 might be in the perspective of the conclusion of future free trade agreements. Needless to recall, Opinion 2/15 only deals with the EU-Singapore Agreement and does not bind the EU institutions in the appreciation of future agreements which normative scope can vary. In theory, would other sustainable development chapters in other free trade agreements be more substantial on the Parties' commitments, the Court could consider they are no more ancillary to the conduct of the CCP and therefore necessitate a mixed legal basis.

In practice, the recent examination of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) by the French Constitutional Council calls for some attention. In its July 2017 decision,[49] the French Constitutional Council distinguished between the parts of CETA that are governed by exclusive competences, and those governed by shared competences. Following its established jurisprudence on EU-related laws and treaties, its constitutional control over the specific CETA provisions would vary accord-

[44] Art. 21, para. 2, let. h), TEU.
[45] Opinion 2/15, cit., para. 164.
[46] *Ibidem*, para.165.
[47] *Ibidem*, para.166.
[48] See *supra*, section III.
[49] French Constitutional Council, judgment of 31 July 2017, no. 2017-749 DC.

ingly. On the one hand, the constitutional control of provisions governed by exclusivity must be limited to the rare cases where the "French constitutional identity" would be at stake.[50] On the other hand, the constitutional control of provisions governed by shared competences ought to be full.[51] Interestingly, instead of detailing its analysis of the CETA provisions, the French Constitutional Council has chosen to refer to the findings of the Court in Opinion 2/15 on the EU-Singapore Agreement. It subsequently concluded that Chapters 22, 23 and 24 of the CETA, respectively dealing with sustainable development, social and environmental issues, were falling within the exclusive competences of the Union.[52] The constitutional control over these chapters was therefore strictly limited. This is yet another illustration of the underlying links between the interpretation of general objectives and the repartition of competences between the EU and its Member States. The direct consequence of this decision is that the sustainable development, environmental and social provisions of the CETA have neither been analysed by the CJEU, nor by the French Constitutional Council. One can wonder whether other Constitutional Courts of the Member States will follow the same logics, which would seal the impact of the general principles guiding EU external action on the repartition of powers between the EU and its member States. In turn, this would put a major responsibility on the CJEU, not only to flesh-out the material scope of these general principles guiding EU external action, but also to guarantee that EU external action effectively aims at their realisation. Hence, calling for a concrete examination by the Court of the substance of the objectives-related provisions of the future free trade agreements to be concluded by the European Union under the CCP.

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[50] *Ibidem*, para. 14.

[51] *Ibidem*, para. 13.

[52] *Ibidem*, para. 17.

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OVERVIEWS

THE RECURRENT CRISIS OF THE EUROPEAN UNION'S COMMON COMMERCIAL POLICY: OPINION 2/15

TABLE OF CONTENTS: I. Introduction. – II. The Opinion of the Court. – III. Analysis of Opinion 2/15. – IV. Concluding remarks.

I. After the modification brought about by the Treaty of Lisbon, the CJEU has recently offered its most thorough interpretation on the scope of the Common Commercial Policy (CCP) through Opinion 2/15.[1] This *Overview* argues that Opinion 2/15 represents just the latest example of the persistent crisis that affects the CCP. The CCP has developed historically through periods of renewal and crisis, in what could be called a pendulum movement. Indeed, the first cases handed down after the entry into force of the Lisbon Treaty strengthened the view of those in favour of a CCP catalyzing all EU external economic relations. However, as was already the case with Opinion 1/94,[2] Opinion 2/15 is based on a friendly amalgamation of the interests of the stakeholders involved, that is, the Commission and the Member States. To be sure, the "arbitration" operated by the CJEU in Opinion 2/15 implies a partial victory for both parties. Still, in view of the Commission's ultimate aim, which was to avoid a possible veto by individual Member States during the ratification process, the solution finally reached is more beneficial to the latter's political interests. In determining that the EU-Singapore Free Trade Agreement (FTA)[3] incorporates a number of components that go beyond the material scope of the CCP set out in the TFEU, i.e., the protection of non-direct foreign investment and its investor-State dispute settlement system, the CJEU has chosen to impose the mixed nature of the EU-Singapore FTA and thus a rather conservative view of the CCP.

II. The Court develops its assessment of the EU's competence to conclude the EU-Singapore FTA along three main lines. The first is devoted to the EU competence in the sphere of CCP. The second is focused on the competence derived from the implied

[1] Court of Justice, opinion 2/15 of 16 May 2017.

[2] Court of Justice, opinion 1/94 of 15 November 1994.

[3] Free Trade Agreement of May 2015 (authentic text) between the European Union, on the one part, and Singapore, on the other part (hereinafter FTA).

powers doctrine. A third section concerns the EU competence to adopt the institutional provisions included in the EU-Singapore FTA.

Applying the classical "centre of gravity" test,[4] the CJEU found that an EU act falls within the CCP if it relates specifically to trade with one or more third States in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it. According to this test, the Court has found that the criteria set out for the determination of the CCP's material scope can be applied to all trade in goods provided for in the EU-Singapore FTA,[5] so that this component of the agreement falls within the exclusive competence of the EU.[6] Thus, the CJEU confirms in this Opinion the same broad concept of international trade in goods which it already maintained in Opinion 1/94, in line with recent developments in international trade policy, which now incorporates issues such as trade facilitation.

Regarding trade in services, the Court states that ch. 8 of the EU-Singapore FTA is also covered by the CCP, as it fulfils the two conditions mentioned above. Recalling that issues such as citizenship, residence, permanent employment and, in general, access to the labour market are excluded, the CJEU confirms that all provisions of this chapter form part of the CCP, including aspects relating to financial services and the mutual recognition of professional qualifications, in accordance with the position expressed by AG Sharpston and contrary to the position held by some Member States.[7] While the Court stated in Opinion 1/94 that trade in services regulated by the General Agreement on Trade in Services (GATS) was covered by the CCP solely as regards mode of supply 1, i.e. "cross-border provision of services",[8] in Opinion 1/08 the CJEU found that the Community had acquired exclusive competence to conclude international agreements on trade in services also in modes of supply 2 to 4,[9] a result equally applicable regarding current Art. 207, para. 1, TFEU.[10]

However, the Court notes that the transport services for persons and goods, relating to international maritime transport, rail transport, road transport and inland waterway transport, provided for in ch. 8 of the EU-Singapore FTA, are excluded from the CCP under Art. 207, para. 5, TFEU. Conversely, the CJEU understands that aircraft repair and maintenance services and those services for the reservation and sale of air transport

[4] On this point, the Court quotes its recent case-law, i.e., Court of Justice: judgment of 18 July 2013, case C-414/11, *Daiichi Sankyo and Sanofi-Aventis Deutschland* [GC], para. 51, and judgment of 22 October 2013, case C-137/12, *Commission v. Council* [GC] (hereinafeter, *Conditional Access Services* case), para. 57, together with opinion 3/15 of 14 February 2017, para. 61.

[5] EU and Singapore FTA, chs 2 to 6.

[6] Opinion 2/15, cit., paras 40-48.

[7] Opinion of AG Sharpston delivered on 21 December 2016, opinion 2/15, paras 204 and 205.

[8] Opinion 1/94, cit., para. 44.

[9] Court of Justice, opinion 1/08 of 30 November 2009, para. 119.

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

services should not be considered as "ancillary" to transport services, and so they fall within the CCP as "business services".[11]

Concerning investment, the Court needed to address two issues. The first one is the scope of the concept of foreign direct investment (FDI) set out in the new CCP following the Treaty of Lisbon. In this regard, and according to its previous case-law,[12] the CJEU states that the EU has exclusive competence relating to investments which enable effective participation in the management or control of a company carrying out an economic activity, whereas "other" foreign investment, i.e., portfolio investment, does not fall within this exclusive competence, as the terms used by Art. 207, para. 1, TFEU are unequivocal.[13] The second issue relates to the material scope of the EU competence in this field of FDI, that is, whether the CCP also covers the protection of direct investments and not only their admission. The Court answered in the positive, as "Article 207(1) TFEU refers generally to EU acts concerning 'foreign direct investment', without drawing a distinction according to whether the acts concern the admission or the protection of such investments".[14] Moreover, the derogation and compensation clauses, including the provisions relating to property law, criminal law, tax law and social security, are not to be considered trade commitments but only limitations to the Member States' own competence derived from the applicability of the non-discrimination principle provided for in the EU-Singapore FTA.[15]

With respect to intellectual property protection, the Court found that ch. 11 of the envisaged agreement relates to "commercial aspects of intellectual property" within the meaning of Art. 207, para. 1, TFEU, as it is intended to govern the liberalization of trade between the EU and Singapore, and in no way falls within the scope of harmonization of the laws of EU Member States.[16] In addition, the Court expressly rejects the idea that the referral made by the agreement to multilateral conventions protecting moral rights may be sufficient to consider that this matter constitutes a component of the EU-Singapore FTA for the purpose of determining the nature of the EU's competence.[17]

After stating that the commitments concerning competition unequivocally form part of the liberalization of trade between the parties and so fall within the scope of the CCP, the Court started its analysis of the issue of sustainable development. Aware of the sensitivity of the issue, the Court of Justice devotes almost thirty paragraphs of its Opinion to it. The Court emphasizes that the TFEU differs significantly from the Treaty on the European

[11] Opinion 2/15, cit., paras 61-68.

[12] Court of Justice: judgment of 12 December 2006, case C-446/04, *Test Claimants in the FII Group Litigation* [GC], paras 181 and 182; judgment of 26 March 2009, case C-326/07, *Commission v. Italy*, para. 35; judgment of 24 November 2016, case C-464/14, *SECIL*, paras 75 and 76.

[13] Opinion 2/15, cit., para. 83.

[14] *Ibid.*, para. 87.

[15] *Ibid.*, paras 101 and 107.

[16] *Ibid.*, para. 126.

[17] *Ibid.*, para. 129.

Community by including new aspects of contemporary international trade in what is now an enlarged CCP, which is a significant development of primary EU law, as it already held in *Daiichi Sankyo*.[18] First, taking into account the reference contained in the last sentence of Art. 207, para. 1, TFEU, in line with Art. 21, para. 3, TEU and Art. 205 TFEU, the Court found that the CCP must integrate the objectives and principles of the EU external action, as provided for by Art. 21, paras 1 and 2, TEU. Specifically, sustainable development is mentioned in Art. 21, para. 2, let. f), of the latter paragraph, where external action is expressly linked to the protection of the environment. In addition, Arts 9 TFEU and 11 TFEU provide that social protection and environmental protection must be integrated into the definition and implementation of Union policies and activities with a view to promoting sustainable development. Therefore, the Court concludes that sustainable development is included within the scope of the CCP, thus justifying the Commission's view on this point and against the opinion of AG Sharpston.[19]

As seen above, services commitments in the field of transport set up in ch. 8 of the EU-Singapore FTA do not fall within the CCP, but have to be approved in accordance with the division of competences between the EU and the Member States in the field of the common transport policy. In line with the *ERTA* judgment,[20] which gave rise to the implied powers doctrine, Art 216 TFEU grants the EU competence to conclude, inter alia, any international agreement which "is likely to affect common rules or alter their scope". Art. 3, para. 2, TFEU provides that the EU competence to conclude such an agreement is exclusive.

The CJEU then held that the commitments contained in ch. 8 of the envisaged agreement that relate to maritime, rail and road transport may affect common rules or alter their scope. Indeed, the Court recalled its case-law on this matter,[21] to the effect that Art. 3, para. 2, TFEU required an analysis in four stages. First, the Court considered that the risk of affecting the common rules or of altering their scope existed in so far as such "commitments fall within the *scope* of those rules" (emphasis added). Second, in the Court's view, finding that there is such a risk did not require a complete match between the scope of international commitments and that covered by Union law, so that it will suffice that "those commitments [...] fall within an area which is *already covered to a large extent* by those rules".[22] Third, Art. 3, para. 2, TFEU must be applicable "where an agreement between the European Union and a third State provides for the application, to the international relations covered by that agreement, of rules that *will overlap* to a large extent with the common EU rules applicable to intra-Community situations [without there

[18] *Ibid.*, para. 141.

[19] *Ibid.*, para. 147.

[20] Court of Justice, judgment of 31 March 1971, case 22/70, *Commission v. Council*, para. 32.

[21] Court of Justice: judgment of 4 September 2014, case C-114/12, *Commission v. Council* [GC], para. 68; opinion 1/13 of 14 October 2014, para. 71; judgment of 26 November 2014, case C-66/13, *Green Network*, para. 29; and opinion 3/15 of 14 February 2017, para. 105.

[22] Opinion 2/15, cit., para. 180 (emphasis added).

being any need for] *contradiction* with those common rules".[23] Finally, in the fourth stage, with regard to internal waterways transport services provided for in the EU-Singapore FTA, the Court considered that they are not liberalized or, at most, they are commitments of extremely limited scope. Quoting Opinion 1/08, the CJEU states that "when examining the nature of the competence to conclude an international agreement, there is no need to take account of the provisions of that agreement which are *extremely limited in scope*".[24]

With respect to portfolio investment, and on the basis of the *ERTA* case, the Commission argued that section A of ch. 9 of the EU-Singapore FTA may affect Art. 63 TFEU as the affected common rule, and it accordingly fell within the exclusive competence of the EU referred to in Art. 3, para. 2, TFEU. However, the CJEU held that "that case-law cannot be applied to a situation where the EU rule referred to is a provision of the FEU Treaty and not a rule adopted on the basis of the FEU Treaty".[25] According to the Court, the reasoning underlying the rule currently contained in Art. 3, para. 2, TFEU cannot be extended to a situation which does not concern rules of secondary law, but rather a rule of primary law. Moreover, the primacy of the provisions of the TEU and of the TFEU precludes international agreements from "affecting" their rules or "altering their scope". The Court concluded that the EU does not have exclusive competence regarding non-direct investment, but considered that Art. 216, para. 1, TFEU was applicable, and so portfolio investment commitments fall within a shared competence, which means that "Section A of ch. 9 of the envisaged agreement cannot be approved by the European Union alone".[26]

Conversely, regarding the final provision of the EU-Singapore FTA on the replacement of previous bilateral investment agreements concluded by Member States with the third country, the Court considers that this provision "cannot be regarded as encroaching upon a competence of the Member States". Recalling its *International Fruit Company* judgment, the CJEU states that the EU can succeed the Member States and has competence to approve, by itself, that kind of provision.[27] Moreover, Regulation (EU) 1219/2012 and Art. 351 TFEU do not affect this conclusion where "that third State expresses the wish that those bilateral agreements come to an end upon the entry into force of the envisaged agreement".[28]

Finally, the CJEU had to decide on a set of institutional arrangements of the EU-Singapore FTA that seek to guarantee substantive provisions by essentially establishing an organizational structure, channels of cooperation, information exchange obligations and certain decision-making powers. The Court recalled that EU's competence to conclude international agreements included contracting such institutional arrangements. These insti-

[23] *Ibid.*, para. 201 (emphasis added).
[24] *Ibid.*, para. 207 (emphasis added).
[25] *Ibid.*, para. 230.
[26] *Ibid.*, para. 244.
[27] *Ibid.*, paras. 248 and 249.
[28] *Ibid.*, para. 254.

tutional arrangements are of an ancillary nature and do not affect the character of the competence to conclude the agreement, in accordance with its case-law, and therefore they fall within the same exclusive or shared competence that corresponds to the substantive provisions which they accompany.[29] The same applies to the rules of transparency, which are also considered to be auxiliary. Respect for the principles of sound administration and effective judicial protection provided for in this agreement does not encroach upon the Member States' exclusive powers.[30]

Regarding the more relevant investor-State dispute settlement system, after recalling that its Opinion only relates to the nature of the EU competence and so does not judge whether the content of the agreement's provisions is compatible with EU law, the CJEU concluded that "such a regime, which removes disputes from the jurisdiction of the courts of the Member States, cannot be of a purely ancillary nature [...] and cannot, therefore, be established without the Member States' consent",[31] so that its approval falls within a competence shared between the EU and the Member States.

On the contrary, with regard to the settlement of disputes between the parties that may arise in connection with the interpretation and application of the EU-Singapore FTA through an arbitration panel, and after emphasizing that the WTO dispute settlement regime is established as an alternative, the Court recalled its case-law[32] which stated that "the competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements".[33] Therefore, after insisting on the fact that the compatibility with and the autonomy of EU law are not under scrutiny here, the Court concluded that the dispute settlement system provided in ch. 15 is ancillary in nature but, in so far as it covers investments, cannot be approved exclusively by the Union.

III. The two requirements identified in Opinion 2/15 for an EU act to be included within the CCP, i.e. that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it, had been laid down by the CJEU case-law, even with an almost identical wording, at least since the *Regione autónoma Friuli-Venezia Giulia and ERSA* case.[34] However, these two requirements can even be traced

[29] *Ibid.*, para. 276.

[30] *Ibid.*, paras 282-284.

[31] *Ibid.*, para. 292.

[32] Court of Justice: opinion 1/91 of 14 December 1991, paras 40 and 70; opinion 1/09 of 8 March 2011, para. 74; and opinion 2/13 of 18 December 2014, para. 182.

[33] Opinion 2/15, cit., para. 298.

[34] Court of Justice, judgment of 12 May 2005, case C-347/03, *Regione autonoma Friuli-Venezia Giulia and ERSA*, para. 75. See also Court of Justice, judgment of 8 September 2009, case C-411/06, *Commission v. European Parliament and the Council* [GC], para. 71.

back in time to Opinion 1/94,[35] having been set out in a similar manner in Opinion 2/00[36] and in the *Energy Star* case.[37] In addition, since the *Daiichi Sankyo* and *Conditional Access Services* cases, the Court has used the same formula which warns that "the mere fact that an EU act, such as an agreement concluded by it, is liable to have implications for trade with one or more third States is not enough for it to be concluded that the act must be classified as falling within the common commercial policy".[38]

However, it is difficult to identify a clear criterion in the application of this centre of gravity test by the Court. Certainly, in Opinion 2/15 the CJEU had stated that ch. 11 of the EU-Singapore FTA on the protection of intellectual property rights falls within the CCP. However, this conclusion differed diametrically from the position upheld by the Court in its Opinion 1/94. In this Opinion, the Court maintained that the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) was not included within the scope of the CCP. Indeed, it said that although "there is a connection between intellectual property and trade in goods" and, although intellectual property rights may have effects on trade, "that is not enough to bring them within the scope of Article 113 [now 207 TFEU]. Intellectual property rights do not relate specifically to international trade; they affect internal trade just as much as, if not more than, international trade".[39] These statements have been widely criticized by specialists since then.[40]

Nonetheless, this interpretation of the CJEU underwent what has been termed as a "radical change".[41] Indeed, in the aforementioned cases *Daiichi Sankyo* and *Conditional Access Services*, the Court made an attempt to highlight the change brought about by the Lisbon Treaty with respect to Art. 133 of the Treaty of the European Community and, even more, with respect to the pre-Amsterdam version, former Art. 113, which was in force when the TRIPs agreement was concluded, a modification that it described as a "significant development of primary law". In these cases, the Court was very concerned to develop a measured argument that would show that "the question of the distribution of the competences of the European Union and the Member States must be examined on the basis of the Treaty now in force".[42] But it also expressly rejected the fact that the considerations made in Opinion 1/94 and in the *Merck Genéricos* case remained rele-

[35] Opinion 1/94, cit. See also Court of Justice: opinion 2/00 of 6 December 2001, para. 40; judgment of 12 December 2002, case C-281/01, *Commission v. Council*, paras 40-41.

[36] Opinion 2/00, cit., para. 40.

[37] *Commission v. Council*, case C-281/01, cit., paras 40 and 41.

[38] Opinion 2/15, cit., para. 36.

[39] Opinion 1/94, cit., para. 57.

[40] J.H.J. BOURGEOIS, *The EC in the WTO and Advisory Opinion 1/94: an Echternach Procession*, in *Common Market Law Review*, 1995, p. 763 *et seq.*; P. PESCATORE, *Opinion 1/94 on 'Conclusion' of the WTO Agreement: Is There an Escape from a Programmed Disaster?*, in *Common Market Law Review*, 1999, p. 387 *et seq.*

[41] J. LARIK, *No Mixed Feelings: The post-Lisbon Common Commercial Policy in Daiichi Sankyo and Commission v. Council (Conditional Access Convention)*, in *Common Market Law Review*, 2015, p. 798.

[42] *Daiichi Sankyo* [GC], cit., para. 48.

vant, since they responded to a wording in the Treaty that was no longer in force. In this balanced line of argument, the CJEU stressed that the drafters of the Treaty could not be unaware that the terms "commercial aspects of intellectual and industrial property", set out in Art. 207, para. 1, TFEU, corresponded almost literally with the title of the TRIPs agreement, or that the purpose of the latter agreement is not to harmonize the laws of the Member States, but rather to reduce distortions to international trade.

Therefore, the recent *Daiichi Sankyo* and *Conditional Access Services* cases have led the doctrine to announce a new orientation of the CJEU jurisprudence on the CCP, even qualified as a "renaissance".[43] We will henceforward be facing a new era favourable to an expansive interpretation of the CCP after the Lisbon Treaty, in line with Opinions 1/75 and 1/78. In this way, the Court would be leaving behind definitively the jurisprudence derived from the aforementioned issues, in particular, Opinion 1/94 and *Merck Genéricos*, labelled as mistaken by some authors.[44]

But then we are left with an important conundrum. In Opinion 1/94, the application of the centre of gravity test determined that the TRIPs agreement should be considered as an agreement that pursues internal harmonization as a priority objective (or, at least, there were two non-dissociable objectives, internal harmonization and external harmonization). In contrast, in the *Daiichi Sankyo* case, the result of that examination has led to the conclusion that, if the TRIPs agreement priority is "to strengthen and harmonize the protection of intellectual property on a worldwide scale", it is also "reducing distortions of international trade",[45] and the Court ended up tilting the balance in favour of this second objective, concluding that "the context of those rules is the liberalization of international trade, not the harmonization of the laws of the Member States of the European Union".[46] Finally, Opinion 2/15 has reinforced this reasoning by stating that ch. 11 of the EU-Singapore FTA "in no way falls within the scope of harmonization of the laws of the Member States of the European Union, but is intended to govern the liberalization of trade between the European Union and the Republic of Singapore".[47] Therefore, what we see is an unquestionable evolution, although very poorly explained,[48] concerning the priority objective of the international agreement in question (be it the TRIPs agreement or the EU-Singapore FTA) with regard to intellectual and industrial property rights.

[43] F. Castillo de la Torre, *The Court of Justice and External Competences After Lisbon: Some Reflections on the Latest Case Law*, in P. Eeckhout, M. López-Escudero (eds), *The European Union's External Action in Times of Crisis*, Oxford: Hart Publishing, 2016, p. 131.

[44] L. Ankersmit, *The Scope of the Common Commercial Policy after Lisbon: The Daiichi Sankyo and Conditional Access Services Grand Chamber Judgments*, in *Legal Issues of Economic Integration*, 2014, pp. 197 and 208.

[45] *Daiichi Sankyo* [GC], cit., para. 58.

[46] *Ibid.*, para. 60.

[47] Opinion 2/15, cit., para. 126.

[48] D. Kleimann, *Reading Opinion 2/15: Standards of Analysis, the Court's Discretion, and the Legal View of the Advocate General*, in *EUI Working Paper RSCAS*, no. 23, 2017, p. 10.

The same can be said about moral rights. The Court has understood that moral rights do not constitute a separate component of the EU-Singapore FTA that might call in question its essential objective, which is none other than international trade. However, the Court has not sufficiently reasoned this decision. The CJEU had, at least, two options which it could have resorted to.[49] The first was to consider moral rights, which in themselves do not have a commercial content, as covered by the CCP, insofar as they can have a direct effect on trade, such as restrictions on the commercial aspects of intellectual property rights. The second was to consider these moral rights as accessory and secondary in relation to the objective and main component of the EU-Singapore FTA, or its ch. 11, that is, international trade. This second option has finally been chosen, implicitly, but a more elaborate argument in this sense would have been desirable.

This wide margin of action, even discretion, on the part of the CJEU has been rightly criticized by the doctrine. Certainly, the determination of the legal basis must be made unequivocally on the basis of "objective factors amenable to judicial review".[50] However, it is not always clear that the methodological options chosen by the CJEU serve to reinforce the coherence of its legal reasoning and as a clear guide regarding its future decisions.

Regarding sustainable development, the CJEU has also disconnected the CCP from internal competences in the field of labour and environmental protection. Indeed, the Court has opted in the area of sustainable development for a type of argument very similar to that used in the field of intellectual property rights. As we have seen, without expressly rejecting the approach adopted in Opinion 1/94, namely that the TRIPs agreement aims to establish a certain harmonization of intellectual property protection on a world scale, since the *Daiichi Sankyo* case the Court considered, nonetheless, that the fundamental objective of the TRIPs agreement is trade. Therefore, implicitly using its centre of gravity test, the Court is nowadays considering the objective of international trade as a priority, leaving aside the other regarding standard-setting. Likewise, in this area of sustainable development, the CJEU seems to be determined to embrace the objective of international trade as the priority. The harmonization that ch. 13 of the EU-Singapore FTA can achieve through referral to multilateral conventions to which the EU and Singapore are parties is not considered by the Court as the priority objective of the agreement. The Court has chosen to anchor sustainable development in the CCP through giving prevalence to trade over harmonization, and not the possible absence of mandatory legal force of ch. 13. More to the point, as AG Sharpston saw no conditionality arising from ch. 13's provisions, the Court has made a significant effort, even resorting to Art. 60 of the Vienna Convention on the Law of Treaties, to grant legal force to those commitments and introduce a certain social and environmental conditionality to the EU-Singapore FTA.

[49] *Ibid.*, pp. 27-28.

[50] Court of Justice, judgment of 14 June 2016, case C-263/14, *Parliament v. Council* [GC], para. 43.

Another issue of special interest in this Opinion concerns the application of the *ERTA* doctrine, now codified in Art. 3, para. 2, TFEU, and, in almost identical terms, in Art. 216, para. 1, fourth sentence, TFEU. In Opinion 2/15, the application of the *ERTA* doctrine has been invoked in two specific areas, namely, in the area of the provision of services in the field of transport and in the area of the protection of portfolio investments. The first area is excluded from the CCP by Art. 207, para. 5, TFEU while the second is not included in the concept of foreign direct investment of Art. 207, para. 1, TFEU. The most interesting legal issue has been raised in relation to portfolio investment. In the absence of common rules, it was debatable whether the EU's competence could arise where the conclusion of an international agreement is "necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties", as provided by the second sentence of Art. 216, para. 1, TFEU. It would also be necessary to determine whether that competence can be exclusive or shared, in accordance with the provisions of Art. 3, para. 2, second sentence, TFEU which, as is well known, codifies the case-law derived from Opinion 1/76.[51] The truth is that the link between Arts 3, para. 2, and 216, para. 1, TFEU is not clear. Indeed, on the one hand, we may infer that the former provision has a certain *vis atractiva* over the latter, meaning that exclusive competence can ultimately be imposed in most cases. On the other hand, Art. 216 TFEU implies a rupture of the *ERTA* doctrine in its traditional conception, since this provision does not entail the need to identify common rules as a requisite to claim EU's external competence.[52]

To this day, there is still a certain ambiguity regarding the *ERTA* doctrine and, specifically, the nature of the EU competence derived from its application. To be sure, the *ERTA* doctrine originally gave rise to an interpretation in which two different decisions adopted by the Court could be identified.[53] First, the CJEU affirmed the EU's implicit external competence to conclude an international agreement in cases where this possibility was not expressly provided for by the Treaty. Secondly, once the EU has adopted legislation internally in an area, it acquires exclusive competence on the external level, but it is a competence that must be interpreted as a pre-emption or field occupation (Member States can no longer conclude international agreements that may affect common rules or alter their scope). Although somewhat rare, it is possible to find case-law that can be explained on

[51] Court of Justice, opinion 1/76 of 26 April 1977. M. KRAJEWSKI, *The Reform of the Common Commercial Policy*, in A. BIONDI, P. EECKHOUT, S. RIPLEY (eds), *EU Law After Lisbon*, Oxford: Oxford University Press, 2012, p. 299.

[52] M. CREMONA, *EU External Relations: Unity and Conferral of Powers*, in L. AZOULAI, (ed.), *The Question of Competence in the European Union*, Oxford: Oxford University Press, 2014, p. 73.

[53] P. EECKHOUT, *Exclusive External Competences: Constructing the EU as an International Actor*, in A. ROSAS, E. LEVITS, Y. BOT (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law*, Den Haag: T.M.C. Asser Press, 2013, p. 627.

the basis of the exercise of implied non-exclusive external competences.[54] In fact, in the most recent cases, one may observe how the Court distinguishes between the determination of the existence of EU competence, on the one hand, and the establishment of the nature of the said competence, on the other.[55] However, as mentioned above, some literature[56] has already pointed out that the differences between Arts 3, para. 2, and 216, para. 1, TFEU will probably lead to the affirmation of the exclusive nature of the EU implicit competences. This conclusion seems to be confirmed by Opinion 2/15 in relation to transport services, but it is not the case with respect to investments.

As stated above, one of the most interesting issues raised in Opinion 2/15 was the invocation, by the Commission, of the *ERTA* doctrine to support the EU's exclusive competence in portfolio investments, in which there are no common rules adopted by the Union. The Commission argued that Art. 63 TFEU could be considered as the "common rule" affected by the EU-Singapore FTA. However, the Court unequivocally decided against the Commission and in favour of the Council and the Member States, stating that the *ERTA* case-law cannot be applied to a situation where the EU rule referred to is a provision of the TFEU and not a rule adopted on the basis of the TFEU.

Therefore, the CJEU opted for a traditional vision of its *ERTA* case-law after the codification brought about by the Lisbon Treaty. Discarding a new or more advanced interpretation that could offer an alternative and more integrationist path to that codification, the Court largely sided with the expectations of Member States, which demanded a restrictive reading of the concept of investment set out in Art. 207 TFEU.[57] Certainly, the limits of the *ERTA* case-law are apparent, as it is difficult to argue that international agreements may jeopardize the supremacy of the EU Treaties as primary law. In this way, the CJEU has closed once and for all this venue as a path to extend EU external implicit competences.

The CJEU found in Opinion 2/15 that the EU-Singapore FTA needed to be concluded as a mixed agreement, as portfolio investments are not covered by the CCP, and the investor-State arbitration system could not be established without the Member States' consent.

Starting with the first aspect, as mentioned above, the CJEU has analysed the possibility that the inclusion of portfolio investments in the EU-Singapore FTA may be "necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties", under the terms of Art. 216, para. 1, TFEU second sentence. Following the reasoning of AG Sharpston, and taking into account that the free movement of capital is one of these objectives, the Court has considered that the sentence of Art. 216,

[54] F. CASTILLO DE LA TORRE, *The Court of Justice*, cit., p. 139.

[55] *Ibid.*, p. 157.

[56] M. CREMONA, *Defining Competence in EU External Relations: Lessons from the Treaty Reform Process*, in A. DASHWOOD, M. MARESCEAU (eds), *Law and Practice of EU External Relations*, Cambridge: Cambridge University Press, 2008, p. 62.

[57] P.J. KUIJPER, *From the Board. Litigation on External Relations Powers After Lisbon: The Member States Reject Their Own Treaty*, in *Legal Issues of Economic Integration*, 2016, pp. 2-3.

para. 1, TFEU is applicable to international agreements concluded by the EU with third States with a view to imposing reciprocity in relation to the liberalization commitment provided for in Art. 63 TFEU. It should be noted that this is an area of shared competence between the EU and the Member States in accordance with Art. 4, para. 2, let. a), TFEU, which concerns the internal market, as identified by the literature.[58] This latter circumstance means that the competence to conclude an international agreement via Art. 216 TFEU may only be a shared one as well and, therefore, ultimately excludes EU exclusive competence in relation to investments included in the EU-Singapore FTA.

One of the most intriguing issues that arises with this result is the persistent recourse to the characterization of an agreement as mixed where the absence of EU exclusive competence is verified. Indeed, even if the Court does not expressly say so, it follows from the absence of exclusivity of the EU's competence that the EU-Singapore FTA must be concluded as a mixed agreement by the EU and the Member States. This state of affairs, this custom assumed by the EU institutions, has been subject to criticism. As has been noted, Member States have traditionally favoured mixed agreements because this inevitably imposes unanimity.[59] Moreover, the Commission has generally accepted the mixed nature of the agreements to avoid institutional confrontation.[60] However, there is no definitive legal argument to support this standard practice. Indeed, as has been argued, when an agreement falls completely within the non-exclusive external competence of the EU, and the EU concludes the agreement, there is no justification of any kind to support the agreement's mixed character.[61] In our opinion this is what happened in the present case in relation to portfolio investments. If the EU has shared competence on the basis of Art. 63 TFEU in relation to Art. 4, para. 2, let. a), TFEU, then the EU may decide to exercise it alone, without necessarily imposing the mixed nature of the EU-Singapore FTA in this field. However, the Court did not even refer to this possibility, thus keeping to its case-law which offers Member States a non-restricted choice on the mixed character of the agreement.[62]

In our view, in the long run this interpretation will probably lead to a reform of the Treaty in relation to the CCP. Indeed, the situation that arises now recalls that provoked by Opinion 1/94. The restrictive interpretation of the CCP in relation to trade in services

[58] S. HINDELANG, N. MAYDELL, *The EU's Common Investment Policy: Connecting the Dots*, in M. BUNGENBERG, J. GRIEBEL, S. HINDELANG (eds), *International Investment Law and EU Law*, Berlin: Springer, 2011, p. 17; *contra*, F. ORTINO, P. EECKHOUT, *Towards an EU Policy on Foreign Direct Investment*, in A. BIONDI, P. EECKHOUT, S. RIPLEY (eds), *EU Law after Lisbon*, cit., pp. 317-318.

[59] A. ROSAS, *The European Union and Mixed Agreements*, in A. DASHWOOD, C. HILLION (eds), *The General Law of EC External Relations*, London: Sweet & Maxwell, 2000, p. 202.

[60] C.D. EHLERMANN, *Mixed Agreements. A List of Problems*, in D. O'KEEFFE, H.G. SCHERMERS (eds), *Mixed Agreements*, Deventer: Kluwer, 1983, p. 9.

[61] P. EECKHOUT, *EU External Relations Law*, Oxford: Oxford University Press, 2011, p. 265.

[62] C.W.A. TIMMERMANNS, *The Court of Justice and Mixed Agreements*, in A. ROSAS, E. LEVITS, Y. BOT (eds), *The Court of Justice*, cit., p. 663.

and intellectual property offered by the CJEU at that time gave way to a series of legal difficulties in order to manage the CCP according to the evolution of international trade, as attested by Opinion 1/08 and the *Daiichi Sankyo* and *Conditional Access Services* cases. After the partial reforms of Amsterdam and Nice, it is the Lisbon Treaty that has filled the gaps which resulted from Opinion 1/94. However, after Opinion 2/15, the situation is similar, but now with respect to portfolio investments. By remaining outside the CCP, and being inextricably linked to direct investments, the EU will be forced to resort to mixed agreements, which will again provoke inter-institutional tensions and difficulties for the EU's external relations. This situation will last until there is a new reform of the CCP that includes portfolio investments. There is of course an alternative that consists of adopting internal legislation on these portfolio investments that could then allow the application of the *ERTA* doctrine. However, this option appears unrealistic. Indeed, Member States will be careful not to activate this possibility unnecessarily when they have fought in order to ensure that the portfolio investments subject-matter inevitably leads to the mixed nature of trade agreements.

Regarding the investor-State arbitration mechanism, some uncertainties persist with respect to Opinion 2/15, a decision that leads once again to uphold a shared competence and, therefore, the mixed nature of EU-Singapore FTA. First of all, from a procedural point of view, the argument made by Member States that they may be sued in an investment dispute and even have to bear the economic burden arising from the award does not necessarily affect the distribution of powers, since, as the AG indicated, Art. 1, para. 1, of Regulation 912/2014 sets out that this Regulation is understood "without prejudice to the division of competences established by the TFEU".[63]

Secondly, from the point of view of the material competence, there are two different contentions that can be made. On the one hand, the Court does not claim that this is an area of Member State exclusive competence, but rather expressly supports the shared character of the competence. However, contrary to what it has ruled in the field of portfolio investments, here the Court does not specify the legal basis on which it relies to determine that this is a shared competence field. Therefore, there are two possibilities to fully interpret the result to which the Court's statement leads. First, one may understand that the CJEU is using the concept of shared competence in the same sense as it did in its case-law prior to the Lisbon Treaty, where by using this expression it simply meant that the international agreement should be concluded as mixed.[64] Secondly, it could be understood that, by pointing out that we are dealing with a shared competence, the Court is referring to a concurrent competence, that is, that the Court is

[63] Regulation (EU) 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals by international agreements to which the European Union is party.

[64] Opinion 1/94, cit., paras 98-105; opinion 2/00, cit., para. 17.

not obligatorily determining the need to resort to the mixed nature of the EU-Singapore FTA. The exercise of this kind of concurrent competence by the EU would have the same effects relative to pre-emption as the adoption of internal secondary legislation.[65]

Obviously, the key to the exercise of shared or concurrent competence lies in the political discretion of the Council, which can decide to implement this EU competence alone or, on the contrary, impose the participation of the Member States by way of a mixed agreement. This is what the CJEU has understood and what has probably inspired its Opinion on this point. That is to say, the issue does not lie so much in a real competence problem, but in a problem of international political visibility of the Member States, which refuse to be left out by the EU in these important new generation FTAs.

IV. Opinion 2/15 is the latest chapter in the institutional confrontation between the Commission, on the one hand, and the Council and the Member States, on the other, regarding the scope of the exclusive competence within the CCP. The procedure for requesting an opinion from the CJEU through Art. 218, para. 11, TFEU has again been used, not so much to ensure that the EU-Singapore FTA falls within the competence of the EU and is adopted on a correct legal basis but rather the Commission has set it in motion to prove the absence of Member States' competence and to confirm EU's exclusive competence. However, in this particular case, as in previous cases, the results are again not entirely successful. Indeed, by stating that the EU-Singapore FTA has a mixed character, the Court has concluded, on the one hand, that the CCP deployed by the EU exceeds the competences established in the TFEU and that, therefore, the EU-Singapore FTA incorporates matters that do not fall within its exclusive competence. On the other hand, the Court implicitly holds that there is no shared external competence that can be exercised by the EU alone. Although AG Wahl, Sharpston and Szpunar are favourable to this latter possibility,[66] which is also supported by EU practice in at least one instance, the Stabilization and Association Agreement with Kosovo, the CJEU has held in this Opinion that the shared competence is equivalent to mixed agreement with no other option.

From the point of view of the CCP's scope of application, the CJEU has deployed a generous interpretation of the centre of gravity test, accepting that in this EU-Singapore FTA the predominant objective should prevail over the secondary one. This interpretation has allowed some novel areas, such as sustainable development, to be included within the scope of the CCP, which in turn will therefore embrace the provisions of the new FTAs that protect the environment or labour standards. In this way, the Court performs a disconnection between the scope of the CCP, on the one hand and, on the oth-

[65] F. Castillo de la Torre, *The Court of Justice*, cit., p. 181.

[66] Opinion of AG Wahl delivered on 8 September 2016, opinion procedure 3/15, paras 119-123; opinion of AG Sharpston, opinion procedure 2/15, cit., para. 75; opinion of AG Szpunar delivered on 24 April 2017, C-600/14, *Germany v. Council*, paras 84 and 85.

er hand, the scope and nature of the internal powers as well as the requirements for the execution of the Union's international obligations.

With regard to investments, one of the fundamental downsides lies in the CJEU's consideration of portfolio investments as an area not included within the EU's exclusive competence. Indeed, as we have seen, the *ERTA* doctrine codified in Art. 3, para. 2, TFEU is not applicable to the provisions of primary law, as the Commission intended. In addition, the mixed nature of the agreement is automatically imposed when the shared external competence is affirmed. Moreover, the investor-State arbitration system has been granted a principal, not ancillary, nature, unlike other external dispute resolution mechanisms. All this makes the EU's exclusive competence in foreign direct investment unfeasible. Indeed, the technical-legal and economic link between direct and indirect investments, together with the attached arbitration system, makes it very difficult for these areas of regulation to be split in different international agreements. Accordingly, the options are basically two. The first alternative would be for the EU to pursue the conclusion of separate agreements, on the one hand, in relation to the CCP as the EU's exclusive competence, which would lead to a type of far-reaching trade agreement, and, on the other hand, in relation to all investments as a mixed agreement. The second alternative would be to pursue ambitious FTAs that include both trade as well as investment in general, as mixed agreements, as seems to be taking place in view of the ongoing negotiations and the conclusion of subsequent FTAs such as the CETA.

However, very recently, the Commission has adopted a document from which it is inferred that we are facing a still open question. Indeed, on the one hand, it is stated that the Commission will continue with the negotiations already started in the field of investment (Japan, China, Myanmar and other partners). However, its proposal to open negotiations with Australia and New Zealand does not include investment protection or the settlement of disputes in investment. In addition, it states that "the debate on the best architecture for EU trade agreements and investment protection agreements must be completed and the Commission stands ready to discuss this further with the Council and the European Parliament".[67]

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[67] Communication COM(2017) 492 final of 21 March 2017 from the Commission on a balanced and progressive trade policy to harness globalization, p. 6.

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ARTICLES

EXERCISES IN LEGAL ACROBATICS: THE BREXIT TRANSITIONAL ARRANGEMENTS

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ABSTRACT: With the imminent closure of the first part of Brexit negotiations, the EU and the UK are shifting the centre of gravity from discussions about the termination of membership to the future arrangements. Anyone *au courant* with EU affairs is aware that what is left of the two-year period laid down in Art. 50 TEU will not be enough to negotiate, to sign and to ratify a future trade agreement. This is one of the reasons why both sides have recently engaged in discussions about a transitional period. As this *Article* proves, this is idea has merits, yet it will be hard to accomplish a plausible solution. Arguably, it may be more beneficial, and less problematic, to extend the two-year period instead.

KEYWORDS: withdrawal from the EU – Brexit – transitional regime – Art. 50 TEU – withdrawal agreement – United Kingdom.

I. INTRODUCTION

A transitional period is a procedural aspect of the Brexit negotiations, which has recently gained the attention of political circles. This is not surprising by any stretch of the imagination. To begin with, shortly after the referendum it became clear that the British political elite and, worse, the United Kingdom (UK)'s government were patently unprepared for what

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was to unravel.[1] Furthermore, the government largely mishandled the first year that followed the plebiscite and triggered Art. 50 TEU without a clear vision or plan for the Brexit negotiations.[2] Inevitably, they have stalled. The sequencing of talks imposed by the EU added to the complexities of the process at hand.[3] As legal and economic consequences of withdrawal were becoming clear, so was the need to extend the transition from EU membership to a post-Brexit arrangement. The two-year period laid down in Art. 50 TEU is obviously way too short to conduct and to complete negotiations of EU withdrawal as well as a new agreement to regulate future relations between the EU and its departed Member State. This was obvious from the start to those *au courant* with everyday EU business. In the fall of 2017, as the negotiators were running out of time, the need for a transitional arrangement of sorts became obvious on both sides of the negotiating table. Indeed, such temporary arrangements are, in very general fashion, envisaged in the EU negotiating principles for the Brexit negotiations. They have been further outlined in the European Council Guidelines of 15 December 2017.[4] Furthermore, an idea of implementation phase has been also suggested by the UK's government,[5] although the members of the public and, in equal measure, the EU negotiating team have been exposed to an unprecedented cacophony of ideas, which are politically appealing, yet legally very unclear and hard, if not impossible, to materialize. When it comes to the transitional regime, as this *Article* proves, it will be very hard to square the circle. The analysis that follows provides an insight into some of the

[1] See further on the referendum, *inter alia*, by H.D. CLARKE, M. GOODWIN, P. WHITELEY (eds), *Brexit: Why Britain Voted to Leave the European Union*, Cambridge: Cambridge University Press, 2017; K. ARMSTRONG, *Brexit Time: Leaving the EU – Why, How and When?*, Cambridge: Cambridge University Press, 2017; P. CRAIG, *Brexit: A Drama in Six Acts*, in *European Law Review*, 2016, p. 447.

[2] There is a plethora of policy papers published in course of 2017, however their quality leaves much to be desired. Many a times they contain unrealistic desiderata, which can hardly serve as negotiating positions. See, for instance, *Future customs arrangements – a future partnership paper*, 15 August 2017, www.gov.uk. For a commentary see J. PELKMANS, *The Brexit Customs Vision – Frictions and Fictions*, in *CEPS*, 22 August 2017, www.ceps.eu.

[3] According to Guidelines on Brexit negotiations of the European Council in the first phase of withdrawal talks the centre of gravity was on the rights of EU and UK citizens, the UK payments to the EU budget as well as issues related to Ireland and Northern Ireland. Only when sufficient progress was achieved, which was for the European Council to determine, the negotiations entered the next phase. See European Council Guidelines EUCO XT 20004/17 of 29 April 2017 following the United Kingdom's notification under Article 50 TEU, www.consilium.europa.eu, para. 4. See also Council Directives XT 21016/17 of 22 May 2017 for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, www.consilium.europa.eu, para. 19

[4] European Council Guidelines EUCO XT 20011/17 of 15 December 2017, paras 3-5.

[5] See Foreign & Commonwealth Office, Prime Minister's Office, 10 Downing Street, Department for Exiting the European Union, The Rt Hon Theresa May MP, *PM's Florence speech: a new era of cooperation and partnership between the UK and the EU*, 22 September 2017, www.gov.uk. For a commentary see, *inter alia*, M. EMERSON, *Stocktaking after Theresa May's Brexit speech in Florence: Key point – the transition, key omission – the future relationship*, in *CEPS*, 26 September 2017, www.ceps.eu.

available options and argues that the most sensible way forward, yet not necessarily agreeable to the UK, is an extension of two-year period laid down in Art. 50 TEU.[6] Any transitional arrangement will be a legal and political minefield, unnecessarily moving the centre of gravity away from what is the most important in the Brexit negotiations: closure of over forty years of the UK's membership in the EU and development of a long-term framework for a future EU-UK relationship.[7]

The analysis that follows is constructed in the following way. The sunset clause, that is Art. 50 TEU, is a starting point. The key questions that will be answered in section II are whether the provision in question is broad enough to accommodate such a transitional regime. Section III focuses on Art. 50 TEU as a transition. Finally, section IV is devoted to dossiers that should be covered in a transitional arrangement and proves that it may be very challenging for the UK and the EU to be on the same page.

II. Art. 50 TEU: does it provide for a transitional arrangement?

Art. 50 TEU is arguably the most well-known provision of the EU Founding Treaties.[8] Ever since the UK voters expressed a desire to leave the EU, it has constantly remained under political and legal microscopes.[9] It has proven to be a *lex imperfecta*: a badly drafted provision that was meant to discourage the Member States from activating it.[10] Some authors even argue that it was never meant to be used.[11] Just like Art. 49 TEU, which governs the

[6] See further E. Frantziou, A. Łazowski, *Brexit Transitional Period*, cit.

[7] For a historical account of UK's membership in the EU see, *inter alia*, A. Geddes, *Britain and the European Union*, Basingstoke: Palgrave, 2013.

[8] As P. Eeckhout and E. Frantziou put it: "Never before has a provision of EU law become so well known in such a short space of time as Article 50 TEU". See P. Eeckhout, E. Frantziou, *Brexit and Article 50 TEU: A Constitutionalist Reading*, in *Common Market Law Review*, 2017, p. 695.

[9] See, *inter alia*, F. Fabbrini (ed.), *The Law & Politics of Brexit*, Oxford: Oxford University Press, 2017; K. Armstrong, *Brexit Time*, cit.; J.A. Hillman, G. Horlick (eds), *Legal Aspects of Brexit: Implications of the United Kingdom's Decision to Withdraw from the European Union*, Washington: Institute of International Economic Law, 2017; M. Dougan (ed.), *The UK After Brexit: Legal and Policy Challenges*, Cambridge: Intersentia, 2017; M. Emerson (ed.), *Britain's Future in Europe. Reform, renegotiation, repatriation or secession?*, London: Roman & Littlefield International, 2016; S. Peers, D. Harvey, *Brexit: the Legal Dimension*, in C. Barnard, S. Peers (eds), *European Union Law*, Oxford: Oxford University Press, 2017, pp. 815-835; A.F. Tatham, *Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon*, in A. Biondi, P. Eeckhout, S. Ripley (eds), *EU Law after Lisbon*, Oxford: Oxford University Press, 2012, pp. 128-154; H. Hoffmeister, *Should I stay or Should I Go? A Critical Analysis of the Right to Withdraw from the EU*, in *European Law Journal*, 2010, p. 589; A. Łazowski, *Withdrawal from the European Union and Alternatives to Membership*, in *European Law Review*, 2012, p. 523; P. Nicolaides, *Withdrawal from the European Union: A Typology of Effects*, in *Maastricht Journal of European and Comparative Law*, 2013, p. 209; C.M. Rieder, *The Withdrawal Clause of the Lisbon Treaty in the Light of EU Citizenship: Between Disintegration and Integration*, in *Fordham International Law Journal*, 2013, p. 147.

[10] See C. Hillion, *Accession and Withdrawal in the Law of the European Union*, in A. Arnull, D. Chalmers (eds), *The Oxford Handbook of European Union Law*, Oxford: Oxford University Press, 2015, p. 142.

[11] See P. Eeckhout, E. Frantziou, *Brexit and Article 50 TEU*, cit., p. 703 and sources cited by the authors.

EU accession, it "is a sparse, framework provision [...] [i]t provides an outline of the basic process and procedural requirements".[12] Alas, it is the only legal framework for the Brexit negotiations and there is no way around it. Not surprisingly, the provision in question has been interpreted in several ways, both in the academic writing and in the political documents. A plethora of available academic analyses of Art. 50 TEU means that it deserves no general rehearsing in this contribution to the debate. However, since little attention has been paid to the possibility of providing a transitional arrangement, it is crucial to verify as a starting point if such a solution is permitted by the legal basis for EU withdrawal.

To begin with, the provision in question does not explicitly provide for any temporary solution. As per Art. 50, paras 2-3, TEU, a withdrawal agreement, regulating the terms of withdrawal and taking account of future relations, is negotiated between the EU and a departing country. If it does not enter into force within two years of notification of the intention to withdraw, a Member State departs the EU without any formal agreement.[13] In order to avoid such a cliff edge, the European Council has the option of extending the two-year deadline. As regulated in Art. 50, para. 3, TEU, for that to happen a unanimous decision of all Member States, including the departing country, is required. So, the question emerges whether the fact that Art. 50 TEU is silent on a possibility of transitional regime means that it is impossible. *Au contraire*, Art. 50 TEU, and a withdrawal agreement envisaged therein, are broad enough to accommodate for an interim solution.

Firstly, Art. 50 TEU does not operate in a legal vacuum, hence it deserves a reading in accordance with the generally established principles governing the interpretation of EU law.[14] Consequentially, it should be interpreted in the light of the principle of loyal cooperation laid down in Art. 4, para. 3, TEU. A brief reminder is fitting that this translates into an obligation imposed on the Member States to proceed with actions aimed at achievement of EU objectives. A flip side of that coin is the obligation to refrain from taking measures that could jeopardise the EU's aims and objectives. Both aspects of this fundamental principle of EU law apply to the parties negotiating a withdrawal agreement, including the exiting country, which formally remains a Member State until the actual date of exit.[15] Bearing this in mind, the underlying objective of the Brexit negotiations should be comprehensive regulation of the terms of departure and, at least, the foundations for future relationship. Arguably, this is envisaged by Art. 50 TEU, which provides explicitly that a withdrawal agreement should "take account of future relations" between

[12] D. Edward, N.N. Shuibhne, *"While Europe's eye is fix'd on mighty things": implications of the Brexit vote for Scotland*, in *European Law Review*, 2016, p. 482.

[13] See further on the unilateral withdrawal, *inter alia*, A. Łazowski, *Unilateral withdrawal from the EU: realistic scenario or a folly?*, in *Journal of European Public Policy*, 2016, pp. 1294-1301.

[14] See P. Eeckhout, E. Frantziou, *Brexit and Article 50 TEU*, cit.

[15] See, for instance, European Council Guidelines EUCO XT 20004/17, para. 25: "Until it leaves the Union, the United Kingdom remains a full Member of the European Union, subject to all rights and obligations set out in the Treaties and under EU law, including the principle of sincere cooperation".

the parties. This, if a need arises, encompasses also a transitional regime that would serve as a bridge between the past and the future.

Secondly, the EU opted for a narrow interpretation of Art. 50 TEU, as not permitting a comprehensive regulation in a single agreement not only of the terms of withdrawal but also of future relations. The opinions of commentators vary when it comes to interpretation of Art. 50 TEU in this respect. The present author belongs to the group which claims that Art. 50 TEU is broad enough to accommodate such a jumbo agreement.[16] However, in accordance with another school of thought, the withdrawal clause is designed only to regulate the terms of exit and, perhaps, some general framework for future relations, leaving the details of the future deal to a separate agreement negotiated in accordance with the standard procedure laid down in Art. 218 TFEU.[17] In its Guidelines on the Brexit negotiations the EU opted for the latter solution claiming that an agreement future relations can only be concluded when the UK departs the EU.[18] Furthermore, the EU also decided – against the will of the UK delegation – about the already mentioned sequencing of talks. While such an approach makes perfect sense in political terms, its credentials are questionable. One could even contemplate if such an approach were not in breach of the principle of loyal co-operation.[19] It should be noted that the opening of negotiations of future relations was conditional on "sufficient progress" being achieved in talks about the terms of withdrawal. This put key decisions in the hands of the EU and, as experience has proven, it is not a straight-forward affair. One of the consequences of sequencing, combined with slow progress in the negotiations of opening three dossiers, is the emerging need for the transitional regime. It is a common knowledge that the trade talks between the EU and third countries traditionally take years to accomplish. Thus, it is a sign of *naïveté* to believe that the two-year period laid down in Art. 50 TEU is long enough to accommodate the withdrawal negotiations and detailed arrangements for future relations (regulated in one or more agreements). To cut a story short, even if the withdrawal agreement is negotiated, approved and enters into force by the end of the

[16] See, *inter alia*, A. Łazowski, *Withdrawal from the European Union and Alternatives to Membership*, cit., p. 523-540.

[17] See, *inter alia*, J. Carmona Nunez, C.-C. Ciurlig, G. Sgueo, *UK Withdrawal from the European Union. Legal and Procedural Issues*, 27 March 2017, www.europarl.europa.eu.

[18] This conclusion is, *prima facie*, correct. However, it does not take into account that Art. 50 TEU itself looks into the future. While the term employed therein ("taking account of future relations") is not particularly fortunate, it does indicate that a withdrawal agreement can also regulate future relations. The key question is where to draw the line between "taking account of future relations" and regulating them comprehensively. To put it differently, which dossiers should be squeezed in into a withdrawal agreement and which would be regulated in a future agreement between the parties.

[19] As per Art. 4, para. 3, TEU: "[T]he Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".

two-year period, it would be almost impossible to conclude and ratify a comprehensive trade deal by 29 March 2019. In this scenario, Art. 50 TEU – read in the light of the principle of loyal co-operation – provides a general framework that may also cover a transitional regime. Without it, the bilateral relations between the EU and the UK would be reduced, until a fully-fledged future agreement is signed, to a mere WTO coverage. That would, in all likelihood, cause a political, legal and economic havoc of mass proportions.[20]

Thirdly, it is one thing to agree that a transitional regime is a legitimate way forward and has a legal basis. Quite a different kettle of fish is what it would entail. In this respect, the wording of Art. 50 TEU does not give any hints. Furthermore, there is no prior experience to rely on, hence it will have to be shaped by practice. When this *Article* was completed, the matter in question has just arrived on the table of the Brexit negotiations.[21] Yet, as mentioned above, it was quite present in the political discourse and in some of the official EU documents. In the first Guidelines of the European Council on Brexit negotiations a possibility of transitional arrangements was elaborated upon. According to the European Council, such a transitional arrangement must be clearly defined, limited in time and subject to effective enforcement mechanism.[22] This general idea was elaborated on further in the European Council Guidelines adopted on 15 December 2017 and expected to turn into a negotiating mandate for the European Commission.[23] At the same time, it was painfully visible that the UK's Government was desperately short of ideas, while the EU was waiting for Whitehall to end the internal negotiations within the Conservative Party and to come up with a credible plan for Brexit, including the transitional arrangements.[24] However, even those very patchy details, which emerged in the meantime, demonstrated rather two completely different visions of a transitional regime. For instance, the European Council, argues that it will demand acceptance of EU law post-withdrawal as well as jurisdiction of the Court of Justice.[25] The European Parliament also envisaged a similar transitional arrangement in its resolutions on Brexit negotiations, yet it was willing to accept it only for a maximum of three years.[26] At the same time, the UK's government offered a tautological explanation along the lines of the infamous "Brexit means Brexit" mantra and insisted on referring to

[20] As things stood when this *Article* was finalised, the withdrawal agreement will focus on several dossiers, including the UK's contributions to the EU budget, the rights of EU citizens residing in the UK and UK citizens residing in the EU as well as the status of the Northern Ireland post Brexit.

[21] The European Council decided on 15 December 2017 that enough progress was achieved in the negotiations to move to the next phase, including the negotiations of the transitional regime.

[22] European Council Guidelines EUCO XT 20004/17, para. II.6.

[23] *Ibidem*, paras 3-5.

[24] See, however, House of Lords, *Report: Brexit: deal or no deal*, 7 December 2017, www.parliament.uk.

[25] *Ibidem*.

[26] European Parliament resolution P8_TA-PROV (2017)0102 of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union, para. 28. See also European Parliament resolution P8_TA-PROV(2017)0490 of 13 December 2017 on the state of play of negotiations with the United Kingdom (2017/2964(RSP)), paras 12-15.

transitional arrangements as "implementation" phase.[27] However, even without clarification of what it meant, it was clear that continued application of EU law and the EU enforcement machinery would not be acceptable to the UK.

Fourthly, as argued by E. Frantziou and the present author in the previous contribution to the debate, Art. 50 TEU should be treated as a transition in itself.[28] This reading of the exit clause takes into account the mere fact that, as of the day of notification, a Member State is heading for the door, and – in consequence – it does not participate in all decisions of the European Council and the Council of the EU. Thus, implicitly, Art. 50 TEU is all about a transition and it could be argued that not only it provides a procedural path for an exit from the EU but also a legal basis for any transitional arrangements that may be necessary (and agreed by the parties).

Last but not least, one should also remember a controversial proposition to use the EEA as a transit zone. This is sometimes promoted in the political and academic circles, although it has been seemingly rejected by Whitehall.[29] The latter's decision should not be taken as set in stone, as the current UK's administration is quite well experienced in taking reverse ferrets. Nevertheless, the propagators of the EEA option do not seem to appreciate that, from the technical point of view, joining the EEA *ad interim* would be a complicated affair. Although the UK is currently a member of the EEA it remains so *qua* its EU membership. In order to remain in the EEA on a temporary basis it would, in all likelihood, have to leave the EU as well as the EEA on the day of Brexit. In order to become an EEA-European Free Trade Association (EFTA) State it would have to negotiate its membership of EFTA and then re-accession to the EEA. That would amount to continued coverage by EU law, participation in the decision-shaping as well as jurisdiction of the EFTA Court. But first and foremost, it would require approval of the three EFTA countries, which should not be taken for granted. Arguably, the complexities of such a transition from EU to EEA membership and the implications of the latter make this scenario merely an academic exercise.

This takes us back to Art. 50 TEU and what it permits for. The analysis presented above has proven that Art. 50 TEU is broad enough to accommodate a transitional regime. It may take two alternative forms: either an extension of the two-year deadline laid down therein or adoption of a tailor-made regime in the withdrawal agreement or a separate agreement.

[27] For instance during weekly questions to the Prime Minister at the House of Commons on 11 October 2017, the Prime Minister T. May said: "On the second point, I made very clear – perhaps I need just to explain it again to members of the Opposition – that when we leave the European Union in March 2019, we will cease to be full members of the single market and the customs union. That will happen because you cannot be full members of the single market and the customs union without accepting all four pillars – free movement; continued, in perpetuity, European Court of Justice jurisdiction. During the implementation period, we will be looking to get an agreement that we can operate on much the same basis as we operate at the moment – under the same rules and regulations – but that will not be the same as full membership of the customs union and the single market". See www.parliament.uk.

[28] E. Frantziou, A. Łazowski, *Brexit Transitional Period*, cit.

[29] As confirmed by the Prime Minister in September 2017. See *PM's Florence speech*, cit.

Both would require a fair degree of political will, while the second option would also necessitate employment of serious legal acrobatics. The first would mean, in a nutshell, that the UK would remain a Member State for a few more years, albeit operating in the withdrawal mode. This, as explained in section 3 of this *Article*, may be politically unacceptable for the hard-core Brexiteers and thus it would make it difficult for the UK to agree to. Furthermore, the complexities of negotiating a tailor-made transitional arrangement may ultimately mean that it would be impossible to agree on the deal before the expiry of the two-year period. To put it differently, one should not exclude a scenario that extension of deadline laid down in Art. 50 TEU would precede the entry into force of the withdrawal agreement and any transitional regime laid down therein.

III. Art. 50 TEU as a transition

Art. 50 TEU encapsulates rather well the peculiarities of withdrawal from the EU. It regulates the process whereby a Member State remains inside of the EU but, at the same time, it is progressing towards the exit door. As interpreted by the European Council in the Brexit Guidelines, the UK remains a fully-fledged member of the club, bound by the principle of loyal co-operation, until the date of exit.[30] Yet, at the same time, it is formally excluded from some meetings, or parts thereof, of the two EU councils. It is unquestionable that Art. 50 TEU serves as a bridge between the full membership and the future relations. Hence, the wording of its paragraph 2, determining that a withdrawal agreement extends to the terms of departure, taking account of the future relations. As already mentioned in the previous section of this *Article*, one may draw a conclusion that Art. 50 TEU is all about a transition, either from the membership to a future association – or any other form of close co-operation.[31] At the same time, should the option of non-regulated withdrawal be pursued, Art. 50 TEU may serve as a vehicle for transition from the membership to a legal vacuum.[32] Seen that way, Art. 50 TEU by itself offers a two-year long transitional period, which – as explained earlier – can be extended unanimously by the European Council acting in unison with the departing Member State. Of course, it is easier said than done.

To begin with, from the political point of view, the extension should not be perceived as *fait accompli*. Not only it may be tricky to reach a consensus between the remaining

[30] European Council Guidelines EUCO XT 20004/17, paras 25-27.

[31] When this *Article* was completed it was rather unclear what the objectives of the UK were. For instance, in May 2017 the UK Government claimed that: "we will seek an ambitious future relationship with the EU which works for all the people of the UK and which allows the UK to fulfil its aspirations for a truly global UK". The White Paper, where this statement was included, was full of ambitious, yet general objectives, which failed to clarify what kind of a future deal with the EU is being sought after. See Department for Exiting the European Union, The Rt Hon, *Policy paper: The United Kingdom's exit from, and new partnership with, the European Union*, 2 February 2017, www.gov.uk.

[32] As noted above, should the UK-EU negotiation end in a fiasco, the UK would leave the EU on unilateral basis without any formal agreement as to the past or future between the parties.

27 Member States but also the political shenanigans in Westminster could seriously undermine the feasibility of such a deal.[33] The thought of remaining in the EU for extra few years may be politically unacceptable, even if it were to the benefit to the UK's economy. Extension of the two-year period laid down in Art. 50 TEU would also bring a number of other political and legal questions to the fore. For instance, how many times and for how long the two-year deadline could be extended. Furthermore, would it be amenable to judicial review in accordance with Art. 263 TFEU?[34] Could it create a special status for the UK allowing it, for example, to negotiate (but not to conclude) agreements with third countries?[35] Overall, if this option were pursued, the UK would remain a Member State for two, or even more, years. It would fully participate in the EU institutions and policy-making. It would also remain bound by EU law and be subjected to the jurisdiction of the CJEU. The "business as usual" scenario would also require continued contributions to the EU budget. Bearing in mind that the EU's seven-year long financial cycle comes to an end in 2020, one could expect that the UK would be involved in negotiations of the next multi-annual budget. This could be a hard pill to swallow on both sides of the English Channel.

IV. Tailor-made transitional arrangement

IV.1. Introduction

The second option for a transitional regime is a tailor-made arrangement that would apply as of the date of withdrawal from the EU. As things stood when the present *Article* was published, this is where the Brexit negotiations were heading to. Following the meeting of the European Council on 19-20 October 2017, the EU has commenced internal preparations for the next phase of the withdrawal negotiations, which, among others, were to extend to a transitional regime.[36] As mentioned earlier in this *Article*, further details, though still rather sketchy, were approved by the European Council on 15 December 2017.[37] This opens up a plethora of legal issues that would have to be resolved either at the outset or later in course of the negotiations. The EU made its position clear, however it remained unknown what would be acceptable to the UK.

[33] As things stood when this *Article* was published, the PM T. May could not even count on unity on the Conservative benches at the House of Commons. See further: *Pro-EU rebels inflict Brexit defeat on May*, Financial Times, 14 December 2017.

[34] As per Art. 263 TFEU, decisions of the European Council, which produce effects *vis-à-vis* third parties may be subject to actions for annulment.

[35] As things stood when this *Article* was completed, the UK was not permitted under existing EU rules to negotiate or conclude trade agreements with third countries. See further, *inter alia*, A. Łazowski. R.A. Wessel, *The External Dimension of Withdrawal from the European Union*, in *Revue des Affaires européennes*, 2016, pp. 623-638.

[36] European Council Conclusions EUCO XT 20014/17 of 20 October 2017.

[37] European Council Guidelines EUCO XT 20011/17, paras 3-5.

Firstly, the question emerges whether provisions on the transition have to be included in the withdrawal agreement or, perhaps, they can find a home in separate bespoke deal. Secondly, what should be the institutional arrangements during the bridging phase. Should the UK remain fully involved in EU decision-making, or should it be kept at bay. Thirdly, how far should the de-integration go in terms of substance. To put it differently, which aspects of EU law would the UK remain to be bound by and in which policies would it participate in during the transition phase. All three dimensions of a transitional regime are analysed in turn.

IV.2. Where to regulate a transitional arrangement?

When the negotiations of a transitional arrangement start, the first dossier on the table should be finding a home for the interim framework. In theory, one could imagine at least two scenarios. Firstly, as currently planned by the EU, relevant provisions could be included in the withdrawal agreement itself. Secondly, one could envisage a separate agreement concluded between the EU and the UK. The latter option, however, would encounter serious procedural challenges of a choice of legal basis and actors involved. As is well-known, for any action of EU institutions one needs to find a substantive and procedural anchor in the Founding Treaties. While it is clear that Art. 50 TEU is a legal basis for conclusion of a withdrawal agreement, it is rather unclear if it is broad enough to cover also a separate treaty restricted to the transitional regime. Even more unclear is the possibility of using other provisions of TEU/TFEU as a legal basis (bases). Furthermore, one should take into account the practicalities of such an arrangement and the potential risks. If two agreements – that is the withdrawal agreement and the agreement on transitional arrangements – were to be signed in parallel, what would have happened if only the first were approved, but not the latter. One could argue, though, that such a solution would only work if both agreements were chained by a *guillotine* clause *a là* EU-Swiss Bilateral Package No 1.[38] To put it differently, only both could enter into force or none. However, the troubles with a legal basis and potential procedural shenanigans make this scenario rather impractical. This is probably one of the reasons why the European Council opts for inclusion of the transitional regime in the withdrawal agreement.[39] Hence, it will serve as a bridge between the past and the future. This, however, opens a political and legal minefield, which will be attended to during the Brexit negotiations, which are due to re-commence in early 2018.

[38] See Art. 1, para. 2, of Decision 2002/309/EC, Euratom of the Council and of the Commission of 4 April 2002 as regards the Agreement on Scientific and Technological Cooperation, on the conclusion of seven Agreements with the Swiss Confederation, p. 1. See further, on EU-Swiss relations, *inter alia*, L. Goetschel, *Switzerland and European Integration: Change Through Distance*, in *European Foreign Affairs Review*, 2003, p. 313; S. Breitenmoser, *Sectoral agreements between the EC and Switzerland: contents and context*, in *Common Market Law Review*, 2003, p. 1137; F. Emmert, *Switzerland and the EU: Partners, for Better or for Worse*, in *European Foreign Affairs Review*, 1998, p. 367.

[39] European Council Guidelines EUCO XT 20011/17, para. 4.

The first question is for how long the interim arrangement should apply and whether it would be fitting to envisage a possible extension of the transitional period, should the negotiations of a fully-fledged trade agreement experience delays.[40] When it comes to first, the European Council makes it clear that the transitional regime will have to be limited in time.[41] The European Parliament firmly talks about a three-year regime.[42] The UK seems to prefer a two-year transition. It should be noted that any extension of an agreed timeframe would be problematic. For instance, what kind of *modus operandi* would apply? Nevertheless, bearing in mind the complexities of a fully-fledged post-Brexit free trade agreement, it would be sensible to provide for a fixed term transitional period with a possibility of extension. It is rather likely that the future relations would be regulated in a mixed agreement requiring ratification of the EU, Euratom and all remaining Member States of the EU. Experience proves that a positive outcome should not be considered *fait accompli.* Furthermore, it would take months, if not years, for all procedures to be completed. Thus, common sense dictates creation of a mechanism allowing for extension of the transitional regime. Although it would be mainly an escape hatch, it could prove to be a too bitter a pill to swallow for the hard-core Brexiteers.

IV.3. Institutional and substantive aspects of a tailor-made transitional arrangement

a) *Institutional aspects of the transitional arrangement*

The negotiations of a transitional arrangement are likely to be a complicated affair. For the EU it is a matter of protecting its uniformity as well as maintaining the homogeneity of its legal order.[43] As put in a straight-forward fashion in the European Council Guidelines of 15 December 2017: "Such transitional arrangements, which will be part of the Withdrawal Agreement, must be in the interest of the Union, clearly defined and precisely limited in time".[44] To begin with, a decision will have to be made as to the formal status of the UK during the transition period and the extent to which it would be bound by the principle of loyal co-operation. The analysis of existing political statements and formal positions of the EU institutions as well as the UK's government seems to imply that the

[40] This is perfectly possible bearing in mind the idiosyncrasies of mixed agreements and most recent shenanigans with ratification of trade agreements with Canada and Ukraine. For an academic appraisal see, *inter alia*, G. Van der Loo, R.A. Wessel, *The Non-Ratification of Mixed Agreements: Legal Consequences and Options*, in *Common Market Law Review*, 2017, pp. 735–770.

[41] European Council Guidelines EUCO XT 20011/17, para. 4.

[42] European Parliament Resolution P8_TA-PROV (2017)0102 of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union, para. 28; European Parliament Resolution P8_TA-PROV(2017)0490 of 13 December 2017 on the state of play of negotiations with the United Kingdom, para. 12.

[43] See the principles governing the Brexit negotiations, which have been unequivocally defined in the European Council Guidelines EUCO XT 20004/17, para. I.

[44] European Council Guidelines EUCO XT 20011/17, para. 4.

transitional regime will apply as of the formal date of departure from the EU. This means that the UK would no longer be a Member State of the EU when the transitional regime commences. It is unclear, though, what exactly would be its status. This is a matter of constitutional importance, which will have to be addressed early in the negotiations. Furthermore, the status of the UK will be inextricably linked with the substance of transitional arrangement. This is up for the negotiations, however the European Council has made its position clear in its Guidelines of 15 December 2017. They provide as follows:

> "In order to ensure a level playing field based on the same rules applying throughout the Single Market, changes to the acquis adopted by EU institutions, bodies, offices and agencies will have to apply both in the United Kingdom and the EU. All existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures will also apply, including the competence of the Court of Justice of the European Union. As the United Kingdom will continue to participate in the Customs Union and the Single Market (with all four freedoms) during the transition, it will have to continue to comply with EU trade policy, to EU customs tariff and collect EU customs duties, and to ensure all EU checks are being performed on the border vis-à-vis other third countries".[45]

The key question is whether any of the above will be agreeable to the UK. Furthermore, to turn such a political statement into law may prove to be challenging. For instance, if the UK were to remain part of the Internal Market, it would be covered by all relevant principles. Thus, an essential question emerges whether post-Brexit the UK can be still bound by the EU Founding Treaties. In this respect at least two solutions seem imaginable. The first option is that the withdrawal agreement would provide a list of TEU/TFEU/Euratom provisions, which would apply to the UK once it departs from the EU. Such a solution would be problematic at many levels. Most importantly, since the UK will cease to be a Member State, could it be bound by provisions, which exclusively apply to members of the club? Furthermore, the question is whether such an extension of the scope of application *rationae personae* to a third country could be provided in the withdrawal agreement, which – in the hierarchy of sources of EU law – will be subordinate to the EU Treaties. This would be legally problematic, to say the least. Hence, as an alternative, one could envisage either inclusion in the withdrawal agreement of provisions replicating relevant sections of TEU/TFEU/Euratom or their list. The first would be along the lines of the Agreement on the EEA, which in many places mirrors what is now the TFEU.[46] This, however, is just the tip of the iceberg as the UK would also have to comply with

[45] European Council Guidelines EUCO XT 20011/17, para. 4.

[46] TFEU was the Treaty establishing the European Economic Community (EEC Treaty) at the time when the EEA Agreement was negotiated.

relevant EU secondary legislation, including the EU Customs Code.[47] Following the practice known from the EEA (and, to a degree also a handful of other international agreements between the EU and third parties) one can expect annexes with long lists of relevant EU *acquis*, that the UK would be expected to comply with.[48] This triggers a number of fundamental questions about the selection and enforcement of such legal acts, participation of the UK in EU decision-making, and the jurisdiction of the CJEU. A taste of what is expected by the EU is clearly visible in the quoted above European Council Guidelines of 15 December 2017.

Firstly, the negotiators would be asked to come up with lists of EU secondary legislation that the UK would remain bound by *après* Brexit. It does not require a broad imagination to picture bitter disputes between the two sides as to the exact scope of the UK's commitment. The formal position of the European Council indicates that the EU expects the UK to comply with EU *acquis,* currently applicable to it. This would include the highly contentious free movement of persons legislation. In this respect one can already detect a potential legal and political clash as the UK is planning to introduce new legislation replacing the current regime applicable *qua* EU law as of the day of Brexit.[49] However, the overall scope of the obligations resting on the shoulders of the UK would largely depend on its substantive involvement in EU matters during the transition period. Judging by the wording of the European Council Conclusions of 15 December 2017, the EU negotiating team will not have the flexibility of a yoga teacher.

Secondly, as is well known, the EU provides for a new legal order, which benefits from doctrines of primacy, direct and indirect effect as well as state liability. Many types of legal acts are directly enforceable in national courts and, in accordance with well-established case-law of the Court of Justice, they are a direct source of rights of individuals that the national courts have the obligation to protect.[50] From the day of the UK's accession to the

[47] Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, p. 1.

[48] See, *inter alia*, Association Agreement of 21 March 2014 between the European Union, the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, p. 3; Association Agreement of 30 August 2014 between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, p. 4; Association Agreement of 27 June 2014 between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, p. 4. For an academic appraisal see, *inter alia*, G. VAN DER LOO, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area. A New Legal Instrument for EU Integration Without Membership*, Leiden: Brill, 2016.

[49] See, for instance, Home Office, Prime Minister's Office, 10 Downing Street, UK Visas and Immigration, Department for Exiting the European Union, and Foreign & Commonwealth Office, *Policy paper: Safeguarding the position of EU citizens in the UK and UK nationals in the EU*, 26 June 2017, www.gov.uk.

[50] See, inter alia, B. DE WITTE, *Direct Effect, Primacy, and the Nature of the Legal Order*, in P. CRAIG, G. DE BÚRCA, *The Evolution of EU Law*, Oxford: Oxford University Press, 2011, pp. 323-362; D. LECZYKIEWICZ, *Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability*, in A. ARNULL, D. CHALMERS (eds), *The Oxford Handbook of European Union Law*, cit., pp. 212-248; A. CAPIK,

European Communities, EU law has been directly enforceable *qua* European Communities Act 1972.[51] The question is how would the EU legal acts covered by the transitional regime be applicable in the UK when it leaves the EU. On the one hand, it is clear that the EU will insist on maintenance of *status quo* and application of the tenets of EU law.[52] On the other hand, the EU (Withdrawal) Bill does not envisage a transitional period scenario; however, it is due to maintain some of the effects of EU secondary legislation in the legal orders of the UK as of the date of Brexit. It is likely that during the negotiations of the transitional arrangements, EU regulations and their direct applicability may be a source of intellectual headaches. As things stood when this *Article* was completed, EU regulations would cease to be directly applicable in the UK when the Bill turns into an Act of Parliament and, as planned, enters into force on the date of withdrawal. The question is how to reconcile that with what the European Council demands, including respect for *effet utile* of EU law, a principle that the Court of Justice is a forceful guardian of. At this stage of the withdrawal negotiations it is unclear whether a continued direct application of EU regulations would be agreeable to the UK or whether a commitment along the lines of Arts 6-7 of the EEA Agreement would be more fitting and acceptable.[53] To put it differently, the UK would be under an obligation to secure effective enforcement of relevant EU legislation but without the obligation to guarantee the direct applicability of regulations. The negotiations will not be limited to the latter but will cover, in more general terms, the application of the doctrines of primacy, direct and indirect effect as well as state liability post-Brexit. Arguably, these fundamental constitutional issues would have to be attended to early in the negotiations of the transitional regime.

Thirdly, UK's continued participation in the Customs Union, the Internal Market or any other policy of the EU would require institutional involvement of its representatives. This will, no doubt, be a very thorny issue in the negotiations. The European Council made it clear in its Guidelines of 15 December 2017 that the UK "as a third country, will no longer participate in or nominate or elect members of the EU institutions, nor participate in the decision-making of the Union bodies, offices and agencies".[54] On the one hand, the language employed by the European Council suggests a *fait accompli*. On the other hand, one can imagine at least two alternative arrangements. The first option is to maintain status quo, which in reality would be rather tricky to accommodate, bearing in mind that

Five Decades since Van Gend en Loos and Costa came to town: primacy, direct and indirect effect revisited, in A. ŁAZOWSKI, S. BLOCKMANS (eds), *Research Handbook on EU Institutional Law*, Cheltenham: Edward Elgar, 2016, pp. 379-420.

[51] For a comprehensive analysis see, *inter alia*, D. NICOL, *EC Membership and Judicialization of British Politics*, Oxford: Oxford University Press, 2001.

[52] European Council Guidelines EUCO XT 20011/17, para. 4.

[53] Further on reception of EU law in the EEA and its application see, *inter alia*, C. BAUDENBACHER (ed.): *The Handbook of EEA Law*, Cham-Heidelberg-New York-Dordrecht-London: Springer, 2015; *The Fundamental Principles of EEA Law*, Cham-Heidelberg-New York-Dordrecht-London: Springer, 2017.

[54] European Council Guidelines EUCO XT 20011/17, para. 3.

the UK is expected to leave the EU when the transitional phase commences. The second, and a more achievable option, is that the UK would have a status comparable to the EEA-EFTA countries and Switzerland.[55] It would be entitled to participation in so-called decision-shaping but not decision-making proper. This would have several advantages for the EU, mainly that the UK would be no longer fully involved in EU institutions. It would not have the right to have a member of the European Commission or elected members of the European Parliament. In that scenario, it would also lose the right to appoint the judges or advocates general at the Court of Justice. Yet, it would not be completely out of the loop. For the UK the advantages of such an option are limited, as its status would be downgraded from a fully-fledged law-maker to a law-taker, at the mercy of twenty-seven EU Member States. Still, however, it would be better than being completely cut-off from the EU decision-making as it would allow the UK diplomats to make attempts at shaping of EU legislation. The option outlined in the European Council Guidelines of 15 December 2017 would be the worst possible scenario for the UK.

Fourthly, the EU is insisting on continued jurisdiction of the Court of Justice *vis-à-vis* the UK.[56] As already noted, if the option of participation in the Internal Market or the Customs Union is chosen, it is inevitable that the UK would be required to apply EU legislation. Consequentially, as the European Council made it clear, the UK would be expected to remain subject to relevant enforcement procedures and scrutiny of compliance. It is questionable whether the infringement proceedings laid down in Arts 258-260 TFEU as well as the preliminary ruling procedure (Art. 267 TFEU) could apply to a former Member State, which would no longer be a party to the TFEU. In this respect, the options seem twofold. Firstly, the withdrawal agreement (or any other agreement regulating a transitional regime) could provide a cross-reference to relevant provisions of TFEU. In the alternative, similar tailor-made *modi operandi* could be developed in course of negotiations and relevant provisions inserted into the withdrawal agreement. Either way, the EU will be driven by the objective need to preserve the effectiveness and homogeneity of EU law. This is likely to translate into a rather non-flexible negotiation stance that would be hard to reconcile with the priorities of the UK's government.

b) *Substantive aspects of the transitional arrangement*

As already mentioned, one of the fundamental issues that will have to be resolved, as the both sides engage in negotiations of the transitional regime, is which substantive dossiers should the deal extend to. To put it differently, it will be essential to agree on the post-Brexit involvement of the UK in the Internal Market, the Customs Union as well as other internal and external policies pursued by the EU. On the EU side things seem to be clear.

[55] See further, *inter alia*, C. TOBLER, *One of Many Challenges After 'Brexit': Institutional Framework of an Alternative Agreement – Lessons from Switzerland and Elsewhere?*, in *Maastricht Journal of European and Comparative Law*, 2016, pp. 575-594.

[56] European Council Guidelines of 15 December 2017, EUCO XT 20011/17, para. 5.

Guidelines of the European Council of 15 December 2017 leave little doubt that the UK is expected to remain fully committed to Internal Market and Customs Union. Yet, with very limited information as to the current intentions of the UK's government it is hard to predict where the debate and the negotiations would go from here. According to the media reports, the business community is becoming ever more concerned with the uncertainties that lay ahead. Many business leaders urge the government to provide for a transitional regime resembling the pre-Brexit arrangement as much as possible. If that were the case, it would amount to participation in key policies requiring compliance with EU primary and secondary legislation. This, as explained above, would be rather problematic for the British negotiators. Furthermore, it would necessitate, as made it clear by the European Council, acceptance of the jurisdiction of the Court of Justice. As well known, ending of the latter, is one of the red lines of the UK's current government.

To give the above more substance it is worth exploring the consequences of maintaining the status quo regarding the Internal Market of the EU. It comprises the four freedoms which, as made clear in the European Council Guidelines for Brexit negotiations, are indivisible.[57] If the transitional regime were to extend the application of Internal Market principles to the UK post-Brexit, it would require acceptance of not only free movement of goods but also free movement of persons. As is well known, this is a highly contentious matter in the UK public discourse and allegedly one of the reasons behind the referendum success of the "Vote Leave" camp. More complexities would be added, if the transitional regime – as demanded by the European Council – were to cover the Customs Union. To what extent would the UK be involved in everyday functioning of the Customs Union? Would it be allowed to negotiate trade agreements with the outside World as long as they would not enter into force before the expiry of the inter-temporal regime? Would and should the UK be engaged in negotiation of trade agreements it may never be a party to, once it leaves the EU? The European Council Guidelines of 15 December 2017 make it clear that the UK would be expected to comply with EU's trade policy towards the outside World. Hence, this implies that the UK would not be permitted to negotiate and to sign trade agreements. It is not certain, though, whether – as a third country – it would remain bound by hundreds of international treaties applicable to EU and its Member States during the transitional period.

Another fitting example would the co-operation in police and criminal matters. Although the UK is covered by an opt-out, it remains bound by several pieces of EU *acquis* it has opted in over the years. This includes a highly contentious, yet useful, Framework Decision on the European Arrest Warrant.[58] Without a transitional regime covering the legal act in question, the UK would, on the date of EU withdrawal, cease to be part of this well-

[57] European Council Guidelines EUCO XT 20004/17, para. I-1.

[58] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. For an academic appraisal see, *inter alia*, N. KEIZER, E. VAN SLIEDREGT (eds), *The European Arrest Warrant in Practice*, The Hague: Asser Press, 2009.

established procedural framework for fast-track extradition. That would have serious legal and security implications, unless a transitional regime provided for continuous application of the European Arrest Warrant legislation, or even more of the mutual recognition instruments that the UK has opted in, was secured.[59] These examples are, of course, presented as part of the sampling exercise. Yet, they demonstrate rather well the challenges ahead.

V. Conclusions

This *Article* proves that a Brexit transitional arrangement is a tempting political proposition, which will be very difficult to turn into reality. The first option is extension of the two-year deadline laid down in Art. 50 TEU. This, however, may not be a straight-forward affair. On the one hand, Art. 50 TEU itself is transitional in nature. It envisages reduction of the involvement of a departing Member State in the everyday work of the EU and, as argued above, serves as a bridge between the EU membership and future relations in any shape or form. On the other hand, the internal UK politics of Brexit makes the extension of the two-year period laid down in Art. 50 TEU rather unlikely. For hard-core Brexiteers it is unimaginable that the UK could remain a member state for longer than necessary, that is beyond 29 March 2019. Furthermore, one should not take for granted that unanimity between the Member States, needed for the extension, would be a *fait accompli*. As things stood when this *Article* was completed, the negotiations of a tailor-made transitional regime to be included in the withdrawal agreement were to commence in early 2018. While both the EU and the UK seemed to have agreed that such a solution was desirable, their objectives were, at least *prima facie*, hard to reconcile. The European Council adopted its Guidelines on 15 December 2017. The wording employed by the EU seems to imply that very little can be negotiated and its stance on key principles governing the future transition is strong and stable. While the UK's position on the essential elements of implementation phase is weak and wobbly, it is – nevertheless – rather clear that it will be very difficult to square the circle. As demonstrated in this *Article*, negotiating a transitional arrangement is a legal minefield with a large number of fundamental issues requiring solutions acceptable to both sides. Any transitional arrangement for Brexit is politically appealing, but legally problematic. Arguably, the plethora of potentially contentious issues that would need to be solved during the negotiations of a transitional period makes one question very legitimate: are they worth the candle? Bearing this in mind it can be argued that negotiation of the transitional arrangement may prove to be as tricky as negotiation of terms and conditions of withdrawal. With a very tight framework for both one can even imagine the following sequence: first the extension of Art. 50 TEU, followed by entry into force of the withdrawal agreement and a transitional period laid

[59] See, House of Lords, European Union Committee, *Brexit: future UK-EU security and police cooperation*, 16 December 2016, www.parliament.uk.

down therein. It only proves that, as the present author argued in the earlier contributions to the debate, a withdrawal from the EU is possible but it will be a very complicated and resource-thirsty exercise.

ARTICLES

EXPLAINING THE EU'S LEGAL OBLIGATION FOR DEMOCRACY PROMOTION: THE CASE OF THE EU-TURKEY RELATIONSHIP

PAUL JAMES CARDWELL*

TABLE OF CONTENTS: I. Introduction. – II. The "democracy" in EU democracy promotion. – III. The EU-Turkey relationship. – IV. Analysing democracy promotion in the EU-Turkey relationship. – IV.1. Positive/express democracy promotion. – IV.2. Negative/express democracy promotion. – IV.3. Positive/implied democracy promotion. – IV.4. Negative/implied democracy promotion. – V. Conclusion.

ABSTRACT: The EU has a Treaty-based obligation to promote democracy in the wider world, with a particular emphasis on neighbouring States. Doctrinal approaches to EU democracy promotion generally focus on a specific set of instruments, whereas the law of external relations underpins a much wider set of policies and practices relating to democracy promotion. This *Article* applies four categories of democracy promotion (on a positive/negative and express/implied axis) to a case study of the EU-Turkey relationship. The wider scope provided by this categorisation demonstrates that democracy promotion should not only be seen within the confines of "positive" measures such as enlargement conditionality but also by measures and practices which are often hidden from view. In doing so, a richer understanding of how the law of the EU's external relations informs policy and practice can be gained.

KEYWORDS: European Union – democracy promotion – Turkey – external relations – CFSP – normative power Europe.

I. INTRODUCTION

The EU has tasked itself with promoting democracy as a "value" in all its external relationships. The TEU lists "democracy" as one of the values upon which the EU is founded

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and hence obliges it to uphold and promote democracy across the globe.[1] As such, we find an expression in the Treaty of the oft-cited characterization of the Union and its identity as a "normative power".[2]

This *Article* focuses on how the legal obligation translates into the practices of EU democracy promotion. Since a doctrinal legal analysis of democracy promotion would likely only capture a select number of measures identifiable as serving this aim, casting a wider net enables legal scholarship to appreciate the diversity of instances where democracy promotion plays a role in EU external relations. The notion of democracy promotion here is therefore wider than that associated with "activities", which has informed much recent research.[3] Whilst a rich body of work in political science/international relations scholarship has explored democracy promotion, particularly since the emergence of the Common Foreign and Security Policy (CFSP) in the TEU in 1992, there is a need for legal scholarship to account for this phenomenon too. This is for three reasons. First, because the nature of "democracy" promoted by the EU (even accounting for its vague parameters) is intrinsically rule-based: the rule of law and human rights protection are integral components of the values of "democracy".[4] Second, that the instruments and conduct of the EU's external relations are underpinned by legal dynamics, whether these be contractual relations with third States (including enlargement, trade or development) or the use of legal instruments as threats (such as restrictive measures (sanctions)). Third, understanding how the legal obligation of the EU is pursued, even in ways which are indirect or hidden within other aims, allows us to more fully appreciate the extent to which the EU can be characterized as a global (legal) actor and promoter of democracy.

The contribution thus is to demonstrate how the wide variety of policies and practices within the context of a bilateral relationship with a third State and legal space provide a fuller understanding of democracy promotion by the EU and its claim to normativity. A four-part categorization is used, exploring positive and negative, express and implied instances of democracy promotion.[5]

[1] Arts 2 and 3, para. 5, TEU.

[2] See I. MANNERS, *Normative Power Europe: A Contradiction in Terms?*, in *Journal of Common Market Studies*, 2002, p. 235 *et seq*.; I. MANNERS, *The Normative Power of the European Union in a Globalized World*, in Z. LAÏDI, *EU Foreign Policy in a Globalised World*, Abingdon: Routledge, 2008, p. 23 *et seq*.; R.A. DEL SARTO, *Normative Empire Europe: the European Union, its Borderlands, and the Arab Spring*, in *Journal of Common Market Studies*, 2016, p. 216.

[3] See, for example, A. WETZEL, J. ORBIE, F. BOSSUYT, *One of What Kind? Comparative Perspectives on the Substance of EU Democracy Promotion*, in *Cambridge Review of International Affairs*, 2015, p. 21 *et seq*.

[4] It is not always possible to distinguish "democracy" and "human rights" in EU discourse, which are often grouped together as "political reforms". As such, although the focus of this *Article* is democracy promotion, this includes consideration of both human rights and the rule of law as a constituent element.

[5] As developed in P.J. CARDWELL, *Mapping Out Democracy Promotion in the EU's External Relations*, in *European Foreign Affairs Review*, 2011, p. 21 *et seq*.

The case study used to demonstrate the different types of democracy promotion at play is the EU-Turkey relationship. The EU-Turkey relationship is one which does not easily in a single frame: the EU's legal, economic and political ties with Turkey sit alongside tensions around migration, security and democratization. The period since 2005 forms the basis of the study, as this marked the point when EU enlargement negotiations with Turkey were officially opened. But although significant, the EU-Turkey relationship is not merely one based on enlargement, given Turkey's "dynamic economy, its strategic location and its important regional role",[6] which distinguishes it from all other (recent) candidate States.

Contemporary relations have been partly structured by the impact of the EU-Turkey migration cooperation "statement" (2016) but also heightened tensions following the attempted *coup d'état* in Turkey in July 2016. The EU institutions condemned the attempted *coup* but have expressed concern at the subsequent government crackdown on civil society and national institutions.[7] Nevertheless, despite the turbulence, the depth of the bilateral economic, political and cultural relationship means that there is an opportunity to explore a wide variety of democracy promotion efforts. The place of democracy promotion and whether the EU is ready to compromise on enforcing its stated values is especially pertinent in light of the strategic role played by Turkey in Europe's migration control and security agendas.

The *Article* does not suggest which of the democracy promotion categories might have the most democratising effect on Turkey, nor whether the "democracy" being promoted is example of a changing (neo-)liberal focus within Europe.[8] Rather, it demonstrates that democracy promotion should not be seen within the confines of the "positive" measures such enlargement process conditionality or specific funding instruments. In putting forward a better understanding of democracy promotion *via* a wider scope of analysis and drawing on insights from political science literature, the *Article* concludes that the EU's claim to be a normative power may still hold, even if the values associated with democracy promotion efforts may be sidelined in favour of other goals, such as migration control and security. The legal dynamics that underpin EU democracy promotion nevertheless help us to better understand both the richness of EU external relations law and policy, their operationalization and relationship with democratic values.

[6] Communication COM(2012) 600 final of 10 October 2012 from the Commission to the European Parliament and the Council on Enlargement strategy and main challenges 2012-2013, p. 16.

[7] Commission Staff Working Document SWD(2016) 366 final of 9 November 2016, *Turkey 2016 Report – Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2016 Communication on EU Enlargement Policy COM(2016) 715 final*, www.ec.europa.eu.

[8] A. WETZEL, J. ORBIE (eds), *The Substance of EU Democracy Promotion*, Basingstoke: Palgrave, 2005.

II. The "democracy" in EU democracy promotion

The Treaty states that the EU is "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights".[9] This translates to a commitment to "uphold and promote its values" in relations with the wider world.[10] The Treaty of Lisbon introduced Art. 21, para. 1, TEU, which stipulates that the EU's international action, "shall be guided by the principles which have inspired its own creation, development and enlargement". These principles include democracy, the rule of law and human rights. The Court of Justice has, in the EU's internal legal order, ensured that these principles are a distinctive part of general EU law.[11] The values in the Treaty are no longer specified as those which are common to the Member States, but rather to the EU itself as an autonomous actor.[12] Legal scholarship has explored what these values constitute in practical expressions of EU external relations and the institutions responsible for their promotion.[13]

The Treaty calls for specific actions at the EU level to "safeguard its values",[14] to "consolidate and support democracy"[15] and to "promote an international system based on stronger multilateral cooperation and good global governance".[16] This provision lays a foundation for the export of EU norms and, with Art. 3, para. 5, TEU, a legal basis.[17] The Treaty makes special mention of the relationship with neighbouring countries and links with the EU's values (rather than *shared* values with the neighbours). In this respect, the EU is charged with establishing "an area of prosperity and good neighbourliness, founded on the values of the Union".[18] The EU's Global Strategy and other recent foreign policy documents place great emphasis on "resilience" of States and societies,

[9] Art. 2 TEU.

[10] Art. 3, para. 5, TEU.

[11] B. De Witte, *The EU and the International Legal Order: the Case of Human Rights*, in M. Evans, P. Koutrakos, *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World*, Oxford: Hart Publishing, 2011, p. 127 *et seq*.

[12] P. Koutrakos, *EU International Relations Law*, 2015, Oxford: Hart Publishing, p. 419.

[13] See, *inter alia*, A. Magen, *The Rule of Law and its Promotion Abroad: Three Problems of Scope*, in *Stanford Journal of International Law*, 2009, p. 51 *et seq*.; M. Cremona, *Values in EU Foreign Policy*, in M. Evans, P. Koutrakos, *Beyond the Established Legal Orders*, cit., p. 275 *et seq*., L. Pech, *Rule of Law as a Guiding Principle of the European Union's External Action*, CLEER Working Papers, no. 3, 2012.

[14] Art. 21, para. 2, let. a), TEU.

[15] Art. 21, para. 2, let. b), TEU.

[16] Art. 21, para. 2, let. h), TEU.

[17] C. Hillion, *Anatomy of EU Norm Export Towards the Neighbourhood*, in P. Van Elsuwege, R. Petrov, *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union*, Abingdon: Routledge, 2014, p. 15 *et seq*.

[18] Art. 8, para. 1, TEU. For further exploration of the nature of "good neighbourliness", see the contributions to: D. Kochenov, E. Basheska (eds), *Good Neighbourliness in the European Legal Context*, Leiden: Brill Nijhoff, 2015.

particularly those in the EU neighbourhood, and make an explicit link between the promotion of democracy in third countries and maintaining democracy within the EU.[19]

There is thus a clear, if general, mandate to promote democracy beyond the EU's borders. "Democracy" is not defined in the Treaties, which is perhaps not surprising since the democratic nature of the EU itself is contested insofar as it is "not about overcoming its democratic nation states, but about managing democratic interdependence".[20] Ongoing debates within the EU about how to tackle democratic "backsliding" in Hungary and Poland reveal the thorny nature of where the limits of democracy lie, and what to do about it. When transplanted to the external sphere, the challenges of the EU as a non-State polity promoting democracy in a third State is no less difficult. As such, Kurki has characterised the EU's democracy promotion as based on a "fuzzy" framework when compared to the logics followed by the US, but also by other international or non-governmental organisations.[21]

The Treaty of Lisbon introduced a section entitled "Provisions on Democratic Principles". These four articles are not concerned with external democracy promotion *per se*. However, they give some insight into the values of democratic legitimacy signalled by Art. 21, para. 1, TEU. The provisions focus on Parliamentary accountability and representative democracy as the foundation of the EU's functioning.[22] This reminds us (and recalls the argument by Manners)[23] that what the EU *is* affects what it *does* externally as a normative actor.

Unlike in the academic literature, within official EU discourse, "democracy support" is generally preferred to "democracy promotion". The use of the former term gives less of an impression of a one-size-fits-all approach and recognition that the category of States where democracy is a subject of concern or discussion is very wide. As a consequence, as Pace has argued in the Mediterranean context,[24] this means that EU policy-making suffers from incoherence in terms of objectives. In official documentation, frequent references are made to emphasising "common" and "shared" values between the EU and a third State, even in instances where the two would appear to have little in common in terms of democratic governance. Frequent reference is made to instruments of international law

[19] High Representative of the Union for Foreign Affairs and Security Policy: *A Global Strategy for the European Union's Foreign and Security Policy: Shared Vision, Common Action: A Stronger Europe*, 28 June 2016, www.europa.eu; *From Shared Vision to Common Action: Implementing the EU Global Strategy Year 1*, 7 June 2017, www.europa.eu.

[20] J. NEYER, *Justice and the Right to Justification: Conceptual Reflections*, in D. KOCHENOV, G. DE BÚRCA, A. WILLIAMS (eds), *Europe's Justice Deficit?*, Oxford: Hart Publishing, 2015, p. 211 *et seq*.

[21] M. KURKI, *Fuzzy Liberalism and EU Democracy Promotion: Why Concepts Matter*, in A. WETZEL, J. ORBIE (eds), *The Substance of EU Democracy Promotion*, Basingstoke: Palgrave, 2005, p. 35 *et seq*.

[22] Art. 10, para. 1, TEU

[23] I. MANNERS, *Normative Power Europe: A Contradiction in Terms?*, cit.

[24] M. PACE, *Paradoxes and Contradictions in EU Democracy Promotion in the Mediterranean*, in *Democratization*, 2009, p. 39 *et seq*.

(especially if signed by the third State), or a pre-existing legal framework with the EU (such as the Cotonou Agreement with African, Caribbean and Pacific States) or within the State's own region as a means of signifying what values these might be. At the same time, this vagueness represents a recognition of a differentiation of values in a process of dialogue where the EU is considering deeper cooperation with a third State. But the nature of what values are "shared" can be varied according to the EU's own interests. As Leino has observed,[25] the "universal" language can be used to promote its own objectives and therefore is not something genuinely shared, but a "false universal".

The common or shared values are thus difficult to identify in their entirety with any certainty, even if aspects of democracy can be crystallised into a core sub-set of values (as Pech has argued in the case of the rule of law).[26] Taken as a whole, the difficulties reflect the even more fundamental question of what *type* of democracy the EU itself embodies beyond the general principles of law identified by the Court of Justice in the absence of a definition in the Treaty. Needless to say, the under-determination of objectives has an impact on democracy promotion efforts.[27] The risk with a differentiated approach is that the EU's reiteration of its strong commitment to promoting democracy includes an in-built downgrading of democracy when other interests are at stake. Common/shared values can be stressed if the aim is to demonstrate that cooperation, rather than criticism, is sought with the third State(s) in question. The way in which the obligation to promote democracy and democratic values in the wider world is thus uneven, and perhaps unavoidably so.

As the EU's Global Strategy notes,[28] ensuring security, economic prosperity and stability in the Mediterranean has clear and tangible benefits for the EU. The former CFSP High Representative explicitly made this point in terms of "respecting and promoting the rule of law as well as fundamental rights and freedoms not only defines the EU but is also in our interest".[29] The EU's stated emphasis is on long-term, incremental changes rather than short-term achievements,[30] though this is brought into question (to take an example from the case study here) by the speed at which accession negotiations were

[25] P. LEINO, *The Journey Towards All that is Good and Beautiful: Human Rights and 'Common Values' as Guiding Principles of EU Foreign Relations Law*, in M. CREMONA, B. DE WITTE (eds), *EU Foreign Relations Law; Constitutional Fundamentals*, Oxford: Hart Publishing, 2008, p. 259 *et seq.*, p. 265.

[26] L. PECH, *Promoting the Rule of Law Abroad: On the EU's Limited Contribution to the Shaping of an International Understanding of the Rule of Law*, in D. KOCHENOV, F. AMTENBRINK (eds), *The European Union's Shaping of the International Legal Order*, Cambridge: Cambridge University Press, 2013, p. 129.

[27] M. KURKI, *Fuzzy Liberalism and EU Democracy Promotion: Why Concepts Matter*, cit.

[28] High Representative of the Union for Foreign Affairs and Security Policy, *A Global Strategy for the European Union's Foreign and Security Policy: Shared Vision, Common Action: A Stronger Europe*, cit.

[29] Council of the European Union, *EU Guidelines: Human Rights and International Humanitarian Law* of March 2009, www.consilium.europa.eu, p. 3.

[30] Council Conclusions of 17 November 2009 on *Democracy Support in the EU's External Relations*, point 4.

promised in return for enhanced migration cooperation with Turkey in early 2016. It would be *naïve* to suggest that the EU engages in democracy promotion without any other interests at stake. The EU's internal considerations are inherently connected to its external engagements, and tied to the legally-based inducements it can offer.[31] The negotiations with Turkey over an arrangement to "reduce the illegal flow of migrants" offer specific advantages but in exchange for security assurances rather than democratic improvements.[32] Whilst this seems to undermine the central claims of the EU as a normative power, it highlights the need to understand where else in the EU's engagement with Turkey democracy promotion takes place, especially "under the radar" and beyond official engagements with central government, to better our understanding and evaluation.

Given the Treaty language across the EU's foreign policy discourse about the importance of democratisation and human rights, it is tempting to focus attention solely on those actions which are taken with the express/stated purpose of influencing the democratic development of third States. Political scientists have extensively theorised the ways in which norms can be transmitted from the EU to third States *via* their interactions. Manners' norm diffusion thesis recognises the different ways that norms transfer as a process including via contagion, procedural diffusion and transference.[33] Norms can be transferred via long-term processes of socialization (whereby the "target" State is exposed to the norms and values of the EU and eventually adopts them) or by strategic calculation by the third State in return for a particular advantage or benefit. Schimmelfennig and Sedelmeier conceptualized the transfer in the context of Central and Eastern Europe via the external incentives model (based on the logic of consequences) or the social learning model (based on the logic of appropriateness and domestically driven processes.[34]

The analysis in this *Article* accepts that norms can transfer in different ways. The emphasis here is less how the norms are accepted or resisted by the target, but the *processes* through which they are observable. Many of the features examined can be understood in terms of a democracy promotion *strategy* on the part of the EU.[35] However, it is also possible that the promotion of democracy is secondary to other aims pursued by the EU, or even as a by-product. That is to say that democracy promotion

[31] See for example the analysis of the security and normative considerations in visa liberalization policy in the EU's neighbourhood: L. DELCOUR, S. FERNANDES, *Visa Liberalization Processes in the EU's Eastern Neighbourhood: Understanding Policy Outcomes*, in *Cambridge Review of International Affairs*, 2016, p. 1259 *et seq*.

[32] Communication COM(2016) 166 of 16 March 2016 from the Commission to the European Parliament, the European Council and the Council on next operational steps in the EU-Turkey cooperation in the field of migration.

[33] I. MANNERS, *Normative Power Europe: A Contradiction in Terms?*, cit.

[34] F. SCHIMMELFENNIG, U. SEDELMEIER (eds), *The Europeanisation of Central and Eastern Europe*, Ithaca: Cornell University Press, 2005.

[35] R. YOUNGS, *Democracy Promotion: The Case of European Union Strategy*, Brussels: Centre for European Policy Studies, 2001.

need not be explicitly labelled as such but can be understood to be a reflection of how the EU presents itself to the world and engages with third States (or, for that matter, within international organisations or multilateral frameworks). In doing so, neglected or unseen aspects of the EU putting its values into action can be observed. It must also be borne in mind that democracy promotion is an integral part of EU foreign and enlargement policies, but not merely that which is the prerogative of the Council and Commission. National and sub-national actors or individuals (such as MEPs) can be engaged in EU democracy promotion too.[36] Nevertheless, the institutional focus of the analysis here is generally limited to the roles played by the Commission, Council or Parliament since these are institutions that, individually or collectively, represent the EU.

A four-part classification is used to shed light on the different ways in which democracy promotion occurs.[37] A "positive" and "express" means of democracy promotion refers to the dominant logic of an inducement to improve some aspect of the third State's democracy. The range of inducements on offer as well as the means vary considerably but the underlying rationale is "reinforcement by reward".[38] Inducements may be couched in general terms and not "concrete" but rather steps towards reaching a particular benefit, though the promotion of democracy as the means to the end will be explicit. Though the inducement is usually offered to the government of the third State, this might not always be the case: direct funding to non-governmental organisations (NGOs) by the EU is an example of positive democracy promotion as a means to achieve better democratic participation. Although many instances of positive democracy promotion could be seen through the prism of conditionality, the scope of the category is wider since it is not necessarily the case that the inducement is *directly* tied to democratic progress only by the government.

"Negative" and "express" democracy promotion appears to be a contradiction in terms, since the nature of "promotion" suggests a positive or "giving" action. But in effect it operates within the same logic as positive, express democracy promotion. That is to say that unless the third State improves or rectifies a situation of concern, then a benefit or potential benefit will be withdrawn, or the EU will seek to invoke punitive measures such as sanctions. The threat of doing so is an integral part of "negative" democracy promotion. One of the main differences with positive, express democracy promotion is that the focus is far more on the governmental organs of a third State than other, non-State actors.

The analysis here accounts for instances of EU activity which can be understood as democracy promotion, but without explicit reference to doing so. The analysis therefore

[36] N. GORDON, S. PARDO, *Normative Power Europe and the Power of the Local*, in *Journal of Common Market Studies*, 2015, p. 416 *et seq*.

[37] P.J. CARDWELL, *Mapping Out Democracy Promotion in the EU's External Relations*, cit.

[38] F. SCHIMMELFENNIG, S. ENGERT, H. KNOBEL, *Costs, Commitment and Compliance. The Impact of EU Democratic Conditionality on Latvia, Slovakia and Turkey*, in *Journal of Common Market Studies*, 2003, p. 496.

avoids the distinction of "hard" and "soft" democracy promotion[39] or one that regards law as being only prescriptive or one-dimensional. The wide conceptualisation of democracy promotion therefore includes "implied" means by which the EU attempts to engage in democracy in a positive or negative way. "Positive" and "implied" democracy promotion refers to instances where the EU is projecting a vision of democracy and/or democratic values in its external relations towards a third country, even though these are not expressly stated as an aim. This might involve in the sharing of or exposure to EU values, such as invitations to join EU-led civil society networks, joint parliamentary assemblies or "twinning" projects; all of which are founded on the values of democratic participation and representation and are integral to the rule of law.

The final category, "negative" and "implied" democracy promotion, is the most difficult to identify in terms of its contents, since it refers to instances without express reference to promoting democracy by withdrawing something, downgrading relations or even the threat of punitive measures. Nevertheless, the case is made here that negative implied democracy promotion is not only possible but already present. For example, the EU might imply to a third State that relations suffer because of a lack of democratic progress and that they could be improved by following the example of a neighbouring State who improved their levels of democracy (either generally or in specific areas). This is particularly evident within the EU's neighbouring geographic regions of the Mediterranean and Eastern Europe.

The argument is made in this *Article* that all four categories of democracy promotion are visible in the EU's relationship with Turkey, and taken together, all enrich our understanding of contemporary democracy promotion. For the reasons explained in the following section, the relationship with Turkey is notable for its depth and longevity amongst all the EU's links with third States. Before exploring each category in detail, the context and content of the relationship needs further exploration.

III. The EU-Turkey relationship

The EU-Turkey relationship is complex, deep and often under close scrutiny. It is above all longstanding: the EEC-Turkey customs agreement (1963) was among the first of its kind and represented an institutionalisation of the relationship long before others with non-EEC States. Turkey has been a key focus of the development of European foreign policy, dating back to European Political Cooperation (EPC) in the 1970s.[40] Contacts between the EU institutions are therefore not at the embryonic stage. Rather, institutional contacts are deep: Turkey is covered by "internal" EU policy (as part of a Customs Union) and external

[39] T. Risse, N. Babayan, *Democracy Promotion and the Challenges of Illiberal Regional Powers*, in *Democratization*, 2015, p. 382.

[40] M.E. Smith, *Europe's Foreign and Security Policy*, Cambridge: Cambridge University Press, 2004, pp. 109-110.

relations via enlargement, neighbourhood policies and the Common Foreign and Security Policy (CFSP). For the latter, it is both an insider (as it is offered the opportunity to participate in CFSP activities and align with Declarations) and an outsider.

Turkey is a longstanding member of European-focussed organisations including the Council of Europe (since 1949), NATO (since 1952), the Organisation for Economic Co-operation and Development (OECD) (since 1961), and the Conference (later the Organization) on Security and Cooperation in Europe (CSCE/OSCE) (since 1975). But realising Turkey's ambition to join the EU has been a very slow process with relatively few "milestones". It is the only candidate where European leaders have been ambivalent or even openly hostile to membership,[41] by questioning whether it "belongs" in Europe.[42] This is bound up in broader questions of Islam's place in Europe[43] and populist shifts in some Member States which have brought Turkish (potential) membership to the fore.[44]

Turkey applied for membership in 1987 but the Commission's 1989 opinion cited macro-economic instabilities and continuing human rights violations after the 1980 military coup as reasons why Turkey should not yet join. Turkey entered a Customs Union with the EU in 1995, but was not granted candidate status until the 1999 Helsinki Council. Other countries in Central and Eastern Europe and the Mediterranean have leapfrogged Turkey and acceded after much shorter periods, before accession negotiations eventually started in 2005. The accession process has not moved at a regular pace and for several years had seen scant progress. The ability of the EU to engage in rule transfer on political reforms was thus diminished.[45] EU-Turkey relations suddenly became more intense, and intensely scrutinised, in early 2016 as a result of increasing numbers of individuals attempting to reach Greece *via* the Turkish coast. The statement concluded between the EU and Turkey on migration cooperation in March 2016 came with a promise of opening enlargement *acquis* chapters and reversing the stagnated pace of accession.

The focus on migration cooperation did not however herald a shift in gear in accession negotiations. The attempted *coup d'état* in July 2016 and subsequent crackdown by the Turkish government on journalists, academics and civil society have led to increas-

[41] These arguments have been made throughout Turkey's candidacy, but appear most often when a new stage in the process is on the horizon. Most notably in recent years, President Sarkozy of France, who with German Chancellor Merkel blocked the opening of "chapters" in the accession process in 2011. He later declared that Turkey is not eligible to join because it is "in Asia Minor, not Europe", M.B., P.P., *Sarkozy: La Turquie dans l'UE? "Une erreur monumentale"*, 2 December 2015, www.europe1.fr.

[42] M. Müftüler Baç, *Turkey's Political Reforms and the Impact of the European Union*, in *South European Society and Politics*, 2005, p. 18.

[43] E. Hughes, *Turkey's Accession to the European Union*, Abingdon: Routledge, 2011, p. 165.

[44] For example, in the UK's EU referendum in June 2016, the official Leave campaign claimed that "Turkey is joining the EU" and that free movement rights would be extended to 76 million Turks. The lack of progress in the enlargement negotiations, making membership only a distant prospect, was not highlighted.

[45] M. Müftüler Baç, *The European Union and Turkey: Transforming the European Periphery into European Borderlands*, 2016, EUI Working Paper RSCAS, no. 12, 2016, p. 4.

ing calls (including by the European Parliament) to suspend accession negotiations.[46] Turkish leaders have been more ambivalent about whether to continue to pursue EU membership as a goal. Although the official position is that Turkey and the EU remain committed to the process, there seems little likelihood that accession negotiations will pick up pace in the short to medium term. Nevertheless, the numerous and wide-ranging engagement activities (some of which are explored below) continue. Examining long-term democracy promotion remains a worthwhile endeavour and the actions of the central government need not mean that EU activities are futile.

Under the political dominance of President Recep Tayyip Erdoğan and the Adalet ve Kalkınma Partisi (AKP) party since 2002, relations with the EU and its Member States have varied considerably, from high points of international cooperation activities and occasional steps forward towards accession, to low points including very public disagreements, as demonstrated by an unprecedented diplomatic spat with Germany and the Netherlands in March 2017.[47] Erdoğan has broken with past leaders in being more forthright about a more prominent role for Islam in Turkish society and critical of European countries' treatment of Muslim minorities.[48] As a result of European ambivalence to membership and its growing economic strength, Turkey's own foreign policy has appeared to focus greater attention on its region, and further afield.[49] Başer has characterised this shift as representing "a more active and ambitious" foreign policy,[50] though others have claimed that the shift can be explained in terms of "historically changing strategies of social reproduction of the Ottoman and Turkish States in response to changing domestic and international environments".[51] In any event, the emphasis on a regional focus marks the emergence of Turkey itself as a normative foreign policy actor in its region, which makes Turkey and the EU potential competitors in the promotion of norms.[52]

Enlargement is not therefore the only prism through which to see EU-Turkey relations. Similarly, democracy promotion is only one aspect of the relationship, sitting alongside an increasing focus on the role of Turkey in the migration "crisis" and particu-

[46] European Parliament Resolution 2016/2993(RSP) of 24 November 2016 on EU-Turkey relations.

[47] In advance of a referendum on changes to the Turkish constitution, Germany and the Netherlands refused to permit Turkish Ministers to address pro-government rallies in their countries. President Erdoğan lambasted the governments, accusing them of Nazi-like behaviour.

[48] E. KIRDIŞ, *Immoderation: Comparing the Christian Right in the US and Pro-Islamic Movement-Parties in Turkey*, in *Democratization*, 2016, p. 430.

[49] D. GÜNAY, *Europeanization of State Capacity and Foreign Policy: Turkey in the Middle East*, in *Mediterranean Politics*, 2014, p. 220 *et seq.*; H. TARIK OĞUZLU, *Turkish Foreign Policy at the Nexus of Changing International and Regional Dynamics*, in *Turkish Studies*, 2016, p. 59.

[50] E.T. BAŞER, *Shift-of-Axis in Turkish Foreign Policy*, in *Turkish Studies*, 2015, p. 305.

[51] C. HOFFMAN, C. CEMGIL, *The (Un)Making of the Pax Turca in the Middle East: Understanding the Social-historical Roots of Foreign Policy*, in *Cambridge Review of International Affairs*, 2016, p. 1280.

[52] E. PARLAR DAL, *Assessing Turkey's "Normative" Power in the Middle East and North Africa Region*, in *Turkish Studies*, 2013, p. 709 *et seq*.

larly those fleeing neighbouring Syria. This makes the implied categories of democracy promotion potentially richer in content. Yet, of all the challenges, Turkish democracy has been a major sticking point. Turkey is ranked lower than all Member States and other candidates in international democracy indexes. For example, it sits at number 97 of 167 in the world and part of the "hybrid regimes" of category according to the Economist Intelligence Unit.[53] Fuat Keyman and Gümüşçü have characterised Turkey's current position as being at the crossroads between democratic consolidation or erosion.[54] Nevertheless, in the context of the Mediterranean, Turkey is ranked higher than most other States (except Israel and Tunisia) and has itself been involved in democracy promotion in the region following the Arab Spring[55] as a means of seeking a role as a regional actor.[56] Gunay finds that Turkey's ties to the EU and candidate status allowed it to have greater influence over other Mediterranean States.[57]

The case study of Turkey thus allows a rich exploration of the different types of democracy promotion employed by the EU over a significant time period. The uniqueness of the EU-Turkey relationship in terms of its longevity, depth and multiple framings mean that this exploration should not be regarded as how democracy promotion operates with other countries near to and far from the EU. It is also important to avoid Eurocentric assumptions that changes in Turkey are necessarily and solely prompted by efforts by the EU. In particular, the advantages on offer as part of the enlargement process may be given as a result of other factors. The strategic role of Turkey in preventing migration flows to Europe and the granting of aid packages to do so is one prominent example, and one where the EU risks putting in danger its claim to be a normative power insofar as the questionable interpretation of international refugee law applies.[58] As Tarık Oğuzlu has noted,

> "[t]he Europeans assume that in return for EU's financial aid to Turkey to help lessen Turkey's burden, opening some chapters in accession negotiations, and provision of visa-free travel to Turkish citizens in the Schengen area in late 2016, Turkey will likely cooperate with the EU in finding a remedy to the Syrian refugee crisis within Turkey's territory".[59]

[53] Economist Intelligence Unit, *Revenge of the "Deplorables"*, in *The Economist*, 31 March 2017, www.eiuperspectives.economist.com.

[54] E. Fuat Keyman, Ş Gümüşçü, *Democracy, Identity and Foreign Policy in Turkey*, Basingstoke: Palgrave, 2014.

[55] Z. Öniş, *Turkey and the Arab Revolutions*, in *Mediterranean Politics*, 2014, p. 203 *et seq*.

[56] B. Ayata, *Turkish Foreign Policy in a Changing Arab World*, in *Journal of European Integration*, 2015, p. 95 *et seq*.

[57] D. Günay, *Europeanization of State Capacity and Foreign Policy: Turkey in the Middle East*, cit., p. 231.

[58] I. Manners, *Normative Power Europe Reconsidered*, in *Journal of European Public Policy*, 2006, p. 194.

[59] H. Tarik Oğuzlu, *Turkish Foreign Policy at the Nexus of Changing International and Regional Dynamics*, cit., p. 64.

Furthermore, that any moves towards "Europeanisation" (including what we might see as consolidating democracy) may not only be accounted for by EU conditionality and incentive-based models, but domestic drivers of change, including from business groups, NGOs and civil society.[60] It is important not to see democracy promotion merely through the relationship between the national government and the EU institutions, or the rhetoric of political leaders. Rather, as some of the instances examined below demonstrate, the "bottom up" approach which engages entities other than the central government with the EU show on the one hand the wide scope of democracy promotion and the importance of focusing on democratisation as a long-term process.

IV. Analysing democracy promotion in the EU-Turkey relationship

The categorisation of democracy promotion with third States was introduced in section II above. The following sections illustrate examples of democracy promotion across the positive/negative and express/implied categories in the case of the EU-Turkey relationship.

IV.1. Positive/express democracy promotion

This dimension to the EU's democracy promotion is the most readily identifiable. This category covers self-standing or over-arching measures designed to increase, in some way, democracy and democratic development in Turkey.

The enlargement process is the prime example in this category. Enlargement is a legal process according to which, as Art. 49 TEU makes clear, begins with the application of a "European State" to become a member. The process of joining is, however, owned and managed by the EU institutions which ultimately assess whether the State is ready to join. Enlargement is included in this category because it is the most obvious way in which a specific advantage (full EU membership) can reward democratic progress (though for European States only). Nevertheless, as a wide-ranging and multifaceted process, aspects of the enlargement process can also be understood as fitting into other categories too. It is therefore important to distinguish the elements which are positive/express here. Further, as Turkey is not (yet) a Member State, the emphasis here is on enlargement as a *process* rather than a *fait accompli*. A linear account of enlargement alone is unlikely to account for domestic change in Turkey over the longer term, especially since the length of time which has passed since Turkey's original application to join.[61]

At the most general level, each of the significant milestones of the enlargement process (accepting an application for membership, recognising a country as a candidate

[60] M. Müftüler Baç, *Turkey's Political Reforms and the Impact of the European Union*, cit.; G. Yilmaz, *EU Conditionality Is Not the Only Game in Town! Domestic Drivers of Turkey's Europeanization*, in *Turkish Studies*, 2014, p. 303 *et seq*.

[61] N. Tocci, *Europeanization in Turkey: Trigger or Anchor for Reform?*, in *South European Society and Politics*, 2005, p. 73 *et seq*.

and beginning the formal process of negotiation) rests on an evaluation of the level of democracy in a third State. The requirement of a democratic system of government as a prerequisite to even consider an application for EU membership was established long-before the EU developed specific approaches to democracy promotion. In 1978, the European Council specified that representative democracy is an "essential element" for membership and was tested first in the accession negotiations of Greece, Spain and Portugal.[62] The Copenhagen Criteria (1993) set out the democratic credentials for future Member States more comprehensively.

The recognition of Turkey's EU candidature in 1999 immediately spurred a period of democratic reforms and constitutional amendments between 1999 and 2002.[63] Two concrete examples are provided by the abolition of the death penalty, which is considered by the EU to be an essential element of a fully democratic State, and the provision of cultural rights (in broadcasting and education) for the Kurdish minority. Both are directly linked to progress in the enlargement process and were achieved *via* a legislative package in 2002, as a direct result of the 1999 recognition of candidate status.[64] Much of the literature on the EU and Turkey published in the mid-2000s focussed on the path Turkey seemed to be taking towards EU membership, however differentiated from other candidates past and present.[65] Yet for Turkey, the evolution has been from one where fulfilling the entry criteria would result in membership, to one where even fulfilling all the criteria does not if the EU does not have the capacity to "absorb" the new Member State.[66]

Democratisation is not a tick box operation, and the EU institutions and Member States were criticised for not ensuring the consolidation of democracy in Romania and Bulgaria before their accession.[67] The steps of the enlargement process that, at this stage, can be measured by the opening and closing of more than 30 chapters of the *acquis* therefore illustrate the "positive" incentive on offer. Legal scholars have criticised the shortcomings of conditionality as failing to embed democracy fully before EU membership.[68] But there is little doubt within the enlargement process of the central place of democratic development as a key factor. This is particularly the case for Turkey: the

[62] N. GHAZARYAN, *The European Neighbourhood Policy and the Democratic Values of the EU*, Oxford: Hart Publishing, 2014, p. 118.

[63] E. ÖZBUDUN, *Democratization Reforms in Turkey, 1993–2004*, in *Turkish Studies*, 2007, p. 179 *et seq.*; G. GÜNLÜK-ŞENESEN, H. KIRIK, *The AKP Era: Democratization or Resecuritization?*, in *Research and Policy on Turkey*, 2016, p. 75 *et seq.*

[64] F. SCHIMMELFENNIG, S. ENGERT, H. KNOBEL, *Costs, Commitment and Compliance. The Impact of EU Democratic Conditionality on Latvia, Slovakia and Turkey*, cit., p. 508.

[65] For example, H. ARIKAN, *Turkey and the EU*, Aldershot: Ashgate, 2003.

[66] A.R. USUL, *Is There Any Hope of the Revival of EU-Turkey Relations in the "New Era"?*, in *Turkish Studies*, 2014, p. 289.

[67] A.B. SPENDZHAROVA, M.A. VACHUDOVA, *Catching Up? Consolidating Liberal Democracy in Bulgaria and Romania after EU Accession*, in *West European Politics*, 2012, p. 39 *et seq.*

[68] D. KOCHENOV, *EU Enlargement and the Failure of Conditionality*, The Hague: Kluwer, 2008.

Commission's 2015 annual report on Turkey's progress in the enlargement process devotes 20 of the 88 pages to political reforms, compared to only five for economic reforms, before even the specific *acquis* are considered. Within the latter, several can be seen as fitting with the positive/express category. In particular, chapter 23 on the judiciary and fundamental rights states that, "[a] proper functioning judicial system and effective fight against corruption are of paramount importance, as is the respect for fundamental rights in law and in practice" and goes on to list Turkey's successes and failures in this respect.[69] In the opening paragraphs, the Commission comments that:

> "Opening benchmarks for Chapters 23 [judiciary and fundamental rights] and 24 [justice, freedom and security] on the rule of law still need to be defined so as to provide Turkey with a roadmap for reforms in this essential area. Turkey can accelerate the pace of negotiations by advancing in the fulfilment of the benchmarks, meeting the requirements of the negotiating framework and by respecting its contractual obligations towards the EU".[70]

Previous reports have made comments on similar lines. Whilst the Commission might be accused of singling out Turkey by "over attentiveness",[71] the explicit linking of progress with pace of reforms makes the positive/express categorisation of this type of democracy promotion clear.

Although the enlargement process provides the foundation for the contemporary EU-Turkey relationship, other instances of positive/express democracy promotion are present too. Turkey is one of only a handful of countries in which more than 25 projects have been run under the European Instrument for Democracy and Human Rights (EIDHR) programme (Nepal, Russia, Venezuela and States in the Western Balkans are others) which effectively allows the EU to engage in positive, express democracy promotion in a third State *without* the permission of the host government.[72] Lavenex and Schimmelfennig have termed this bottom-up approach "linkage" which facilitates contact beyond the level of central government departments.[73] The ongoing civil society dialogue between Turkey and the EU awarded grants to 199 projects between 2006-2009 and is co-funded by the EU and Turkey.[74] Whilst the legal basis is separate to the enlargement process, the dialogue offers an insight for the EU institutions which in turn informs the Commission's re-

[69] Commission Staff Working Document SWD(2015) 216 final of 10 November 2015, *Turkey 2015 Report – Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2015 Communication on EU Enlargement Policy COM(2015) 611 final*, www.ec.europa.eu, p. 55.

[70] *Ibid.*, p. 4.

[71] C. BALKIR, M. AKNUR, *Different Trajectories yet the Same Substance: Croatia and Turkey*, in A. WETZEL, J. ORBIE (eds), *The Substance of EU Democracy Promotion*, Basingstoke: Palgrave, 2015, p. 85 *et seq*.

[72] R. YOUNGS, *Democracy Promotion: The Case of European Union Strategy*, cit., p. 31.

[73] S. LAVENEX, F. SCHIMMELFENNIG, *EU Democracy Promotion in the Neighbourhood: From Leverage to Governance?*, in *Democratization*, 2011, p. 885 *et seq*.

[74] C. BALKIR, M. AKNUR, *Different Trajectories yet the Same Substance: Croatia and Turkey*, cit., p. 103.

ports on Turkey's readiness for membership.[75] The EU deals directly with NGOs as "human rights defenders" by issuing grants for projects on developing civil society, often with a technical (and thus less ostensibly political) focus. The EU has adopted a "local strategy" on Turkey which points to areas where Turkish democracy and the protection of human rights is believed to be lacking.[76] As these two examples demonstrate that positive/express democracy promotion instruments are fully in evidence here, the analysis now turns to express measures which are negative, rather than positive.

IV.2. Negative/express democracy promotion

A promotion measure which is negatively expressed generally refers to the means the EU has at its disposal which can be engaged to withdraw a benefit it offers to a third State, in order to prompt rectification of an issue of concern. In a sense, these are the "stick" counterparts to the "carrots" in the previous section within the enlargement process. It is expressed in the Commission's reports on Turkey that progress in the enlargement process, towards the end goal of becoming a Member State, cannot be achieved without democratic improvement. As such, positive and negative efforts form a "push-pull" effect, which is also subject to changes over time, especially in the drawn-out case of Turkish membership.[77]

The enlargement process thus incorporates negative/express democracy promotion. Official criticism of Turkey by the EU institutions or Member States is often explicitly linked to a stalling of the enlargement process (and a reminder of the economic benefits of EU membership). Examples of this include aspects of the local strategy on human rights and democracy and negative judgments of the European Court of Human Rights against Turkey[78] which then feed into the Commission's evaluation of progress and, in turn, the Council's decision to open chapters for negotiations.[79] Perceived backsliding on democratic progress, such as floating the return of the death penalty by the

[75] Communication (COM)2016 166, cit., p. 13.

[76] European Union local strategy in Turkey to support and defend Human Rights Defenders (HRDs), *European Union Local Strategy to Support and Defend Human Rights Defenders in Turkey*, 2015, www.avrupa.info.tr.

[77] M. Müftüler Baç, *The Never-Ending Story: Turkey and the European Union*, in *Middle East Studies*, 1998, p. 255; A.R. Usul, *Is There any Hope of the Revival of EU-Turkey Relations in the "New Era"?*, cit.

[78] The European Convention on the Protection of Human Rights and Fundamental Freedoms is not an EU instrument but all candidates are expected to be signatories. Turkey ratified the Convention in 1953, but has been one of the countries found most regularly to have breached its rights by the European Court of Human Rights. The Turkish government issued a derogation from the Convention in July 2016 following the attempted *coup d'état*. See further, B. Baglayan, *Turkey Declares State of Emergency and Derogates from ECHR After Failed Coup d'État*, in *Leiden Law Blog*, 8 August 2016, leidenlawblog.nl.

[79] M. Müftüler Baç, *The European Union and Turkey: Transforming the European Periphery into European Borderlands*, cit., pp. 5-6.

government, is generally followed by a warning from the EU institutions that this would prevent or disrupt negotiations.[80]

Usually, the means by which this type of democracy promotion is visible is in the EU's international agreements with third countries. Since the growth in external agreements during the 1990s, the EU has insisted on incorporating democracy and human rights clauses as essentials elements in its agreements with third States.[81] The clauses are typically worded to cover "substantial violations" for which procedures of "special urgency" may be engaged including the suspension of the agreement. These clauses are heralded as a key factor in the practical application of normative power EU. In reality, activation is rare and the Commission admits that "dialogue and persuasion" and "positive action" is preferred to "penalties".[82]

The Association Agreement between the EU and Turkey (Ankara Agreement) does not include a human rights clause. Whilst this may not have been surprising at the initial entry into force of the agreement in 1964, the Association Council decision of 1995 establishing a customs union did not do so either.[83] Although the issue was "hotly debated"[84] such clauses only became the norm in the period *after* 1995[85] and were not without legal controversy, as Portugal unsuccessfully challenged the inclusion of human rights clauses in agreements in the Court of Justice.[86] However, Turkey is part of the Euro-Mediterranean Partnership (MEDA) programme which includes a human rights clause as an essential element.[87] Since Turkey is unusual amongst the EuroMed part-

[80] S. ERKUŞ, *EU Remains Against Death Penalty in Turkey*, in *Hurriyet Daily News*, 16 February 2015, www.hurriyetdailynews.com.

[81] The wording is generally as follows: "Respect for democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, as well as for the principle of the rule of law, underpins the internal and international policies of the Parties and constitutes an essential element of this Agreement".

[82] European Commission, *The European Union: Furthering Democracy and Human Rights Across the Globe*, Luxembourg: Office for Official Publications of the European Communities, 2007, www.ec.europa.eu.

[83] EC-Turkey Association Council Decision 1/95 of 22 December 1995 on implementing the final phase of the Customs Union.

[84] European Parliament, Directorate-General for External Policies of the Union, *Human Rights and Democracy Clauses in the EU's International Agreements*, September 2005, www.europarl.europa.eu, p. 6.

[85] Communication COM(1995) 216 final of 23 May 1995 from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries.

[86] Court of Justice, judgment of 3 December 1996, case C-268/94, *Portugal v. Council of the European Union*.

[87] Regulation (EC) 1488/96 of the Council of 23 July 1996 on financial and technical measures to accompany (MEDA) the reform of economic and social structures in the framework of the Euro-Mediterranean partnership, Art. 3: "[t]his Regulation is based on respect for democratic principles and the rule of law and also for human rights and fundamental freedoms, which constitute an essential element thereof, the violation of which element will justify the adoption of appropriate measures".

ners as the only one involved in an enlargement process,[88] there was no need for a specific EuroMed Association Agreement as with the other partners.

Turkey has not been the target of any restrictive measures (sanctions) by the EU, which since the entry into force of the Treaty of Lisbon have become ever more prevalent as a feature of EU external relations.[89] As a third State, there is nothing that would prevent the imposition of sanctions by the EU if circumstances dictated, but there would need to be a serious deterioration in the democracy or human rights situation. The first step would likely be a halt to the enlargement negotiations. To date, this has not occurred. Whilst the EU has been critical of "backsliding"[90] in Turkish democracy for several years, this criticism has not prevented the EU and its Member States seeking enhanced migration cooperation (which eventually took the form of a "statement")[91] with Turkey since early 2016. This demonstrates that whilst the EU institutions might engage in criticism and impose restrictive measures on third States, the political realities mean than a highly differentiated approach is followed. In summary, negative/express democracy promotion is therefore primarily evident in the EU-Turkey relationship within the context of the enlargement process.

IV.3. Positive/implied democracy promotion

In this category, democracy promotion which is less tied to specific instruments to reach a certain goal, can be seen through the more gradual projection of values towards a third State. As an example of the EU's normative power at work, we expect to see here a sharing of values but without express demands.

Hence, a dividing line can be drawn between the express demands on Turkey *via* the enlargement process (positive/express), and the more gradual process of European-

[88] The Partnership was relaunched as the Union for the Mediterranean in 2008, and States including Albania, Bosnia-Herzegovina and Montenegro were also included in the framework.

[89] P.J. Cardwell, *The Legalisation of European Union Foreign Policy and the Use of Sanctions*, in *Cambridge Yearbook of European Legal Studies*, 2015, p. 287; C. Portela, *How the EU Learned to Love Sanctions*, in M. Leonard (ed.), *Connectivity Wars: Why Migration, Finance and Trade are the Geo-economic Battlegrounds of the Future*, London: European Council on Foreign Relations, 2016, p. 36 *et seq*.

[90] M. Müftüler Baç, *The European Union and Turkey: Transforming the European Periphery into European Borderlands*, cit., p. 7.

[91] The "statement" is not referred to as an "agreement" since the EU's competences to make agreements were not used. Following a challenge to the legality of the statement in the General Court brought by several Pakistani and Afghan nationals, the Court found that the "statement" is not an agreement and therefore the judicial review procedure under Art. 263 could not be used. Furthermore, the view of the Court is that he statement was not made by the Council of the EU, but rather the Member States (in spite of it being termed the "EU-Turkey statement"). General Court, orders of 28 February 2017, cases T-192/16, T-193/16 and T-257/16, *NF, NG and NM v. European Council*.

isation *via* multi-level engagement with Turkey.[92] Europeanisation is not a singular concept, and given its malleability, particular readings could apply to other categories under examination in this *Article*. The particular reading of Europeanisation as understood here is, "the emergence of new rules, norms, practices, and structures of meaning to which member states are exposed and which they have to incorporate into their domestic rule structures".[93] This type of Europeanisation emerged as a characterisation of what happens to actors (including Member States) within the EU, but has since been developed into a means of understanding what happens beyond the EU's borders.[94] It is sometimes understood as a "bottom up" approach,[95] which makes its characteristics appropriate to be included in the positive/implied category. Whilst this might be seen as little different to the instruments detailed in the positive/express category above, instances in this implied category work in a different, more subtle way. Although the examples cited within this category are also covered by the enlargement process, since they are all commented upon in the enlargement reports, the claim here is that they would be likely to exist anyway because of the nature of Turkey as a large, neighbouring State with whom the EU will obviously (need to) engage with.

Many of the instances included here also apply to other neighbourhood States in Eastern Europe and to a more limited extent, in the Mediterranean. Europeanisation is expressed through the providing of domestic incentives and a "sensitizing" of exposure to EU values to domestic actors. In practice, positive/implied democracy promotion engages both governmental, public organisations and NGO/civil society bodies though often in different ways. The common thread running through the numerous instances of the involvement and inclusion of the EU in Turkish civil society, directly with Parliamentary groups, NGOs and institutions contributes to projecting a vision of liberal democracy by exposure. This also includes the place of minorities[96] and women[97] in society, and well as more institutional-level initiatives, such as the inclusion of Turkey in the Europe-

[92] F. SCHIMMELFENNIG, S. ENGERT, H. KNOBEL, *Costs, Commitment and Compliance. The Impact of EU Democratic Conditionality on Latvia, Slovakia and Turkey*, cit.; F. SCHIMMELFENNIG, U. SEDELMEIER (eds), *The Europeanisation of Central and Eastern Europe*, cit.

[93] T.A. BÖRZEL, *Europeanisation Meets Turkey: A Case Sui Generis?*, in Ç. NAS, Y. ÖZER (eds), *Turkey and the European Union: Processes of Europeanisation*, Abingdon: Routledge, 2016, p. 9 *et seq*., p. 218; T.A. BÖRZEL, D. SOYALTIN, G. YILMAZ, *Same Same or Different? Accession Europeanization in Central and Eastern Europe and Turkey Compared*, in A. TEKIN, A. GÜNAY (eds), *The Europeanization of Turkey*, Abingdon: Routledge, 2015, p. 218.

[94] F. SCHIMMELFENNIG, U. SEDELMEIER (eds), *The Europeanisation of Central and Eastern Europe*, cit.

[95] S. JACQUOT, C. WOLL, *Usage of European integration: Europeanisation from a Sociological Perspective*, in *European Integration Online Papers*, 2003, eiop.or.

[96] G. YILMAZ, *From EU Conditionality to Domestic Choice for Change: Exploring Europeanisation of Minority Rights in Turkey*, in Ç. NAS, Y. ÖZER (eds), *Turkey and the European Union*, cit., p. 119 *et seq.*

[97] S.U. ÇUBUKÇU, *Contribution to the Europeanisation Process: Demands for Democracy of Second Wave Feminism in Turkey*, in Ç. NAS, Y. ÖZER (eds), *Turkey and the European Union*, cit., p. 141 *et seq*.

an Network of Ombudsmen.[98] Therefore, this category captures ongoing processes which are often missed by the focus on Turkey's "macro-political deficiencies" in meeting the Copenhagen criteria for enlargement.[99]

Two further examples (governmental and non-governmental) are as follows. First, Turkey and other candidate/neighbouring States are invited to align with CFSP Declarations. Declarations are not legally enforceable, and the third States have no input into their content, but aligning States confirm that they will adjust national policies to confirm with the text. The Declarations are usually critical of third States, with the most frequent points of contention relating to democracy, the rule of law or human rights (such as unfair/illegitimate elections, treatment of minorities or use of the death penalty).[100] Turkey has aligned itself with approximately 60 percent of Declarations since 2005, though the annual rate has ranged between 40 and 80 percent. Whilst this practice is also commented on in the enlargement reports (as evidence of the required adaptation of national foreign policy to the CFSP), this process is also an example of sensitising the third countries to values that the EU seeks to promote. Whilst many of the Declarations seem anodyne, alignment might be domestically controversial in terms of the subject matter. For instance, for Declarations marking International Day against Homophobia, Turkey has sometimes aligned but more frequently has not. Thus, though the text of Declaration might be very generally worded, the very process of inviting Turkey and others to align is an implied promotion of what the EU considers to be part of "its" democratic values, whether or not the third State aligns. The content is thus anything but anodyne for the third country in question in terms of how it wants to project itself to the wider world: expressing shared values with the EU or making a strategic calculation to do so.

Second, at the non-governmental level, Noutcheva has highlighted Europeanisation as societal mobilisation and empowerment, as an alternative to élite empowerment.[101] This relies on accounting for both the EU's structural power and actorness, which permits understanding the role of the EU (across its institutions) as a diffuser of ideas. She makes the distinction between material assistance (which was covered in the positive/express category above) and the "ideational backing of protest events triggered by government

[98] P. KUBICEK, *The European Union and Grassroots Democratization in Turkey*, in *Turkish Studies*, 2005, p. 363; Commission Staff Working Document SWD(2013) 417 final of 16 October 2013, *Turkey 2013 Progress Report – Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2016 Communication on Enlargement Strategy and Main Challenges 2013-2014 COM(2013) 700 final*, eurlex.europa.eu, p. 10.

[99] T. DIEZ, A. AGNANTOPOULOS, A. KALIBER, *Turkey, Europeanisation and Civil Society*, in *South European Society and Politics*, 2005, p. 7.

[100] P.J. CARDWELL, *Values in the European Union's Foreign Policy: An Analysis and Assessment of CFSP Declarations*, in *European Foreign Affairs Review*, 2016, p. 601 *et seq*.

[101] G. NOUTCHEVA, *Societal Empowerment and Europeanization*, in *Journal of Common Market Studies*, 2016, p. 691 *et seq*.

policies that fall short of democratic norms".[102] In practice, the EU's press releases on events and officials' meetings with representatives of social movements risks destabilising relations with the government (which has certainly been the case with Turkey) but is a means of positively implying certain democratic values including plurality of political processes, rights of minorities etc. With these examples in mind, positive/implied democracy promotion here is expressed partly, though not exclusively, through the enlargement process but also through the frameworks for relations with neighbouring States.

IV.4. Negative/implied democracy promotion

The final category of EU democracy promotion is the least readily identifiable since it involves looking beyond the actual or potential use of negative means, to instances where the negative dimension to democracy promotion is *indirectly* used. Covered here are instances where the EU has attempted to export its model of democracy or values, but in a way which is both masked by other aims and which purports to take away some perceived benefit to the third State. In a sense, the behaviour of the EU could be characterised as being "passive aggressive".[103] In other words, democracy promotion is present as an aim but hidden from view which makes it difficult to readily regard it as a singular "strategy" on the part of the EU.

As previously noted, it could be said that the existence of the human rights suspension clauses could fit within this category, since the EU institutions admit that these would only be triggered as a very last resort. The presence of these clauses function more as a threat for potential use. However, this category is much more open-textured. The negative/implied category points to instances where the target country in question is alerted to the fact that the EU is pursuing deeper cooperation (with the assumption of certain advantages to be gained by that country) with other, usually neighbouring, countries. The negative aspect is therefore that there is something in terms of its level of democracy which is preventing it from receiving such advantages that the EU is prepared to give. The implied aspect is that it may not be done using express words. In some cases, the EU has used CFSP Declarations against countries which imply that negative effects of a poor relationship with the EU (because of a lack of democracy) prevent that country from enjoying the type of relationship or benefits the EU has to offer. Belarus is a clear example where this approach has been followed.

With Turkey, the EU does not generally engage in the open criticism of the country beyond official documentation such as the enlargement reports. As such, the clearest example here is the pursuit of enlargement negotiations with other States, which applied after Turkey but joined before it and from a lower level of economic development (of which Bulgaria, Romania and Croatia stand out as examples). Of course, since this is

[102] *Ibid.*, p. 696.

[103] I am grateful to Zsuzsanna Végh for pointing out this characterisation.

implied then the reason may only be partly related to democracy, especially in the case of Turkey, the lack of progress towards full recognition of the government of Cyprus is a noted sticking point. But in response to Turkish complaints that it has been treated less favourably than other candidates, official speeches and documents from the EU institutions imply that the sticking points are not merely formal ones which can be resolved in a straightforward fashion.

With this in mind, this category can therefore include instances where there is no specific "box" to be ticked, and thus can be distinguished from, in particular, the negative/express category. To give a practical example, on lesbian, gay, bisexual, and transgender (LGBT) rights, the EU's comments on Turkey are less on the formal nature of legal protection for minorities, but the lack of an "atmosphere of tolerance" around the enforcement and recognition of rights.[104] Therefore, the implication is that this slows the enlargement process without being framed explicitly as such (if it was, this would move into the negative/express category). But because it is *not* explicit, this practice speaks to the wider Turkey-specific issue of being seen as a European country capable of closer relations. The implication is that this enforcement of rights is expected of a European country, despite the continued lack of such enforcement in countries in Central and Eastern Europe.

V. Conclusion

This *Article* has sought to demonstrate, *via* the case study of Turkey, that the putting into practice of the Treaty obligation to promote democracy should not be viewed in a narrow way, with only mechanisms specifically flagged as "democracy promotion" tools as the only ones which "count". Rather, there are a host of means by which the EU attempts to promote or support democracy in third countries and not all of them follow a singular, defined strategy. Some of these means are specific to the EU as a particular kind of international, non-State actor. Needless to say, all are likely to have varying levels of success and the EU cannot and should not be understood as an organisation whose *raison d'être* is promoting democracy, despite what the Treaty text might indicate.

The nature of democracy promotion by the EU is frequently criticised for its vagueness and incoherence. But the nature of the EU as a unique, supranational entity means that such analysis risks falling into the trap of treating it as we would a nation State. Leaving aside the difficulties involved in forming a coherent vision of what kind of democracy should be promoted, it is possible to see that the fusion and interchangeability of the language of human rights and the respect for the rule of law within the EU's conception of democracy is a reflection of the EU's own legal order. Furthermore, the ways

[104] Commission, *Turkey: 2015 Report*, cit., pp. 67-68.

in which the positive and negative measures are used are fundamentally legal in character, even if their deployment is often constrained by political considerations.

The case study of Turkey demonstrates what the EU does towards a neighbouring country where the enlargement process is a significant but not the only frame for the relationship, in express, implied, positive and negative terms. As a neighbourhood and potential EU Member State, Turkey's situation and relationship is not fully replicated by any other State in the neighbourhood or beyond. The EU's engagement with Turkey can be exhibit features of democracy promotion across all four categories. The instances and weightings of positive/negative and express/implied democracy promotion are varied. Turkey's economic strength and importance to the EU for tackling, in particular, challenges in migration exert a strong influence on the desire and ability of the EU to engage in the types of democracy promotion that might be found towards other States. And yet, the declining prospects of Turkish EU membership, increased fractiousness at the official government level and prioritisation of migration/security-focussed goals within the relationship exert strong effects on how democracy promotion is operationalized. Part of this is the role the EU plays in fulfilling the other goals of the Treaty, including the security and well-being of its citizens, which has resulted in using measures which should (according to the EU's own discourse) be tied more closely to democratic progress, such as visa liberalization. The pursuit of migration control and security has taken headline precedence over the promotion of democracy, and used as a catalyst to promise Turkey greater progress along the path of enlargement.

However, what the analysis here has shown is that the multitude of ways and means that the EU has at its disposal to (attempt to) promote democracy in a third country offers an opportunity to understand the EU as a multifaceted international actor. Much democracy promotion is *not* subject to the potentially rapidly changing state of relations between the highest levels of government in Turkey and the EU institutions. The wider scope of analysis of democracy promotion demonstrates that this does not fatally undermine the characterisation of the EU as a normative power since the less visible, implied democracy promotion aspects remain, even when attention is focussed on the "headline" issues.

The uniqueness of the EU's relationship with Turkey means that the instances of democracy promotion in all four of the categories are unlikely to be fully replicated in any other relationship. Herein lies the limitation to the case study used here. Nevertheless, it is instructive in terms of the EU's other relationships and particularly those around the neighbourhood in the Mediterranean and Eastern Europe. Since Turkey is the only country with an enlargement perspective, however distant, then if the EU is not successful in promoting values in the country then it would seem to undermine any chances to do so with other States. Rather, the danger is that the Turkish case shows the democracy promotion efforts to be hollow and easily waived, thus undermining the EU's credibility in the region, at home and as a global actor. However, the particular na-

ture of the EU as a non-State actor means that the aspects of democracy promotion which are less immediately visible, and particularly those which are implied rather than express, need to be taken seriously in evaluating what kind of an actor the EU is, and whether it meets its Treaty goals.

ARTICLES

INTEGRATION IN EUROPEAN DEFENCE: SOME LEGAL CONSIDERATIONS

LUIGI LONARDO*

TABLE OF CONTENTS: I. Introduction. – II. Reasons for the inclusion of EDU provisions in the Lisbon Treaty and their rationale. – III. Legal considerations. – III.1. The options. – III.2. Establishment of Permanent Structured Cooperation. – III.3. Functioning. – III.4. Purpose. – III.5. Funding. – IV. Conclusion.

ABSTRACT: The perceived surge in external threats such as hybrid and cyber warfare, the instability in EU neighbourhood, and deadly attacks on the very EU territory, jointly with the pending process of the UK leaving the European Union, recently renewed political and academic interest in the establishment of a European Defence Union (EDU). EDU is foreseen in Art. 42, para. 2, TEU, as part of Common Security and Defence Policy (CSDP), but only with Resolution of 22 November 2016 on the European Defence Union the European Parliament called for its establishment. This is now taking concrete shape: by Decision of 11 December 2011, the Council of the European Union has established a Permanent Structured Cooperation, and in June 2017 the Commission proposed the adoption of an *ad hoc* fund. The permanent structured cooperation is a mechanism for Member States to combine their military efforts provided for in the TEU, but never implemented or used until now. The opportunity to use a start-up fund is also foreseen in Art. 41, para. 3, TEU. This *Article* devotes attention to the legal foundations of EDU. It discusses issues related to its establishment, functioning, aims, and funding; in addition, it explores the relationship between EDU and other options available to policy-makers for providing a European defence: the mutual defence clause of Art. 42, para. 7, TEU and the mutual assistance clause of Art. 222 TFEU.

KEYWORDS: European Defence Union – European army – Common Foreign and Security Policy – Common Security and Defence Policy – EU external relations Law – international relations.

I. INTRODUCTION

The framing of a European Defence Union (EDU) is foreseen in Art. 42, para. 2, TEU, but it has not yet taken place. The perceived surge in threats to the European Union, such as hybrid and cyber warfare, instability in its neighbourhood, and deadly attacks on its very

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territory are the concern that recently[1] triggered the proposal to set up a common Union defence policy.[2] Moreover, given the traditional reticence of the UK to pursue more integration in the defence sector, its decision to leave the EU, together with a more permissive United States attitude toward European autonomous defence, have also renewed the political viability of the Franco-German effort to increase cooperation in this area.[3]

Against this background, by Resolution of 22 November 2016, the European Parliament called for the establishment of such a Defence Union.[4] The Commission reflection paper of 7 June 2017 made reference to the Parliament's resolution,[5] which was endorsed again by the European Council Conclusions of 22-23 June 2017.

By Decision of 11 December 2011,[6] the Council of the European Union has established a Permanent Structured Cooperation, between 25 Member States (except Malta and UK). In June 2017 the Commission proposed the adoption of an *ad hoc* fund.[7] The permanent structured cooperation is a mechanism, envisaged in the TEU, for Member States (MSs) to combine their military efforts: however, it was never implemented nor used until now.[8] The opportunity to use a start-up fund is also foreseen in Art. 41, para. 3, TEU.

[1] Defence has figured quite prominently in the EU agenda since the European Council Conclusions of December 2013. In those Council conclusions, the High Representative (HR) was asked "in close cooperation with the Commission, to assess the impact of changes in the global environment, and to report to the Council in the course of 2015 on the challenges and opportunities arising for the Union, following consultations with the Member States"; See N. Tocci, *Towards an EU Global Strategy*, in A. Missiroli (ed.), *Towards an EU Global Strategy. Background, Process, References*, Paris: European Union Institute for Security Studies, 2015, p. 115. Between December 2013 and the time of writing, tension with Russia over eastern Ukraine; the rise of the Islamic State; terrorist attacks for example in Paris, Nice, Berlin, London and Barcelona; the Brexit Referendum; the election of Donald Trump at the US Presidency all contributed, for EU policy-makers, to the necessity to establish a Defence Union.

[2] European Parliament Resolution 2016/2052(INI) of 22 November 2016 on the European Defence Union discussed below; Reuters Staff, *Germany, France Drafting Details of Defense Fund: German Minister*, in *Reuters*, 10 June 2017, www.reuters.com.

[3] Joint Position of 11 September 2016 by Defence Ministers Ursula von der Leyen and Jean Yves le Drian, *Revitalizing CSDP. Towards a comprehensive, realistic and credible Defence in the EU*, www.senato.it; Commission White Paper COM(2017)2025 of 1 March 2017 on the Future of Europe proposed three scenarios of increased cooperation in defence: a group of Member States decide to cooperate much closer on defence matters; joint defence capacities are established; or, finally, a EDU is established. T. Barber, *EU Comes Together Over Brexit*, in *Financial Times*, 7 June 2017, www.ft.com.

[4] European Parliament Resolution (2016)2052.

[5] Commission Reflection Paper COM(2017) 315 of 7 June 2017on the Future of European Defence.

[6] Decision 2017/1063/CFSP of the Council of 11 December 2017 establishing Permanent Structured Cooperation (PESCO) and determining the list of Participating Member States.

[7] Communication COM(2017)295 of 7 June 2017 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Launching the European Defence Fund*.

[8] A first attempt to start a discussion on permanent structured cooperation was made by the Belgians in 2010, but it fell on deaf years. S. Biscop, J. Coelmont, *CSDP and the Ghent Framework: The Indirect Approach to Permanent Structured Cooperation?*, in *European Foreign Affairs Review*, 2011, p. 149 *et seq*.

From a practical perspective, the study of the law of the European Defence Union is necessary for the implementation of the EU Global Strategy of 2016 and of the official EU documents referring to EDU mentioned above. Indeed, since one of the Global Strategy's objectives is the protection of European citizens, the High Representative (HR) and the Foreign Affairs Council will have to consider, among other options, the establishment of EDU. With the aim of providing decision makers and scholars with a clear picture of the legal options offered by the Treaties, this *Article* is devoted to the largely unexplored legal foundations of EDU.[9]

From an academic perspective, EDU raises both legal and political questions. In the first category, there are issues related to establishment, functioning, aims, and funding of the permanent structured cooperation, which this *Article* explore together with the relationship between the permanent structured cooperation and other legal options available to policy-makers: the mutual defence clause,[10] and the mutual assistance clause.[11] To the second category, which this *Article* does not discuss, pertain issues related to EDU relationship with the NATO; to the desirability of the project itself; to the relationship between EDU and other areas of EU law-making; and to the repercussion of EDU for the integration paradigm of the EU.

Finally, a broader issue underlies the discussion on the law of European defence: even more than in other areas, in the field of international security the drafting and im-

[9] A major exception is P. KOUTRAKOS, *The Common Security and Defence Policy*, Oxford: Oxford University Press, 2013. Other contributions are acknowledged in the footnotes of this *Article* whenever reference is made to them.

[10] Art. 42, para. 7, TEU: "If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States". Art. 51 UN Charter, binding on all EU MSs, states that: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the UN, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security".

[11] Art. 222 TFEU: "1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to: (a) prevent the terrorist threat in the territory of the Member States; protect democratic institutions and the civilian population from any terrorist attack; assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack; (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster. 2. Should a Member State be the object of a terrorist attack or the victim of a natural or man- made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council".

plementation of law is inextricably linked to historical and political interests.[12] For example, EDU would be inextricably linked to coordination with NATO:[13] 21 EU MSs are NATO members; there are six non-NATO EU MSs: Austria, Cyprus, Malta, Ireland, Sweden, and Finland. Some European non-EU States are also NATO members (Turkey, Norway and, in the future, the United Kingdom). Aside from these alliances, some EU MSs have between themselves both multilateral[14] and bilateral[15] defence treaties. In a domain that States perceive as power-driven more than law driven,[16] the stimulating and fundamental question as to what role law can play is left open for discussion.

II. Reasons for the inclusion of EDU provisions in the Lisbon Treaty and their rationale

The Lisbon Treaty introduced the permanent structured cooperation in EU law,[17] along with the mutual defence clause (Art. 42, para. 7, TEU). These two mechanisms were discussed at the Convention for the Future of Europe and inserted in the Constitutional Treaty of 2004. While that Treaty was never adopted, the rules flew, substantially unchanged, in the Lisbon Treaty of 2009.

The provisions on a permanent cooperation were a significant innovation, in the Constitutional Treaty, of EU defence framework. They followed the shared willingness to improve EU's capacity to act united in the international system as a Union – something which had not happened successfully during the wars in the Balkan in the previous decade, and after 11 September 2001 in Afghanistan and Iraq. With a pattern that in this field still endures fifteen years later, British scepticism was contraposed to Franco-German initiatives. Since some MSs had already bilateral agreements in some defence areas, and with a view to strengthen EU's efficiency and coherence, following a Franco-German proposal, the Working Group on Defence at the Convention for the Future of Europe recommended to increase the role of the HR, that those MSs wishing to undertake firmer commitments than others should be enabled to do so with the Union's framework, and that a Common Foreign Security Policy (CFSP) emergency budget

[12] P. Koutrakos, *The Common Security and Defence Policy*, cit., p. 79.

[13] European Parliament Resolution (2016)2052, point 4.

[14] The Nordic Defence Cooperation, which acquired this name in 1997, includes Sweden, Finland, Denmark and also Norway.

[15] Dutch-Belgian navies cooperation, formalised in 1996, english.defensie.nl.

[16] M. Koskenniemi, *International Law Aspects of the Common Foreign and Security Policy*, in M. Koskenniemi (ed.), *International Law Aspects of the European Union* , Leiden: Brill Nijhoff, 1998, p. 27.

[17] European Parliament, Directorate-General for External policies of the Union, Policy Department, *The Lisbon Treaty and Its Implications for CFSP/ESDP*, Briefing Paper, Brussels: European Parliament, 2008, p. 7, www.europarl.europa.eu.

should be set up.[18] The second of these items – later to become the permanent structured cooperation – was conceived also with the view to allow MSs to transfer their obligations under the 1954 Western European Union (WEU) Treaty into EU law.[19] The United Kingdom (UK) government's initial reaction was very cautious. As it reminded at a hearing in the UK Parliament, "none of these structures pretends to provide an operational EU military command structure either at the strategic or the tactical levels. There are no standing EU headquarters (just as there is no EU standing force). Any such EU operational command structure would duplicate existing NATO and national assets".[20] In particular, the UK government made clear its intention to resist the inclusion of any security guarantee in the new treaty which could rival or come to replace the security guarantee established through NATO.[21]

At the Convention for the Future of Europe, the mutual defence clause, which would become Art. 42, para. 7, TEU, followed from a recommendation by the Defence Working Group that MSs should commit to mobilising all instruments to prevent or respond to a terrorist attack or natural disaster within the EU.[22] The recommendation, phrased in those broad terms, proved unacceptable for the UK and other MSs which wanted to preserve. The mutual defence clause was instead phrased so as to provide obligation to assist a Member State victim of an "armed aggression",[23] and it was meant to accommodate three groups of States:[24] those seeking a mutual defence commitment which could be satisfied with the part of the article stating that "the other Member States shall have […] an obligation of aid and assistance by all the means in their power"; those seeking to protect their traditional neutral status (such as Ireland, Austria and Sweden) which could be satisfied with the clause "[t]his shall not prejudice the specific character of the security and defence policy of certain Member States"; and those wanting to ensure that the article would not undermine NATO which could be satisfied with the reminder that "[c]ommitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation". In addition to the mutual defence clause, and prompted by deadly attacks in Madrid (2004) and in London (2005), MSs later decided to introduce a "solidarity clause" in the event of a man-made or natu-

[18] Working Group VIII "Defence", *Franco-German comments on the preliminary draft final report of Working Group VIII "Defence*" of 4 December 2002.

[19] This happened with the Lisbon Treaty, and the WEU officially came to an end in 2010.

[20] Select Committee on European Union Forty-First Report, Government Response to the Committee's 11th Report, *The EU, A Player on the Global Stage?*, www.publications.parliament.uk, para. 284.

[21] UK Government White Paper Cm 5934 of 1 September 2003, *A Constitutional Treaty for the EU – The British approach to the European Union Intergovernmental Conference 2003*, para. 95.

[22] House of Lords Select Committee on the European Union, Report of 21 October 2003, *The Future of Europe – The Convention's Draft Constitutional Treaty*, www.publications.parliament.uk, p. 46.

[23] This is discussed more at length later in the *Article*.

[24] H-J. BLANKE, S. MANGIAMELI, *The Treaty on European Union (TEU) A Commentary*, Heidelberg: Springer, 2013, p. 1201 *et seq*.

ral disaster, at the request of the political authority of the concerned Member State. This would later become Art. 222 TFEU, and the relationship between this clause and the mutual defence of Art. 42, para. 7, TEU is explored later in the *Article*.

III. Legal considerations

The European Parliament envisaged that an EDU should encompass a permanent structured cooperation, a mechanism never used before its establishment on 11 December 2017, and which used to lie, like a sleeping giant, among the provisions of Title V TEU.[25] Following the Parliament's proposal, some authors have commented on the permanent structured cooperation,[26] a subject which gets at best a mention in mainstream legal scholarship.[27]

The permanent structured cooperation is characterised by flexibility in its establishment, management, and purpose; by continuity in its functioning; and its effectiveness depends to a large extent on its funding.[28]

III.1. The options

The analysis will focus on the permanent structured cooperation, but this is by no means the only possible option to serve as legal basis for a common European Defence. As a first option, in theory, the creation of a European army could be achieved through a super-governmental, integrationist, pro-federal project.[29] This, however, would require Treaty amendments as well as major restructuring of MSs defence policies, and it is not a reasonable option at the moment of writing: it is a lengthy and costly procedure which requires MSs' unanimity.

[25] F. Mauro, *Permanent Structured Cooperation. The Sleeping Beauty of European Defence*, in *Groupe de Recherche et d'Information sur la Paix et la Sécurité*, 27 May 2015, www.grip.org. Brussels refers to the classic fairy tale, but I prefer to use the image of a giant because I do not derive any aesthetic pleasure from the contemplation of the Permanent Structured Cooperation.

[26] S. Biscop, *Oratio pro Pesco*, Brussels: Egmont Paper, 2017; A. Bakker, M. Drent, D. Zandee, *European Defence Core Groups. The Why, What & How of Permanent Structured Cooperation*, in *Egmont Institute*, 25 November 2016, www.egmontinstitute.be; and other contribution cited in footnotes of this *Article* where relevant.

[27] The only notable exception is P. Koutrakos, *The Common Security and Defence Policy*, cit. Authors from other disciplines, instead, had written on the Permanent Structured Cooperation already before. S. Biscop, *From ESDP to CSDP: The Search for Added Value through Permanent Structured Cooperation*, in *UACES*, 1-3 September 2008, www.uaces.org.

[28] P. Koutrakos, *The Common Security and Defence Policy*, cit., p. 76.

[29] Similar to the failed European Defence Community, which in the Fifties would have replaced MSs armies with an EU standing one.

A second, more politically viable option – despite staunch criticism[30] – is to have recourse to other provisions on the Common Security and Defence Policy (CSDP). This option would not encompass any further relinquishment of sovereignty from MSs to the EU. The management of the Defence Union would be done at an intergovernmental level, much as it happens, as a rule, in the whole area of CFSP. This second option would permit to choose between several legal bases. Art. 42, para. 7, TEU, for example, is an important "mutual defence clause". Pursuant to it, MSs have an obligation to assist another MS victim of an "armed aggression" on its territory.[31] Apart from the ambiguity of the phrase armed aggression, which does not recur elsewhere in legal documents,[32] the Article is phrased similarly to other clauses of collective defence, such as Art. 5 NATO Charter or Art. 4 of the 1948 Brussels Treaty, whereby Western European States agreed to make an alliance for the security of the continent.[33] EU Treaties heavily rely on United Nations obligations, on paper:[34] the very Art. 42, para. 7, TEU makes reference to Art. 51 of the UN Charter.[35] However, there are two reasonable and opposite interpretations of Art. 51 UN Charter: a permissive and a restrictive interpretation. The

[30] J. RANKIN, *Is There a Secret Plan to Create an EU Army?*, in *The Guardian*, 27 May 2016, www.theguardian.com.

[31] The obligation is similar, in substance, to that deriving from Art. 222 TFEU. The events triggering each Article, as well as the procedure, however, differ.

[32] General Assembly, Resolution A/RES/29/3314 of 14 December 1974 on the Definition of Aggression; its Art. 1 states: "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the UN Charter, as set out in this Definition". The Resolution is not binding on the EU if not to the extent it reflects customary law.

[33] Respectively: "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 UN Charter, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.
Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security' and 'If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 UN Charter, afford the Party so attacked all the military and other aid and assistance in their power".

[34] P. EECKHOUT, M. LOPEZ-ESCUDERO (eds), *The European Union's External Action in Times of Crisis* , Oxford: Hart Publishing, 2016, p. 52.

[35] "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the UN, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security".

permissive one disregards the requirement that the armed attack must have occurred and allows, for example, for anticipatory self-defence. A permissive interpretation also relinquishes the requirement that the armed attack is committed by a State – even though State practice points to the opposite direction.[36] It is therefore debatable whether Art. 51 of the UN Charter – and consequently Art. 42, para. 7, TEU – extends the right to self-defence to a case of attack by non-State actors. In practice, Art. 42, para. 7, TEU was only used once in the history of the EU, when President Hollande called for its application after November 2015.[37] The trigger of France's request were simultaneous shootings and killings in Paris, carried out by operatives of the Islamic State (IS), which later claimed responsibility for the attack. At present, no State recognises IS as a State within the meaning, for example, of the Montevideo Convention. The application of Art. 42, para. 7, TEU in case of an attack by an entity that France considers a terrorist organisation is evidence, therefore, that the notion of "aggression" in Art. 42, para. 7, TEU and of Art. 51 UN Charter is interpreted broadly. In that case, the concrete use of that clause consisted in France concluding bilateral agreements with some other EU countries, with the aim of receiving troops for France's missions abroad and focus their soldiers on patrolling the country's territory.[38]

Moreover, as a third option, the relationship of that CSDP provision with Art. 222 TFEU is worth of analysis. Even though the clause is in the TFEU, there are four grounds for considering it in relation to other CFSP instruments.

In *Anagnostakis*, the General Court held that Art. 222 TFEU "clearly does not relate to economic and monetary policy, or economic circumstances or the budgetary difficulties of the Member States" – thus implying that it might refer, instead, to the CFSP, or at least to EU's external action in general.[39] This was the opinion of AG Jääskinen in *Elitaliana*: EU's external action covers Art. 222 TFEU.[40] Even more explicit was the Opinion of AG Bot in case C-130/10, that the Article relates to the CFSP, in particular in so far as concerns CSDP.[41] Finally, the Council Decision implementing Art. 222 refers, in its fifth recital, to the structures developed under the CSDP as instruments developed pursuant

[36] M. MILANOVIC, *Self-Defense and Non-State Actors: Indeterminacy and Jus ad Bellum*, in *EJIL Talk!*, 21 February 2010, www.ejiltalk.org.

[37] E. CIMIOTTA, *Le Implicazioni del Primo Ricorso alla c.d. 'Clausola di Mutua Assistenza' del Trattato sull'Unione Europea*, in *European Papers*, 2016, Vol. 1, No 1, www.europeanpapers.eu, p. 163 *et seq*.

[38] S.E. ANGHEL, C. CIRLIG, *Activation of Article 42(7) TEU France's Request for Assistance and Member States' Responses*, in *European Council Briefing*, July 2016, www.europarl.europa.eu, p. 3.

[39] General Court, judgment of 30 September 2015, case T-450/12, *Anagnostakis v. Commission*, para. 60.

[40] Opinion of AG Jääskinen delivered on 21 May 2015, case C-493/13, *P Elitaliana v. EULEX Kosovo*, para. 17.

[41] Opinion of AG Bot delivered on 31 January 2012, case C-130/10, *European Parliament v. Council of the European Union*, para. 65.

to the solidarity clause.[42] However, the Council Decision implementing the solidarity clause does not provide a general framework for dealing with actions having military defence implications, because the joint proposal[43] excluded "defence implications".

Both Arts 42, para. 7, TEU and 222 TFEU require that the event takes place on a Member State's territory. Both Articles shall be read in conjunction with Art. 196 TFEU, which imposes duties on the EU to encourage cooperation to prevent and assist civilians in case of natural or man-made disasters. But these are, on paper, the only overlap in the scope of the two Articles.

While the mutual defence clause requires an armed aggression to trigger it, the mutual assistance clause requires a terrorist attack, a man-made, or natural disaster. While, as we saw, "armed aggression" was interpreted so as to encompass a terrorist attack, the scope of application of the solidarity clause is wider. This was due to the initiative of Michel Barnier, chairman of the Working Group VIII on Defence for the drafting of a Constitutional Treaty in 2003.[44]

Moreover, the mutual defence obligation is only incumbent upon other MSs, while Art. 222 TFEU imposes an obligation on the EU as well. This means the opportunity to mobilise Union's own resources such as police, funds, etc.[45] It is also important to recall that Art. 42, para. 7, TEU is subject to the exception that the provision "shall not prejudice the specific character of the security and defence policy of certain Member States", even though what the exception exactly means is object of debate.[46]

The obligations of solidarity are wider than those stemming from mutual defence. Obligations involve the prevention, protection, and assistance in case of such an event. Moreover, it is debated whether Art. 222 TFEU could be used also to suppress social arrest (whether this is certainly not the case for Art. 42, para. 7, TEU).

Finally, Art. 44, para. 1, TEU, allows for a form of enhanced cooperation by some MSs to carry out, on a voluntary basis, specific tasks entrusted to them by the Council. The reasons why the European Parliament and other authors have not called for these legal bases is that the permanent structured cooperation, in the eyes of its supporters,

[42] Council Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause.

[43] High Representative of the EU for Foreign Affairs and Security Policy and the European Commission, Joint proposal of 21 December 2012 for a Council Decision on the arrangements for the implementation by the Union of the Solidarity Clause presented, pursuant to Article 222(3) TFEU.

[44] S. VILLANI, *The EU Civil Protection Mechanism: Instrument of Response in the Event of a Disaster*, in *Revista Universitaria Europea*, 2017, p. 129.

[45] M. FUCHS-DRAPIER, *The European Union's Solidarity Clause in the Event of a Terrorist Attack: Towards Solidarity or Maintaining Sovereignty?*, in *Journal of Contingencies and Crisis Management*, 2011, p. 185 *et seq*.

[46] P. HILPOLD, *Filling a Buzzword with Life: The Implementation of the Solidarity Clause in Article 222 TFEU*, in *Legal Issues of Economic Integration*, 2015, p. 217.

offers two distinctive advantages: it can be used for external action, and, as the name suggests, it is permanent.

III.2. Establishment of permanent structured cooperation

The legal basis for a permanent structured cooperation is provided for in Art. 42, para. 6, TEU:

> "Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework. Such cooperation shall be governed by Article 46. It shall not affect the provisions of Article 43".

Art. 46 and Protocol 10 lay down detailed but flexible provisions. The establishment of the cooperation follows a two tier process. The first is of positive harmonisation in cooperation and in the development of defence capacities between MSs who wish to commit themselves to do so. The details of these are set out in Art. 1 of Protocol 10. More analytically, "cooperation" includes activities "from joint development or procurement to pooling, i.e. permanent multinational formations, either deepening integration in relevant existing ones (e.g. battle groups or Euro corps) or new initiatives".[47]

Development of capacities includes but is not limited to a "medical command; advanced training; remotely piloted aircraft systems capability; combat search and rescue; military capacity to counter nuclear, biological, chemical and radiological threats; strategic surveillance of EU borders; and shared access to satellite imagery."[48] It might also involve creating or sharing military facilities for the supervision or training of military personnel:[49] at the moment, the EU does not have military headquarters.[50] Pursuant to Art. 3 of Protocol 10, the European Defence Agency shall contribute to the regular assessment of participating Member States' contributions with regard to capabilities.

Once this first phase is deemed completed, and MSs who have so decided between themselves have sufficiently harmonised their defence capabilities, the second phase involves a notification to the High Representative and the Council (Art. 46, para. 1, TEU).

[47] C. Niseen, *European Defence Cooperation after the Lisbon Treaty. The Road is Paved for Increased Momentum*, Copenhagen: Danish Institute for International Studies, 2015, p. 15.

[48] A. Marrone, N. Pirozzi, P. Sartori, *PESCO: An Ace in the Hand for European Defence*, in *Istituto Affari Internazionali*, 22 March 2017, www.iai.it, p. 4.

[49] *Ibidem*, p. 6.

[50] P. Koutrakos, *The Common Security and Defence Policy*, cit., p. 101.

The notification was given by 23 MSs on 13 November 2017, and by Ireland and Portugal on 7 December 2017.[51]

The Council then proceeded to adopt a decision establishing the permanent structured cooperation, acting by qualified majority.

III.3. Functioning

The functioning of the permanent structured cooperation is inspired by three principles: willingness, continuity, and flexibility. These principles clearly show a preference for leaving MSs in power at all time during the cooperation, while at the same time providing a framework that encompassed rigorous rules, compliance with which is realistic. The preference for the reliance on political bargain and unanimity follows, for the CSDP, the precise recommendation that was formulated already in 2002 by Working Group VIII of the European Convention.[52]

The requirement of willingness explains why the mechanism is called a permanent structured "cooperation".

Any Member State which has the sufficient capacities can join at any stage the permanent structured cooperation, and, most importantly, leave it (Art. 46, para. 5, TEU). This is what Professor Koutrakos named the principle of "openness". The process of joining at a later stage after the establishment of the cooperation is identical to the one foreseen for the original set up of the mechanism: same requirements for the Member State, same procedure and voting rules; the only difference is that there is no time-limit of three months for the Council to act.

The procedure for leaving the cooperation seems to be fairly simple: a unilateral declaration of the MS who does not wish to take part in the operations any longer will suffice. The Council shall simply take notice of the withdrawal.

Moreover, the decision-making rule throughout the cooperation will be unanimity – obviously, unanimity of the participating MSs only (Art. 46, para. 6, TEU).

The requirement of continuity accounts for the qualification of the structured cooperation as "permanent". Continuity ensured guaranteed by Art. 46, para. 4, TEU: a Member State which no longer fulfils the criteria or is no longer able to meet the commitments it made prior to entering the cooperation, may be suspended from participating in it. The decision is taken by the Council voting by unanimity.

The permanent cooperation is flexible in so far as it is only "structured", and its functioning is not otherwise defined in detail.

[51] European Council, Council of the European Union, Press Release 765/17 of 11 December 2017, *Defence cooperation: Council establishes Permanent Structured Cooperation (PESCO), with 25 member states participating in Council of the European Union*,.

[52] P. Craig, *The Lisbon Treaty. Law, Politics, and Treaty Reform*, Oxford: Oxford University Press, 2010, p. 419. The final report of the Working Group is available at www.european-convention.europa.eu.

While some authors read in the rules on this cooperation an inevitable evolution and therefore an unstoppable incremental collaboration,[53] this is not necessarily the case. The rules of Art. 46 are instead fashioned in a way as to allow MSs not only to withdraw at any point, but also as to pick to what missions and operations it want to participate.[54]

An important aspect of the flexibility constitutional to the permanent cooperation is that there are no times constraints at to when it will be set up,[55] nor when and how often it should act. This makes eminent sense, given that the cooperation is permanent precisely in order to ensure a timely reaction to unforeseen events. A time-schedule or any other kind of temporal planning would be detrimental to the rationale of the cooperation.

A source of potential concern looming over the whole set of provisions on the CSDP is the absence of jurisdiction of the CJEU. Art. 24 TEU provides that the Court shall not have jurisdiction on the provisions of Title V TEU and acts implementing them, i.e. on CFSP, thus including CSDP.[56]

The only cases on which the Court has jurisdiction is to monitor compliance with Art. 40 TEU and to review the legality of sanctions. Art. 40 TEU provides that CFSP and TFEU external competences shall not affect each other's powers and procedures.

A first scenario where the Court has jurisdiction would therefore be to ensure that nothing in CSDP encroaches on TFEU competence, for example trade or humanitarian assistance acts which fall under the TFEU competence of EU external relations.[57]

A second scenario would be Art. 222 was invoked during one of the operations of the permanent structured cooperation or even in parallel with the mutual assistance clause. In its first paragraph, that Article provides that "[t]he Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster". In that case, if a measure was adopted on a dual legal basis, or, more simply, if an ongoing CSDP operation was, in the case of a terrorist attack, concretely carried out on EU territory pursuant to a Council Decision adopted under Arts 222, para. 3, TFEU and 31, para. 1, TEU, then the Court might find that it has jurisdiction to rule on the original CSDP act as well.

Art. 222 TFEU, indeed, could act as a "bridge" between CSDP and TFEU competences, thus conferring jurisdiction to the Court, in the same way as Art. 215 TFEU does. By Art. 215 the Union implements sanctions against individuals. In *Rosneft*, the Court ruled

[53] P. KOUTRAKOS, *The Common Security and Defence Policy*, cit.

[54] A. MARRONE, N. PIROZZI, P. SARTORI, *PESCO: An Ace in the Hand for European Defence*, cit., p. 4.

[55] Protocol 10 spoke of 2010 as deadline.

[56] See Court of Justice, opinion 2/13 of 18 December 2014, para. 252; Court of Justice, judgment of 28 March 2017, case C-72/15, *Rosneft*, para. 99.

[57] A. DASHWOOD, *The Continuing Bipolarity of the EU External Action*, in I. GOVAERE, E. LANNON, P. VAN ELSUWEGE, S. ADAM (eds), *The European Union in the World: Essays in Honour of Marc Maresceau*, Leiden: Brill Nijhoff, 2014, p. 3 *et seq.*; P. KOUTRAKOS, *The Common Security and Defence Policy*, cit., Chapter 8.

that Art. 215 acts as a "bridge" between CFSP and TFEU,[58] and thus it appears that CFSP decisions which need implementation via Art. 215 are also subject to the Court's jurisdiction, because they have "crossed the bridge" – which is AG Whatelet's expression.[59]

Finally, even though I believe that the Charter of Fundamental Rights of the European Union is applicable to CFSP, there are good grounds for concern over the accountability mechanisms of CSDP missions.[60]

As far as institutional involvement is concerned, the High Representative puts into effect European foreign policy and, therefore, also EDU (Art. 24 TEU). To the HR pertain the right to propose decisions (Art. 42, para. 4, TEU), and coordination of the tasks which are the purpose of CSDP. This might appear to be at issue with Art. 15, para. 6, TEU, which provides that "[t]he President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy." The issue of representation of the EU should be resolved in the sense of granting the President of European Council representation at government level, and to HR representation at anything below that level (that is, exchanges between diplomats).[61]

In EDU, the Political and Security Committee (PSC) plays a major role. PSC is the main deliberative and preparatory body for the CSDP, even though overview and coordination of the missions is the HR's task.

III.4. Purpose

The tasks of EU missions in CSDP are established in Art. 42, para. 1, TEU and specified in Art. 43, para. 1, TEU as a non-exhaustive list. These draw from, but are broader than, the so-called "Petersberg tasks", which defined the military objectives of the European Union in 1992. Drawing on the Franco-British St Malo declaration of 1998,[62] the Cologne[63] and Helsinki[64] European Council meeting of 1999, the TEU assigns to CSDP missions purely defensive and peace-keeping tasks, namely: "peace-keeping, conflict pre-

[58] *Rosneft*, cit., para. 89; see also Court of Justice, judgment of 19 July 2012, case C-130/10, *European Parliament v. Council of the European Union*, para. 59.

[59] Opinion of AG Whatelet delivered on 31 May 2016, case C-72/15, *Rosneft*, footnote 56.

[60] S.O. Johansen, *Accountability Mechanisms for Human Rights Violations by CSDP Missions: Available and Sufficient?*, in *International and Comparative Law Quarterly*, 2017, p. 181 *et seq*.

[61] P.J. Kuijper, J. Wouters, F. Hoffmeister, G. De Baere, T. Ramopoulos, *The Law of EU External Relations. Cases, Materials, and Commentary on the EU as an International Legal Actor*, Oxford: Oxford University Press, 2015, p. 26.

[62] Franco–British St. Malo Declaration of 4 December 1998, www.cvce.eu.

[63] European Parliament, Conclusions of the Presidency of 3-4 June 1999, www.europarl.europa.eu.

[64] European Parliament, Conclusions of the Presidency of 10-11 December 1999, www.europarl.europa.eu.

vention and strengthening international security in accordance with the principles of the UN Charter".[65]

The specification of the concrete objectives and scope of these tasks, however, is left to the Council (Art. 43, para. 2, TEU): this leaves open the question of how much discretion would the Council enjoy in making these decisions. The issue is of fundamental constitutional importance because it has repercussions for both the role of the EU in the international scene and for the discussion over the desirability of the EDU itself. Much of the debate surrounding the opportunity of an EDU clearly depends on what EU forces do or aim to.

The autonomy of the Council would encounter clear constitutional limits: those of Arts 21, para. 2, let. a), b), and c),[66] and 42 TEU. EDU would be used exclusively for defence and to safeguard EU security, integrity, and independence – or, outside the Union, to preserve peace and prevent conflicts. This shall also be in line with the values of Art. 3, para. 5, TEU.[67] But these are only external boundaries. One thing is to state the obvious – the EDU could not be used to expand EU's territory – quite another thing is to interpret the reference in the TEU to the "respect for the principles of the United Nations Charter". Would it be possible to use an EU army for "humanitarian intervention", e.g. without UN Security Council authorisation but for the aim of stopping most serious violations of human rights? Would anticipatory or pre-emptive self-defence be considered in line with the principles of the Charter? Would an armed-attack by a non-State actor trigger the "inherent right to self-defence" enshrined in Art. 51 UN Charter? Aside from issues of compliance with the UN Charter, could EDU be used for internal security purposes?

[65] Art. 43 TEU specifies: "The tasks referred to in Article 42(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories".

[66] Art. 21, para. 2, let. a), b), and c), TEU: "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; (b) consolidate and support democracy, the rule of law, human rights and the principles of international law; (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders".

[67] Art. 3, para. 5, TEU: "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".

There is, at present, no clear answer to these questions. The CJEU seems willing to leave the Council a broad scope for discretion when it comes to decisions of CFSP.[68] At this stage, therefore, the only possible answer is that the precise purpose of EDU will depend on how the Council interprets its role.

Moreover, the EU could conclude – as it does at present[69] – international agreements to facilitate or regulate its CSDP missions, pursuant to Arts 37 TEU and 218 TFEU. These would also be necessary for EDU, and the CJEU shall have jurisdiction to give opinions on their conclusion, pursuant to Art. 218, para. 11, TFEU.

While the competence of the Union to conclude these treaties is not debatable, the nature of such competence is unclear. In particular, as far as the conclusion of the agreements is concerned, it is not clear whether it is subject to the rule of Art. 3, para. 2, TFEU, which states that the Union shall have exclusive competence for the conclusion of international treaties "when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope".[70] The first two requirements hardly apply to CSDP. There can be no legislative acts in CFSP, and it is hard to see what internal aspect is *not* conditional to external security, thus making it difficult to take this requirement seriously.[71] It might instead happen that a CSDP-related treaty affect common rules or alter their scope – for example rules on defence products.[72]

III.5. Funding

The rule for EU budget is that military expenses are paid by MSs, unless they are administrative costs. In this category fall civilian missions with defence implications as well. At present, these costs are financed by a mechanism called ATHENA,[73] whereby MSs who

[68] *Rosneft*, cit., para. 146; opinion of AG Whatelet, *Rosneft*, cit., para. 105; Court of Justice: judgment of 1 February 2007, case C-266/05, *P Sison v. Council of the European Union*, para. 33; judgment of 28 November 2013, case C-348/12, *P Council v. Manufacturing Support & Procurement Kala Naft*, para. 120; judgment of 7 April 2016, case C-193/15, *Akhras*, para. 51; judgment of 12 May 2016, case C-358/15, *Bank of Industry and Mine v. Council of the European Union*, para. 57.

[69] P.J. Kuijper, J. Wouters, F. Hoffmeister, G. De Baere, T. Ramopoulos, *The Law of EU External Relations*, cit., p. 673 describes the three kinds of international agreements the EU concludes with regard to CSDP missions.

[70] I will not discuss the extent to which this Article intends to codify the previous case law of the Court. Opinion of AG Kokott delivered on 27 June 2013, case C-137/12, *Commission v. Council*, para. 111.

[71] This would be even more true if the Article intended to codify Court of Justice, opinion 1/76 of 26 April 1977 on the "complementarity principle", that the Union enjoys exclusive competence when internal and external action are so "inextricably linked" that it does not make sense to have one without the other.

[72] On which see M. Trybus, L.R.A. Butler, *The Internal Market and National Security: Transposition, Impact and Reform of the EU Directive on Intra-Community Transfers of Defence Products*, in *Common Market Law Review*, 2017, p. 403 *et seq*.

[73] Council Decision (CFSP) 2015/528 of 27 March 2015 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications (ATHENA) and repealing Decision 2011/871/CFSP.

have decided not to abstain (Art. 31, para. 1, TEU) contribute in proportion to their Gross national product.

The TEU, however, also provides for a specific start-up fund in Art. 41, para. 3. This should pay for preparatory activities to the tasks of CSDP missions – thus including EDU ones – which are not financed by MSs. At the moment, such a fund does not exist, but it is a kind of instrument not new to the EU experience. It is conceivable that it could be fashioned, if not in its form and least in its substance,[74] like an international agreement not dissimilar from the European Stability Mechanism or to the Single Resolution Fund for Banking Union.

The adoption of the fund shall follow a two-stages procedure: first, a Council decision should set up the fund (pursuant to Art. 41, para. 3, let. a), TEU – without involvement of the European Parliament). Second, after consultation with the European Parliament, the Council should establish a procedure for using the fund.

Commentators have noticed the uncertainty over the purpose of the financing, which accounts for MSs reluctance to establish this fund;[75] or the potential for inter-institutional disputes on the budgetary procedure.[76]

There are also doubts as to the practical relevance thereof. For the fund to be useful, MSs would have to contribute hefty sums, especially since they already have ATHENA in place. Indeed, since this fund was conceived before ATHENA was created, it appears that MSs have already found a way to solve the issue, thus eliminating, in practice, the need for the start-up fund of Art. 41, para. 3, TEU.

In addition to this, the Commission, following the Speech of President Juncker on the state of the Union, proposed a Defence Plan in November 2016.[77]

IV. Conclusion

The prospect of EDU is a powerful reminder that the EU is an unfinished project. Uncertainty over EDU's aims casts doubt over its practical significance. At present, since it is impossible to determine with legal certainty what the duties and tasks of the EDU will be, proponents of the EDU are having a hard time "selling" it to the public and to MSs government.[78]

[74] It has to be a Council decision.

[75] H-J. Blanke, S. Mangiameli, *The Treaty on European Union (TEU) A Commentary*, cit., p.1197.

[76] P. Koutrakos, *The Common Security and Defence Policy*, cit., p. 76.

[77] Communication COM/2016/950 of 30 November 2016 Commission to the European Parliament, the European Council, the Council, the European Economic and social Committee and the Committee of the Regions, *European Defence Action Plan*. See, on it, S. Biscop, *Differentiated Integration in Defence: A Plea for PeSco*, in *Istituto Affari Internazionali*, 6 February 2017, www.iai.it, p. 8.

[78] D Keohane, *Samuel Beckett's EU Army*, in *Carnegie Europe*, 16 December 2016, www.carnegieeurope.eu.

EU military policies are and remain voluntary, that is, subject to the preferences of each individual MS. In EDU, the balance of politics and law is overwhelmingly in favour of the former. But contrary to what Koutrakos suggests,[79] the strength of the rules on permanent structured lies precisely in this. The norms are rigorous to a sufficient degree, while leaving MSs enough flexibility to pursue their own policies. Ultimately, it is precisely the reliance on policies rather than on legal factors the element that may guarantee the permanent structured cooperation's success. Further research should explore if there are aspects of legal distinctiveness about the EDU; whether it is even "softer" and more intergovernmental than CFSP; how and to what extent EDU links with EU law proper; and, more theoretically, where it fits into the model of EU integration.

However, given the overlap with existing CSDP mechanism, NATO, and other ad hoc coalitions, as well as the potential conflict between the purposes of EDU and some of EU's obligations under the UN Charter, the practical relevance of the EDU comprising the establishment permanent structured cooperation is at best questionable.

[79] P. KOUTRAKOS, *The Common Security and Defence Policy*, cit., p. 78.

Dialogues
A Dialogue on *Front Polisario*

Foreword

In an earlier issue, *European Papers* hosted a comment by Eva Kassoti on the Court of Justice's decision in case C-104/16 P, *Council of the European Union v. Front Polisario*.

The comment has triggered a number of reactions, some of which requesting that the critical points it made be counterbalanced by different views. Aware of the many controversial issues entailed by the decision, the current issue of *European Papers* offers a wider range of opinions, brought together in this *Dialogue*. To attain this goal, an exception to the linguistic regime of the *e-Journal* proved to be necessary. Some contributions were submitted spontaneously, others were invited.

The various contributions unfold along an invisible thread, keeping together topics such as the legal consequences of serious breaches of collective interests and values of the international community, the tension between these interests and values and the recurrently re-emerging *raison d'Etat*, the role of the European Union as an actor in international relations and as a promoter of the development of international law, and the relations between its political and judicial Institutions in shaping the European lines of foreign affairs.

European Papers does not endorse any of the arguments that are put forward, but, as always, puts its columns at the disposal of every plausible, yet controversial, argument pertaining to the process of European integration. It is the profound belief of its governing bodies that the active development of a European approach to international law is intimately connected to the future of Europe and to the role it wants to play in an ever more interconnected world.

DIALOGUES
A DIALOGUE ON *FRONT POLISARIO*

"SELF-DETERMINATION AT THE EUROPEAN COURTS: THE *FRONT POLISARIO* CASE" OR "THE UNINTENDED AWAKENING OF A GIANT"

PETER HILPOLD*

ABSTRACT: The judgment delivered by the Court of Justice on 21st December 2016 in *Front Polisario* (case C-104/16 P, *Council of the European Union v. Front Polisario* [GC]), has all the ingredients to become a leading case of EU jurisprudence. While formally overturning the judgment by the General Court in case T-512/12 (judgment of 10 December 2015) which annulled the liberalization agreement concluded by EU with Morocco in 2012 as it violated the rights of the people of Western Sahara (occupied by Morocco), in substance the Court's judgment even goes beyond the judgment of the General Court in defence of self-determination. The *jus cogens* and *erga omnes* character of self-determination is reiterated and emphasized by the Court of Justice. This is no small thing in a time when calls for self-determination seem to disrupt long-established states worldwide and also in Europe.

KEYWORDS: self-determination – *erga omnes* norms – *jus cogens* – Western Sahara – Association Agreement EU-Morocco – colonialism – Front Polisario.

I. INTRODUCTION

The "rallying cry" for self-determination is again to be heard all over Europe and far beyond. At the moment, "Catalonia" stands at the middle of the self-determination row and there is much uncertainty about the extent to which this concept applies to this factual situation.[1] There is broad agreement on the view that self-determination has many facets, it knows many perspectives and many forms of implementation. As far as self-determination is not retained to be co-extensive to sovereignty (or, only be considered, so

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[1] See E. LÓPEZ-JACOISTE, *Autonomy and Self-determination in Spain: Catalonia's Claims for Independence from the Perspective of International Law*, in P. HILPOLD (ed.), *Autonomie und Selbstbestimmung*, Baden-Baden: Nomos, 2016, p. 218 *et seq.*, and X. ARZOZ, *Autonomie und Selbstbestimmung in Spanien aus verfassungsrechtlicher Sicht*, *ibidem*, p. 242 *et seq.*

to say, as the other face of the coin of national sovereignty, a view, however, that diminishes the actual importance of this concept), this right is generally accepted only with regard to the "colonial" context, i.e. in respect to non-self-governing territories (NSGT)[2] and for peoples subjected to foreign domination or occupation.[3] According to the prevailing view in international law academia, the colonial right to self-determination has widely lost its relevance, the right to self-determination of peoples under foreign domination or occupation is mostly undisputed and so primary attention is devoted to the right to self-determination in its internal expression, i.e. in regard to peoples seeking more effective participation in political decisions affecting their situation as well as to the issue of secession, i.e. to the strive of peoples (usually defined along ethnic or linguistic lines) for independence. So it could grossly be stated that there are manifestations of self-determination that go widely uncontested (the "colonial" right to self-determination and the fight against foreign domination or occupation) and other forms of self-determination (the "internal" right to self-determination[4] and the purported right to secession) that are of particular interest for academic discussion, exactly because there is so much uncertainty in these fields. Recent developments evidence, however, that this distinction is not so clear as is usually portrayed. The *Front Polisario* case recently decided in an appeal judgment by the Court of Justice[5] demonstrates that that colonial and post-colonial self-determination still remain topical and that these fields display many uncertainties, the clarification of which could be of great value for the self-determination discussion as a whole. In particular, however, it is interesting to note that the EU is now assuming a leading role in the attempt to bring clarity in this field. Though purportedly relying on international law these findings by the EU Courts are, however, not always really convincing from the viewpoint of the international legal order.

[2] This right is based on the general reference to self-determination in the Arts 1, para. 2, and 55 of the UN Charter and is referred to in more specific indications in Chapter XI of the UN Charter that addresses the "territories whose peoples have not yet attained a full measure of self-government", in General Assembly, Resolution 1514 (XV) of 14 December 1960, Declaration on the granting of independence to colonial countries and peoples, UN Doc. A/RES/1514.

[3] This specific connotation of the right to self-determination has outgrown from state practice and UN resolutions. See A. CASSESE, *Self-determination of Peoples*, Cambridge: Cambridge University Press, 1995, p. 90 *et seq*.

[4] On this issue see S. OETER, *Selbstbestimmungsrecht im Wandel – Überlegungen zur Debatte um Selbstbestimmung, Sezessionsrecht und "Declaration on Granting Independence to Colonial Countries and Peoples Vorzeitige" Anerkennung*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1992, p. 741 *et seq*., as well as P. HILPOLD, *Self-determination and Autonomy:Between Secession and Internal Self-determination*, in *International Journal on Minority and Group Rights*, 2017, p. 1 *et seq.*

[5] Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council of the European Union v. Front Polisario* [GC].

II. Some factual elements of the Western Sahara dispute

The Western Sahara dispute came into being as a textbook case of colonial self-determination only to develop afterwards into an issue demonstrating different traits of an array of categories of self-determination. The Western Sahara was declared a Spanish colony by a Royal decree of 1884, although at that time factual control of this territory was mainly limited to the coastal area and guaranteed by the conclusion of agreements with the chiefs of local tribes.[6] When after 1945 colonialism was set to come to an end, Spain, one of the first colonial powers, first tried to oppose this trend. When Spain became an UN Member in 1955 first this country, like Portugal, neglected her reporting obligations as to her non self-governing territories but eventually, and this time unlike Portugal, resistance was given up after the anti-colonialism resolutions mentioned above were adopted by the UN General Assembly.[7] The following years the remaining colonial powers came under mounting pressure by the UN, and in particular by the UN General Assembly where a growing number of newly independent states gathered in their fight against colonialism. In the longer run, Spain had little to halt this movement. The strategy to declare the remaining colonies as "overseas provinces" of metropolitan Spain and therefore as a natural, genuine part of Spain territory soon proved to be in vane and the statement of 11 November 1960 of the representative of Spain at the 1048th meeting of the Special Political and Decolonization Committee (Fourth Committee) that its government had agreed to transmit information to the UN Secretary-General in accordance with the provisions of Chapter XI UN Charter preceded the two anticolonialism resolutions of 14 and 15 December 1960 only by a few weeks.[8]

Four years earlier, in 1956, the Spanish and French protectorate of Morocco had gained independence and this newly independent state soon became a strong competitor with regard to sovereignty claims over Western Sahara territory as the Moroccan king opined that ancient Moroccan territorial title extended far south to areas of the Western Sahara. Therefore, the Western Sahara decolonization process had all the ingredients for an enormous, unprecedented complicacy as different claims overlapped and the Sahrawi people's claim for self-determination was interpreted by Morocco, albeit in a patently false way, as a violation of their own claim for a full realization of self-determination. This dispute offered a platform for further geopolitical interests to materialize and to influence the legal debate: From the beginning Morocco could count on the strong support by the previous Protector power France and subsequently, during

[6] See A. Cassese, *Self-determination*, cit., p. 214.

[7] See J. Crawford, *The Creation of States in International Law*, Oxford: Oxford University Press, 2006, p. 608 *et seq*.

[8] General Assembly (Fourth Committee), 1047th Meeting of 11 November 1960, UN Doc. A/C.4/SR.1047. As this author has exposed elsewhere Portugal was more adamant in this approach when it declared its colonies to make part of the metropolitan state and stuck to this approach until the "Carnation Revolution" of 24 April 1974. See P. Hilpold, *Der Osttimor-Fall*, Frankfurt: Peter Lang, 1995.

the Cold War, Morocco's political allegiance with the West made sure that Western states, although mostly sympathetic to the lot of the Sahrawi people, endorsed their claim for self-determination only half-heartedly as this might have emboldened the Sahrawi people's most important ally, Algeria, a country then tied to the socialist area.

Starting with the year 1963 discussions of growing intensity about Western Sahara's right to self-determination took place in the UN General Assembly, in the Special Committee on the Granting of Independence and in the UN Security Council,[9] although in the later institution Morocco could count (and still can count) on France's allegiance at least in the sense that any attempt to discuss the human rights situation in this region, let alone the provision of active support by the Security Council for self-determination would be vetoed by France.[10] In 1964 the first UN General Assembly resolutions were issued demanding Spain to implement the right to self-determination and, in UN General Assembly resolution 2290 (XXI) of 20 December 1966, Spain was specifically requested to determine the procedures for a referendum under the auspices of the UN and in consultation with Morocco and Mauritania.[11]

In the following years the General Assembly continued with these pleas towards Spain, with growing clarity and insistence, calling also upon all States to provide help to colonial peoples struggling for self-determination with all necessary means.[12] Already at that time, therefore, the *erga omnes* nature of the Sahrawis' struggle for self-determination, that should become so important in the proceedings before the European Courts, had been clearly recognized. In 1973, a liberation movement for Western Sahara, the *Front Popular para la Liberacion de Saguia al Hamra y Rio de Oro* (Front Polisario), was formed and it soon got broad popular support.

Finally, towards the end of President Franco's dictatorship, in 1974, Spain agreed to hold a referendum under the auspices of and supervised by the UN, during the first six months of 1975.[13]

As is well known this referendum has never taken place. It has been convincingly shown in literature that Morocco has ably circumvented all relative obligations: promises were half-heartedly given and eventually not maintained. The Sahrawi people demonstrated enormous patience, putting all their confidence in the UN, only to be dis-

[9] See P. Maria Vernet, *Decolonization: Spanish Territories*, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law,* Oxford: Oxford University Press, 2010, opil.ouplaw.com, para. 52 *et seq*.

[10] See P. Bolopion, *France against Human Rights*, in *Le Monde*, 22 December 2010, www.hrw.org.

[11] General Assembly, Resolution 2229 (XXI) of 20 December 1966, Question of Ifni and Spanish Sahara, UN Doc. A/RES/2229. See P. Maria Vernet, *Decolonization*, cit., para. 53.

[12] See General Assembly: Resolution 2711 of 14 December 1970, Question of Spanish Sahara, UN Doc. A/RES/271; Resolution 2983 of 14 December 1972, Question of Spanish Sahara, UN Doc. A/RES/2983.

[13] See General Assembly, Letter dated 20 August 1974 from the Permanent Representative of Spain to the United Nations addressed to the Secretary-General, 21 August 1974, UN Doc. A/9714, as cited by J. Soroeta, *The Conflict in Western Sahara After Forty Years of Occupation: International Law versus Realpolitik*, in *German Yearbook of International Law*, 2016, p. 190.

appointed in the end when it had to take notice of the fact that Morocco, in the meantime, had created *faits accompli* while successive UN General Secretaries became ever more indulgent towards Moroccan intransigence, eventually being prepared to accept an agreement according to which the Sahrawi people should renounce (external) self-determination and settle for an autonomy within Morocco.[14]

At the insistence of Morocco, hoping both for a legal affirmation of her territorial claims and a postponement *sine die* of the referendum which otherwise was due to be held, the UN General Assembly asked the International Court of Justice to give an advisory opinion on the Western Sahara issue.[15] This opinion, issued a year later, on 16 October 1975, notwithstanding its prudent tone, was a disappointment for Morocco (as well as Mauritania) as it denied the alleged existence of pre-colonial sovereign titles by Morocco (and Mauritania) on Western Sahara territory[16] and it confirmed the right to self-determination by the Sahrawi people through the free and genuine expression of their will as the territory of the Western Sahara was not *terra nullius* at the time of Spanish occupation.[17]

Morocco de facto ignored this opinion and orchestrated instead the so-called "Green March", a population transfer from Morocco to the Western Sahara in order to occupy this territory not only militarily but also with the clear intent to change the population structure in case a referendum should nonetheless take place.

An ambiguous role, both on the political level as on the legal one, was played in this context by Spain. As the colonial power, Spain had specific duties towards this NSGT and it was constantly reminded of these duties by the UN. By the Madrid Declaration of principles signed by the governments of Spain, Morocco and Mauritania on 14 November 1975, Spain seemed to put its administrating powers at the service of the self-determination process as it is required by UN decolonization law. When it became clear, however, that Morocco was not interested in awarding a real self-determination opportunity to the Sahrawi people, Spain, in 1976, took this as a facile excuse and left the scene, leaving the Sahrawi people, toward whom Spain had generated a clear liability by colonizing them, to their appalling lot. There can be no doubt that this way Spain had not come up to her obligations. The developments in 1976 might have come unforeseen and it might also be true that the ensuing turmoil was beyond immediate control by Spain. On the other hand, Spanish disinterest in this question was palpable to all parties involved and has surely emboldened Moroccan resolve to impose her will. It can hardly be argued that the administrating power of a NSGT has to oversee and favour

[14] For a good description of these events see J. SOROETA, *The Conflict in Western Sahara*, cit.

[15] General Assembly, Resolution 3292 of 13 December 1974, Question of Western Sahara, UN Doc. A/RES/3290.

[16] The existence of pre-colonial feudal links by Morocco and Mauritania towards the territory of what is now the Western Sahara (or, more precisely to the respective population) was not denied but these links were not strong enough to exclude an autonomous right to self-determination of the Sahrawis.

[17] International Court of Justice, *Western Sahara*, advisory opinion of 16 October 1975, para. 85.

the self-determination process only if no major resistance arises. On the contrary, it can be argued that the administrating power has to shoulder extensive burdens in such situations as this is only commensurate to the liabilities created through the colonization process. Spain has done very little to come up to these obligations. If at all, Spain has paid lip service to the obligations resulting from her former status as a colonial power. An awkward situation has arisen:

Still in 2017, Spain is listed by the UN among the states that have reporting obligations under Art. 73, let. e), of the UN Charter, in this specific case as to Western Sahara. A look at the UN Report on the "Information from Non-Self-Governing Territories transmitted under Article 73e of the Charter of the United Nations" of 2017 reveals that information about Western Sahara is conspicuous by its absence.[18]

As an explanation, the following note is added:

> "On 26 February 1976, the Permanent Representative of Spain to the United Nations informed the Secretary-General that 'the Spanish Government, as of today, definitely terminates its presence in the Territory of the Sahara and deems it necessary to place the following on record: ... (a) Spain considers itself henceforth exempt from any responsibility of an international nature in connection with the administration of the said Territory, in view of the cessation of its participation in the temporary administration established for the Territory'".[19]

As evidenced, this justification does not withstand closer scrutiny.

This problem has even been compounded by the fact that Spain (as a state and through private Spanish economic actors) has participated in the economic exploitation of this region. In the late 1960s, by accident, rich phosphate stocks were discovered and by 1975 Western Sahara had become the sixth largest phosphate exporter in the world.[20] Spain continues to import phosphate and other natural resources (in particular oil and fish) from the Western Sahara and to exercise broader economic interests in this region.[21]

Economic Association between the EU and the Member States and Morocco further exacerbates this problem as this agreement opens the EU's borders for products originating from Moroccan territory of which, according to the Moroccan government interpretation, the Western Sahara makes part. This is, of course, not the position taken by the EU

[18] General Assembly, Report of the Secretary General on information from non-self-governing territories transmitted under article 73e of the Charter of the United Nations of 3 February 2017, UN Doc. A/72/62.

[19] General Assembly, Letter dated 26 February 1976 from the Permanent Representative of Spain to the United Nations Addressed to the Secretary General of 26 February 1976, UN Doc. A/31/56 S/11997.

[20] See M. Beardsworth, M. Kredlow, *The Last African Colony: A Look at the History and Modern Day Conflict of Morocco and Western Sahara*,, 2005, web.stanford.edu.

[21] See V. Trasosmontes, *El Territorio del Sáhara Occidental y sus Económicos: Reflexiones para España*, in *Documento Marco del Instituto Español de Estudios Estratégicos*, no. 17/2014, 30 October 2014, www.ieee.es.

but the Union has, at least so far, no instrument at hand to give effective substance to this position, i.e. to control which products are originating from the Western Sahara.

III. The Association Agreement and the proceeding before the General Court in the Case T-512/12

On 26 February 1996 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, was signed. It was approved on behalf of the Communities by Council and Commission Decision 2000/204/EC.[22] In furtherance to this agreement the parties concluded on 13 December 2010 a Liberalisation agreement ("Liberalisation Agreement 2010").[23] This agreement was approved by the Council Decision 2012/497/EU of 8 March 2012[24] and entered into force on 1 October 2012. The Council Decision 2012/497 offered a basis for attacking the Liberalisation Agreement 2010 through the Union's judicial system.

The plaintiff was the Front Polisario which requested the annulment of the Council Decision of 2012 before the General Court. This was an unprecedented action that required the General Court not only to decide upon highly delicate questions of international law and international politics but also to solve unprecedented dogmatic issues of EU law. As the judgment by the General Court of 10 December 2015 has already been broadly commented in literature[25] a few considerations as to this regard should suffice.

[22] Decision 2000/204/EC, ECSC of the Council and Commission of 24 January 2000 on the conclusion of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part.

[23] 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 No 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 Kingdom of Morocco of 13 December 2010.

[24] Decision 2012/497/EU of the Council 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.

[25] See inter alia F. Dubuisson, *La Question du Sahara Occidental Devant le Tribunal de l'Union Européenne: une Application Approximative du Droit International Relativ aux Territoires non Autonomes*, in *Journal de Droit International*, 2016, p. 503 *et seq.*; O. Peiffert, *Le Recours d'un Movement de Liberation Nationale á l'Encontre d'un Acte d'Appropriation d'un Accord International de l'Union: Aspects Contentieux*, in *Revue Trimestrelle de Droit Européen*, 2016, p. 319 *et seq.*; T.F. Graff, *Accords de Libre-échange et Territoires Occupés: a Propos de l'Arrêt TPIUE, 10 décembre 2015, Front Polisario c. Conseil*, in *Revue Générale de Droit International Public*, 2016, p. 263 *et seq.*; S. Hummelbrunner, 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*, in *Utrecht Journal of International and European Law*, 2016, p. 19 *et seq.* and E. Kassoti, *The Front Polisario v. Council*

In this action of pivotal importance was the question of the standing of the Front Polisario. According to the General Court the Front Polisario, though not having legal personality according to any national law, could be considered to have acquired legal personality through international law, the Front Polisario by its crucial role played in the Western Sahara status process, which is also recognized by the EU, has to be recognized legal personality within EU law according to Article 263 TFEU. This is an absolutely innovative approach, a thoroughly international-law-friendly position. The strong standing accorded to the Front Polisario by international law (and subsequently also by the EU) should convey legal personality to this entity also in EU law. There is no obvious legal basis for this reasoning in EU law but this is rather an expression of deference towards international law and in particular towards specific branches of international law of eminent status, like the law of colonial self-determination. It is interesting to note that the Court of Justice, though turning the judgment of first instance up-side down, did not touch upon this issue, reaching its conclusions via another approach, i.e. by sustaining that the Liberation Agreement 2010 did not apply to the Western Sahara and could therefore not affect the Front Polisario. Therefore it can be sustained that this innovative approach has been kept intact, at least in principle.[26]

Once cleared, the *locus standi* by Front Polisario it had to be assessed whether the Union was really prohibited from concluding the Liberalisation Agreement of 2010, as the plaintiff maintained, in which case the Council Decision 2012/497 had to be annulled. After a detailed examination of the case the General Court found a reason for a (partial) annulment of the Decision which was both of a procedural and a substantive nature. In fact, the General Court rightly found that there was no absolute prohibition in force to conclude an international agreement on the use of resources of a disputed territory but the wide discretion the Union had in this field was limited by the need to ensure that the production of the goods originating from this territory was not carried out in a manner detrimental to the population of that territory and did not entail infringements of fundamental rights of this population. According to the General Court, the Council did not carry out this assessment in an appropriate way and therefore the Council Decision 2012/497 was annulled as far as it applied to the Western Sahara.

Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part), in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, p. 339 *et seq.*

[26] Much criticism been voiced against the General Court's reasoning as to this point. It was sustained that the Liberalisation agreement, as an economic agreement, could hardly affect a national liberalisation movement such as Front Polisario which acts mainly by political and military measures (see in this sense Á. De Elera, *The Frente Polisario Judgments:an Assessment in the Light of the Court of Justice's Case Law on Territorial Disputes*, in J. Czuczai, F. Naert (eds), *The EU as a Global Actor – Bridging Legal Theory and Practice*, *Liber Amicorum in honour of Ricardo Gosalbo Bono*, Leiden: Brill Nihijoff, 2017, p. 280. In reality, however, there are good arguments to sustain that Front Polisario, while using military measures for its struggle, is a representative of the Sahrawi people in the broader sense and therefore is also directly affected by economic measures impinging on the right to self-determination.

There can be no doubt that these findings posed enormous challenges for the present case as in general for the future management of EU external economic relations. As to the basis of this rule in international law, usually reference is made to an opinion delivered by the former Under-Secretary-General for legal affairs and legal counsel of the UN, Dr. Hans Corell. In his ground-breaking study on "The legality of exploring and exploiting natural resource in Western Sahara",[27] Corell examined what International Law and practice says about the use of resources of colonial territories, a specific expression of the concept of permanent sovereignty on natural resources. The judgment of the General Court does not exactly reflect the position taken by Hans Corell. In fact, according to Corell: "if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the principles of international law applicable to mineral resource activities in Non-Self-Governing Territories".[28]

Corell, therefore, gives much relevance to consultation[29] while the General Court seemed to emphasize an autonomous right (and duty) by the Council to assess the consequences of an international agreement on the colonial territory. But how should the Council act in this regard and to what extent is it dependent from previous consultation with the concerned population?

The partial annulment could hardly be implemented exactly because for Morocco the Western Sahara was an integral part of their territory and in many cases it would have been next to impossible to ascertain the origin of specific products. The most decisive challenge was posed, however, by the requirement introduced by the General Court to carry out a human rights assessment of the agreement's consequences, presently in the Western Sahara and potentially in all future relations. Fearsome scenarios could be depicted on the wall on this basis: what was left of the EU's discretionary power in the conclusion of international agreements if there was an obligation of previous "impact assessment" of uncertain nature and extend? At which point a critical result of such an assessment would translate in a prohibition to conclude the agreement? Would minor points of criticism imply an obligation to set other actions short of an abortion of treaty negotiations? What were the values whose respect the EU should in any case impose? Of course, there are norms and catalogues of norms (see, for example, Art. 2 TEU or the Charter of Fundamental Rights of the European Union) but many of these norms are fairly imprecise and open up new space for discretionary valuation. Of course, in an *effet utile* interpretation of this new approach it would not have been so difficult to translate it into a useful instrument. In fact, human rights violations in the Western Sa-

[27] H. CORELL, *The Legality of Exploring and Exploiting Natural Resources in Western Sahara*, 2002, hlrn.org.

[28] Security Council, Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council of 12 February 2002, UN Doc. S/2002/161.

[29] See also A. ANNONI, *C'è un giudice per il Sahara Occidentale?,* in *Rivista di diritto internazionale*, 2016, p. 873.

hara are so extreme, the violation of the right to self-determination by Morocco is so evident that the criterion developed by the General Court in this case and applicable to this case could be interpreted as an instrument designed to apply only to the most outrageous cases. Applied in this sense, this criterion could become sort of a "tie-break-rule" for isolated situations of manifest disregard of the human rights implications of the EU's external action. Nonetheless, a considerable amount of uncertainty would remain and so there is small wonder that the Court in the appeal proceeding attempted to bring clarity into this area.

As will be shown, the Court of Justice, although formally turning upside down the judicial findings by the General Court, managed not only to confirm their main content but to go even further and to be more pronounced as to the defence of the Sahrawi people's right to self-determination. It is, however, not really sure whether the position taken by the Court is technically more convincing.

IV. The Court of Justice judgment of 21 December 2016

The judgment of 21 December 2016 was delivered after an expedited procedure. The potentially far-reaching (and disruptive) consequences of the General Court's judgment should thereby be contained as far as possible or not materialize at all.

The finding by the Court of Justice, following the lines of the opinion delivered by AG Wathelet, was formally negative for the Front Polisario as the Council's appeal was upheld and the General Court's judgment (favourable to Front Polisario) was set aside. In substance, however, this finding did not worsen the Front Polisario's position (and in fact, it was hailed by this organization as a success) as it ruled that what was contested by Front Polisario (the application of the Liberalization Agreement 2010 to an occupied territory, thereby disregarding the rights of the Sahrawi people when resources of this territory are exploited potentially against the will of the local people and in detriment of their rights) could legally not happen as this agreement did not apply to the Western Sahara.[30] By this ruling the Court substituted the empirical approach adopted by the General Court by a normative one[31] according to which there could not be what there must not be. For the Court there were various legal grounds for which such an exten-

[30] It is perhaps interesting to note that the Court of Justice took this bold stance despite the, as it was called, "unacceptable and arrogant 'warning' given to the Court by France regarding the serious consequences for the EU that would follow from a confirmation of the judgment of 15 December 2015". See J. Soreta, *The Conflict*, cit., p. 220, referring to the Statement in Intervention of France of 31 May 2016, in *Council v. Front Polisario* [GC], cit.

[31] See in this sense J. Gundel, *Der EuGH als Wächter über die Völkerrechtlichen Grenzen von Abkommen der Union mit Besatzungsmächten. – Anmerkung zum Urteil des EuGH (GK) vom 21.12.2016 RS C-104/1 6 P (Rat/Front Polisario)*, in *Europarecht*, 2017, p. 4474. As Enzo Cannizzaro puts it, "[t]he effect of the interpretative decision enacted by the Court of Justice presents striking analogies with a declaration of invalidity". See E. Cannizzaro, *In Defence of Front Polisario: The ECJ as a Global Jus Cogens Maker*, in *Common Market Law Review*, 2018, in course of publication, p. 10 of the manuscript.

sion of the Integrations agreement's territorial reach would be illegal. Several of these grounds were hardly convincing in factual and in legal terms.

For example, the Court rejects the argument of tacit acceptance of Morocco's extension of the Liberalization Agreement to Western Sahara.[32] In reality, however, Morocco, in the last decades never has permitted doubts that it considers the Western Sahara to be part of her sovereign territory and the Council not only did not protest against this attitude but actively contributed to implement the Liberalization Agreement. No measure was perceptible which would have been suited to limit the application of the Liberalization Agreement only to Moroccan territory. As has been shown very clearly in literature, Morocco does consider itself as an administrative power but behaves rather as an occupying power and the EU is fully aware of this fact.[33]

The Court also makes reference to the 1969 Vienna Convention on the Law of Treaties (VCLT) in its intention to limit the territorial application of the Liberalization treaty to Morocco. The Court draws, however, assumptions from the VCLT that are not warranted. For example, for the Court, an extension of the Liberalization Agreement 2010 to the Western Sahara would run counter to the principle of relativity of international treaties set out in Art. 34 VCLT (as the Sahrawi people have not been involved in treaty negotiations).[34] As has been correctly remarked, however, the Court errs when it attributes substantive character to the principle of relativity: the violation of this principle does not render the treaty invalid but makes it rather unopposable against the third party affected.[35]

At the end, the whole controversy boils down to the question whether the right to self-determination can really be attributed the enormous relevance as the judgment by the Court in *Front Polisario* suggests.

V. The right to self-determination and the *Front Polisario* case

There can be no doubt that the Court of Justice judgment in *Front Polisario* has opened up a new chapter in the discussion about self-determination even though if it seems that few have yet realized the enormous potential reach of this new jurisprudence. The

[32] *Council v. Front Polisario* [GC], cit., para. 99.

[33] See F. Dubuisson, G. Poissonnier, *La Cour de Justice de l'Union Européenne et la Question du Sahara Occidental: Cachez Cette Pratique (Illégale) que je ne Saurais Voir*, in *Revue Belge de Droit International*, 2016, p. 607. Alan Hervé has aptly remarked the following in this context: "L'approche du Tribunal avait pour avantage de metre le droit en adéquation avec le fait et de prendre acte d´une certaine hypocrisie des institutions de l´Union et des États membres de l'Union qui ne peuvent ignorer, par exemple, les activités poursuivies par les entreprises européennes sur ce territorie en cooperation avec les autorités du Maroc". See A. Hervé, *Le Cour de Justice de l'Union Euorpéenne Comme juge de Droit Commun du Droit International Public?*, in *Revue Trimestrelle de Droit Européen*, 2017, p. 28.

[34] *Council v. Front Polisario* [GC], cit., para. 106.

[35] See F. Dubuisson, G. Poissonnier, *La Cour de Justice*, cit., p. 612. For a good analysis of this topic see also E. Kassoti, *The* Council v. Front Polisario *Case: The Selective Reliance on International Rules on Treaty Interpretation (Second Part*), in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, p. 23 *et seq.*

practice by Morocco (factually sustained by the EU) to treat the Western Sahara like her own territory and therefore to apply also the Liberalization Agreement 2010 to this area could only be disregarded by the Court of Justice if this Court had identified a superior norm that could render all these measures illegal from the outset. In other words, the Court did not have to deal with these illegal measures, so the underlying reasoning goes, as they are devoid of any legal basis, they are set aside by the respective superior norm. And this superior norm is clearly the right to self-determination. What the Court states in the first sentence of para. 88 of its judgment is not really ground-breaking:

> "[…] it should be noted, first of all, that the customary principle of self-determination referred to in particular in Article 1 of the Charter of the United Nations is, as the International Court of Justice stated in paragraphs 54 to 56 of its Advisory Opinion on Western Sahara, a principle of international law applicable to all non-self-governing territories and to all peoples who have not yet achieved independence".

In fact, hereby, the Court only reiterated what is commonly recognized and accepted. The real innovation is to be found in the second sentence of the same paragraph: "[i]t is, moreover, a legally enforceable right *erga omnes* and one of the essential principles of international law (East Timor, (*Portugal v Australia*), judgment, *ICJ Reports 1995*, p. 90, paragraph 29 and the case-law cited)".

It is true that the International Court of Justice qualified the right to self-determination as an *erga omnes* principle also before, but in applying this principle to the *Front Polisario* case, the Court of Justice goes far beyond what was said by the International Court of Justice in 1995 (in the *East Timor* case)[36] and in 2004 (in the *Wall Opinion*).[37] In fact, the statement of 1995 was nothing more than an *obiter dictum* of unclear consequences. It was audacious at that time, it was even revolutionary, but it left the legal interpreters puzzled as to its effective substance and meaning. This author has dealt extensively with the *East Timor* case immediately after the judgment was issued.[38] The conclusions drawn, more than 20 years ago, do not seem to need much changes today.[39]

[36] International Court of Justice, *Case Concerning East Timor* (Portugal v. Australia), judgment of 30 June 1995.

[37] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004.

[38] See P. HILPOLD, *Der Osttimor-Fall*, cit., p. 51 *et seq.*, where this author pointed out that the concept of *erga omnes* obligations poses a formidable challenge to the very nature of International Law, a normative system that is still very much of a coordinative nature. To say that this case is different as we are confronted here with the obligatory jurisdiction by the CJEU means to overlook the decisive factor that the question whether the Western Sahara can be part of a Liberalization agreement with Morocco is first of all a question of international law and only as a reflex touches also upon EU law. On the *erga omnes* nature of the right to self-determination see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* cit.

[39] For a comprehensive, and periodically updated, monograph on *erga omnes* obligations see P. PICONE, *Comunità internazionale e obblighi "erga omnes"*, Napoli: Jovene Editore, 2013.

The Court of Justice appears to take a different view and seems to attribute to the right to self-determination also *jus cogens* nature in all of this right's legally recognized applications, and in particular also in a post-colonial context as it is here at issue.[40] The *jus cogens* and the *erga omnes* character of self-determination seems to merge.[41] This is no small thing as the right to self-determination would be enormously strengthened. The right to self-determination would impose itself on all conflicting rules and situations and go parallel to a general *erga omnes* obligation not to recognize, not even indirectly, a situation in violation to this right. No diverging agreement could withstand this powerful rule. And this seems exactly to be what the Court of Justice had in mind when it qualified the principle of self-determination as an "essential principle of international law" and went on in para. 89 of its judgment, to state the following: "[a]s such, that principle [the principle of self-determination] forms part of the rules of international law applicable to relations between the European Union and the Kingdom of Morocco, which the General Court was obliged to take into account".

As is well-known, also in the past there have been authors who have attributed *jus cogens* nature to the right to self-determination,[42] but it cannot be overlooked that this qualification is by far not generally recognized and if at all it should apply to colonial self-determination in the stricter sense. Colonialism is now universally condemned and colonial self-determination is only the flip-side of the same coin. Here we are confronted, however, much like in the *East Timor* case, with a situation of post-colonial self-determination as the occupying state has been a colony itself in the past. To qualify such a right to self-determination as *jus cogens* would mean to give a dominant role to self-determination claims in many other constellations. As the present case shows this would not only affect inter-state legal relations but international relations as a whole, in particular also in the economic field. Due to the uncertain reach and justification of many of these claims far-reaching disruption in international relations could ensue.

[40] See extensively on this subject E. CANNIZZARO, *In defence of Front Polisario*, cit.

[41] Traditionally, however, it has always been held that these two qualifications, while having a common core meaning, have to be distinguished. See *inter alia* S. KADELBACH, *Jus Cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms*, in C. TOMUSCHAT, J.M. THOUVENIN (eds), *The Fundamental Rules of the International Legal Order*, Leiden: Brill Nijhoff, 2006, p. 38.

[42] See, most prominently, A. CRISTESCU, UN. Sub-Commission on Prevention of Discrimination and Protection of Minorities. Special Rapporteur on the Right to Self-determination, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments,* UN Doc. E/CN.4/sub.2/404/Rev.1(1981); H. GROS ESPIELL, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. Special Rapporteur on the Right to Self-determination, *The Right to Self-Determination: Implementation of United Nations Resolutions,* UN Doc. E/CN.4/Sub.2/405/Rev.1(1980); Economic and Social Council, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 31st Session of 20 September 1978, UN Doc. E/CN.4/1296, E/CN.4/Sub.2/417, paras 163-182.

VI. Conclusions

As shown, the path taken by the Court of Justice was most probably intended to mitigate the effects of the pronouncement by the General Court in the *Front Polisario* case associated with the intent to uphold the human rights-friendly approach adopted in the first instance. In so far it can be said that the Court has succeeded in his intent. This was also the reason why the Court's judgment, while dismissing the claims by Front Polisario, was greeted by this liberation organization.[43] The Liberalization Agreement 2010 has not been invalidated but its reach has been limited, even in absence of a specific limitation clause. While it was thereby possible for the EU to avoid a major diplomatic row with Morocco, at least in the short term, two major threats are associated with this decision in the longer term: at a first glance, as no pronunciation of illegality is to be found in this judgment, both the EU and Morocco could return to "business as usual" and content that nothing happened, everything was legal, no reprimand was uttered. There are signs that exactly this will happen, at least in a first moment.[44] On a longer run, however, it is hardly conceivable that such an attitude can be upheld.

It is rather far more likely – and this development would pose a far greater challenge – that the statement on self-determination contained in the Court of Justice judgment will be applied also to other international crisis regions with which the EU stands in contact. As nearly every region of the world is in some way or the other connected with the EU this could mean that the EU will have to apply a new understanding on self-determination that could radically influence the leeway in its external action. If applied coherently, this new rule would mean that the EU is prohibited from extending the territorial application of trade agreements to occupied regions whose population is denied

[43] It was reported that Front Polisario's representative to Europe, Mohamed Sidati, greeted the ruling with the following statement: "The ruling confirms the long-established legal status of Western Sahara as a non-self-governing territory, and upholds existing international law [...] We call on EU member states and institutions to now comply with the ruling and immediately cease all agreements, funding and projects reinforcing Morocco's illegal occupation of Western Sahara". See D. Dudley, *European Court Dismisses Morocco's Claim to Western Sahara, Throwing EU Trade Deal Into Doubt*, in *Forbes*, 21 December 2016, www.forbes.com.

[44] As is well-known, also the Fisheries Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco has been challenged by the Front Polisario (see case C-266/16, pending) and has furthermore come under strict scrutiny by the European Parliament as it offers fishing rights to the EU also in the Western Sahara waters. For the European Commission, answering to a written question by the EU Parliament, E-007185-13, no problems were given in this field: "The Western Sahara waters are included in the new Protocol, which contains provisions ensuring that it fully complies with international law and serves the interests of all the populations concerned. In particular, Morocco should regularly report on the economic and social impact of the sectoral support provided for by the Protocol, including its geographical distribution". See also F. Dubuisson, G. Poissonnier, *La Court*, cit., p. 635 *et seq*. On the Fisheries Partnership see E. Milano, *The New Fisheries Partnership Agreement Between the European Community and the Kingdom of Morocco: Fishing too South?*, in M. Balboni, G. Laschi (eds), *The European Union Approach Towards Western Sahara*, Frankfurt: Peter Lang, 2017, p. 151 *et seq*.

their right to self-determination. Thereby, EU external relations would be further politicized, much more than this is already the case at present. It is difficult to grasp how the EU could manage such a challenge in a structured and convincing way. The approach developed by the General Court, as demanding as it might have been when it imposed an obligation on the Council to examine on a case-by-case basis whether the economic interests of the population in an occupied ("disputed") area have been sufficiently taken into consideration, eventually might have been easier to implement than the idealistic solution developed by the CJEU.[45]

[45] For a critical perspective in this regard see J. ODERMATT, *Council of the European Union v. Front Populaire pour la Libération de la Saguia-Elhamra et du Rio Deoro (Front Polisario). Case C-104/16 P*, in *American Journal of International Law*, 2017, p. 731 *et seq.*, stating the following: "The CJEU integrates elements of international law into its legal reasoning, but does so only as a subsidiary means of interpreting EU law, further illustrating how the CJEU applies principles of public international law, including the law of treaties, through an EU law lens" (p. 738).

DIALOGUES
A DIALOGUE ON *FRONT POLISARIO*

L'UNION EUROPÉENNE ET LA QUESTION DU SAHARA: ENTRE LA RECONNAISSANCE DE LA SOUVERAINETÉ DU MAROC ET LES ERREMENTS DE LA JUSTICE EUROPÉENNE

ABDELHAMID EL OUALI*

ABSTRACT: This *Dialogue* aims at addressing the ambivalent policy of the EU with regard to the Western Sahara conflict. Adopting a strictly legal perspective, it seeks to show that, while the political organs of the EU (the Council and the Commission) have recognized, through several international agreements signed in the past thirty years as well as through their subsequent conduct to these agreements, the sovereignty of Morocco over Western Sahara territory, the judicial organs of the EU (the General Court, in the first instance, and the Court of Justice, on appeal) have recently adopted an opposite stand (see General Court, judgment of 10 December 2015, case T-512/12, *Front Polisario v. Coucil of the European Union* and Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council of the European Union v. Front Polisario* [GC]), and taken the risk to act *ultra vires* as their decisions are legally unfounded and contradict major principles of international law.

KEYWORDS: self-determination – non-self-governing territories – law of treaties – subsequent conduct – permanent sovereignty over natural resources – Western Sahara conflict.

I. INTRODUCTION

Publiquement, l'UE a toujours affiché une certaine neutralité dans le conflit du Sahara. Mais dans ses relations réciproques avec le Maroc, en particulier à l'occasion de l'élaboration et de l'exécution des très nombreux accords de coopération mutuelle, dont les premiers ont été conclus dans les années soixante dix, l'UE a constamment considéré que ce dernier détenait un droit de souveraineté sur le Sahara. La signature de ces accords, ainsi que leur renouvellement, ont été effectués sur la base de la reconnaissance de la souveraineté du Maroc sur tout son territoire, y compris le Sahara. L'application de ces accords a aussi été constamment étendue à ce territoire. Cette ap-

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plication a été accompagnée de la part de l'UE par des actes, des attitudes et des comportements qui attestent la reconnaissance de sa part de la souveraineté du Maroc sur le Sahara. Or, en droit international, une conduite subséquente, qui se reflète à travers un comportement homogène, constant, et continu dans le temps, fait naître à la charge de son auteur une obligation juridique.

Néanmoins, la justice européenne vient, à travers deux arrêts très controversés, de placer l'UE dans une position juridiquement intenable et cela à l'occasion de l'examen de la question de la validité juridique de l'accord, conclu en 2012, entre l'UE et le Maroc relatif aux mesures de libéralisation réciproques en matière de produits agricoles transformés, de poissons et de produits de pêche (ci-après accord de libéralisation). Il en est ainsi parce que le premier arrêt, prononcé le 10 décembre 2015 par le Tribunal,[1] procède purement et simplement à l'annulation de cet accord au motif que son application ne s'est pas faite au profit des populations du Sahara, alors que le second, en date du 21 décembre 2016, et émanant de la Cour de justice,[2] effectue l'annulation de ce même arrêt en estimant que ledit accord avait été conclu sans consultation de la population du Sahara.

Ces deux décisions de justice sont juridiquement infondées car elles sont contraires au droit international. Elles placent l'UE dans une situation juridiquement intenable et affectent les droits souverains d'un pays étranger. Elles constituent aussi une sérieuse menace au développement de la coopération entre l'UE et l'un de ses partenaires essentiels au Sud de la Méditerranée, car toute coopération suppose la confiance réciproque et la stabilité des relations juridiques.

La reconnaissance tacite par l'UE de la souveraineté du Maroc sur le Sahara s'est en particulier incarnée lors de la conclusion d'une série d'accords en matière de pêche que les deux parties ont signé/renouvelé durant les années 1980, 1990, 2000 et 2010, ainsi que dans la conduite subséquente qui s'en est suivie de la part de l'UE au moment de leur application. Le dernier en date de ces accords est le protocole du 20 décembre 2013 signé dans le cadre de l'accord de partenariat de 2006 dans le secteur de la pêche. C'est en vue de l'annulation de ce protocole que le Polisario a introduit le 14 mars 2014 un recours devant la Cour de justice, recours qui n'a pas encore fait l'objet d'examen.

L'objet de la présente étude est d'analyser l'intenable situation juridique dans laquelle se trouvent désormais les relations entre l'UE et le Maroc, du fait de deux comportements totalement contradictoires, qui sont, d'un côté, la reconnaissance par l'UE de la souveraineté du Maroc sur le Sahara à l'occasion de la signature et de l'application des accords de pêche, et, de l'autre, la non-reconnaissance par la justice européenne de

[1] Tribunal, arrêt du 10 décembre 2015, affaire T-512/12, *Front populaire pour la libération de la Saguia-el-hamra et du Rio de Oro (Front Polisario) c. Conseil de l'Union européenne*.

[2] Cour de justice, arrêt du 21 décembre 2016, affaire C-104/16 P, *Conseil de l'Union européenne c. Front populaire pour la libération de la Saguia-el-hamra et du Rio de Oro (Front Polisario)* [GC].

la souveraineté du Maroc sur le Sahara à l'occasion de l'examen de la validité de l'accord de 2012 relatif aux mesures de libéralisation.

II. La reconnaissance par l'Union européenne de la souveraineté du Maroc sur le Sahara

Il est un fait bien établi en droit que l'UE a reconnu la souveraineté du Maroc sur le Sahara. Elle l'a fait, d'abord, à travers une série d'accords internationaux, dont l'accord de partenariat. Elle l'a fait, ensuite, à travers une conduite subséquente à ces accords.

II.1. La reconnaissance par l'Union européenne de la souveraineté du Maroc sur le Sahara à travers une série d'accords internationaux, dont l'accord de partenariat

L'accord de partenariat appartient à une série d'accords de pêche qui ont, durant les dernières décennies, reconnu implicitement la souveraineté du Maroc sur le Sahara. Le premier accord du genre est celui conclu en 1985 avec la Maroc par la Communauté économique européenne (CEE). Cet accord est conclu à la suite de l'adhésion de l'Espagne à la CEE en 1983. Il reprend à son compte la disposition de l'accord signé le 17 février 1977 entre le Maroc et l'Espagne dans laquelle il est stipulé que les navires espagnols sont autorisés à pêcher dans les eaux du Sahara se trouvant "sous juridiction marocaine", ce qui constituait une réaffirmation par l'Espagne, après la conclusion de l'Accord de Madrid, de la souveraineté du Maroc sur le Sahara. A l'époque, le Maroc avait aussi signé un accord similaire avec le Portugal, qui adhérera également à la CEE. Celle-ci conclut, par la suite, en 1988 et 1992, des accords sectoriels qui autorisent les membres de la Communauté à pêcher dans les eaux sur lesquelles le Maroc exerce "sa souveraineté et sa juridiction", sous-entendant par là toutes les zones de pêche sous souveraineté marocaine, y compris le Sahara. Un autre accord est signé entre le Maroc et l'UE en 1995. Il comporte la même disposition dans laquelle il est en effet affirmé que cet accord s'applique aux zones de pêche sur lesquelles "le Royaume du Maroc exerce sa souveraineté ou sa juridiction" (art. 1). C'est pratiquement la même disposition que l'accord de partenariat reprend à son compte en son art. 2. Comme ses prédécesseurs, l'accord de partenariat reconnait ainsi implicitement la souveraineté du Maroc sur le Sahara. Il va plus loin encore dans la mesure où il se réfère expressément, comme l'avait fait auparavant l'accord de 1995, aux ports de Dakhla, Boujdour et Layoune,[3] qui, comme chacun le sait, se trouvent au Sahara. Ainsi, l'on est en présence, durant les trois décennies, d'une ligne de conduite continue de la CEE et de son héritière, l'UE, consistant à reconnaître implicitement la souveraineté du Maroc sur le Sahara.

[3] Cf. New York City Bar, Committee on United Nations, *Report on Legal Issues Involved in the Western Sahara Dispute: Use of Natural Resources* , avril 2011, www.nycbar.org, p. 18.

On le sait, lors des négociations de l'accord de partenariat, qui ont démarré en 2005, des pressions ont été exercées sur l'UE en vue de l'amener à exclure du champ de l'accord les eaux territoriales du Sahara au prétexte que ces eaux ne relèveraient pas de la souveraineté du Maroc.[4] Cette campagne a eu pour effet de pousser le 25 janvier 2006 le Comité de développement du Parlement européen à demander au Service juridique de ce dernier son avis sur la compatibilité du futur accord avec le droit international. Le 20 février 2006, le Service juridique remet son avis[5] dans lequel il estime que le Sahara est un territoire non-autonome et que le Maroc s'y trouve en tant que puissance administrante de fait (il reprend ici à son compte l'avis de Hans Corell),[6] que le projet d'accord n'inclut ni n'exclut les eaux du Sahara et que seule la pratique ultérieure montrera quel est son champ territorial d'application réel, et que, au cas où il apparaitrait que les eaux du Sahara sont incluses, l'UE pourrait entrer en discussion avec le Maroc en vue de suspendre l'application de l'accord si celui-ci n'est pas appliqué de manière à tenir compte des intérêts de la population locale. Par cet avis, le Service juridique donne son agrément à la conclusion de l'accord. Malgré cela, la campagne visant à exclure les eaux du Sahara de l'accord continue, ce qui a pour effet de pousser certains pays de l'UE de demander un second avis, mais cette-fois au Service juridique du Conseil. Or, celui-ci formule, à son tour, les mêmes remarques que le Service juridique du Parlement européen. Malgré cela, la campagne pour l'exclusion des eaux du Sahara de l'accord persiste. Mais, cela n'empêche pas les négociateurs européens de reprendre dans le texte de l'accord de partenariat la disposition traditionnelle que la pêche peut avoir lieu dans "les eaux sous souveraineté du Royaume du Maroc", avec le sous-entendu que ces eaux englobent aussi celles du Sahara. Lors de la discussion du projet d'accord de partenariat en vue de son adoption par le Conseil, la Suède s'y est opposée, alors que trois pays se sont abstenus (Finlande, Irlande et Pays-Bas), mais l'accord a fini par être adopté par le Conseil le 22 mai 2006 et signé avec le Maroc le 22 juillet de la même année.[7] L'accord de partenariat comporte l'accord proprement dit, un protocole et des annexes. Il prévoit notamment le paiement d'une contribution financière (144.4

[4] V.P. Wrange, *Le Sahara Occidental et l'Accord de Partenariat UE-Maroc dans le domaine de la Pêche (APP)*, 7 décembre 2011, www.fishelsewhere.eu.

[5] Parlement européen, avis juridique du Service juridique, SJ-0085/06 du 20 février 2006, Proposal for a Council regulation on the conclusion of the fisheries parnership agreement between the European Community and the Kingdom of Morocco – Compatibility with the principles of international law, www.arso.org.

[6] H. Corell, Lettre datée du 29 janvier 2002, adressée au Président du Conseil de sécurité par le Secrétaire général adjoint aux affaires juridiques, Conseiller juridique, UN Doc. S/2002/161, undocs.org. Pour une analyse générale et critique de l'avis, v. A. El Ouali, *Le conflit du Sahara au regard du droit international*, Bruxelles: Bruylant, 2015, p. 109 *et seq*.

[7] Pour le texte de l'accord de partenariat, v. règlement (CE) 764/2006 du Conseil du 22 mai 2006 relatif à la conclusion de l'accord de partenariat dans le secteur de la pêche entre la Communauté européenne et le Royaume du Maroc.

millions d'euros) en contrepartie du droit pour les navires européens de pêcher dans les eaux marocaines. A cet égard, il est important de le signaler, l'art. 2 du protocole précise que le Maroc jouit d'une "discrétion totale" quant à l'utilisation de cette contribution financière. L'accord fixe sa durée de validité à quatre ans, allant de 2007 à 2011. Il crée aussi un Comité conjoint qui est chargé de superviser l'application de l'accord et se réunit à cet effet au moins une fois par an.

Mais la campagne contre l'accord de partenariat persistera encore. Certes, elle ne parviendra pas à persuader l'UE de renoncer à le conclure. Néanmoins, elle va amener celle-ci à demander au Maroc, alors que ledit accord était déjà signé et ratifié, de lui indiquer comment il l'appliquait de manière à servir les intérêts de la population du Sahara. En faisant cela, l'UE donne effet à l'une des recommandations du Service juridique du Parlement européen, qui, dans l'avis précité, avait suggéré qu'il serait utile que la Commission ou le Conseil demande au Maroc des renseignements sur la façon dont l'accord de partenariat était appliqué en faveur de la population locale, et que si des difficultés surgissaient à cet effet, la question devrait être évoquée au sein du Comité conjoint, sinon, et s'il s'avérait que le Maroc ignorait les intérêts de ladite population, l'application de l'accord de partenariat devrait être suspendue en vertu de l'art. 15 de ce dernier et de l'art. 9 du protocole. Or, la demande de clarification concernant la question de savoir si l'accord de partenariat était appliqué en faveur des populations locales est contraire à la conduite subséquente que l'UE a constamment prise au sujet de la qualification du statut du Maroc au Sahara.

II.2. La reconnaissance par l'Union européenne de la souveraineté du Maroc sur le Sahara à travers sa conduite subséquente

On le sait, en droit international, un comportement homogène, constant, et continu dans le temps peut faire naître à la charge de son auteur une obligation internationale.[8] Ce comportement peut consister en une série d'actes exprimant un acquiescement, une reconnaissance, une renonciation, etc. Le droit international attache un effet juridique à ce type de comportement en raison du principe de bonne foi qui requiert que l'on tienne compte de la volonté exprimée et qu'un Etat est de ce fait en droit d'attendre d'un autre Etat qu'il respecte les convictions qu'il a fait naitre chez lui du fait de ses déclarations ou de sa conduite à propos d'une question donnée.[9] Cet effet juridique peut comporter la naissance d'une obligation à la charge de son auteur et d'un droit au bé-

[8] Cf. P. Cahier, *Le comportement des Etats comme source de droits et d'obligations,* in *Recueil d'études de droit international en hommage à Paul Guggenheim*, Genève: Imprimerie de la Tribune, 1968, p. 237 *et seq*.

[9] Cf. E. Zoller, *La bonne foi en droit international public*, Paris: Pedone, 1977, p. 71.

néfice de son destinataire.[10] C'est ce qui peut se produire notamment du fait d'une pratique subséquente à la suite de la conclusion d'un traité, que cette pratique corresponde à un acte unilatéral d'une partie au traité ou à un comportement concordant des autres parties contractantes.

Il y a une grande variété de situations dans lesquelles la pratique subséquente à un traité peut produire un effet juridique. La situation, qui nous intéresse ici, est celle où la pratique subséquente permet de révéler la volonté initiale des parties au traité. La pratique subséquente peut notamment aider à clarifier le sens et la portée d'une disposition d'un traité à travers la manière avec laquelle les parties appliquent concrètement cette disposition car

> "l'application révèle toujours une interprétation qui la sous-tend. En analysant l'application, on obtient donc une mesure d'interprétation inhérente aux actes. C'est une mesure issue de l'effectivité, émanant du réel: elle est *rebus ipsis et factis.* Cette adhérence aux faits offre à ce critère un certain degré d'objectivité apparente, car si l'échange de promesses contractuelles ne contient au fond que la proclamation d'intentions, la pratique suivie en offre la mise en œuvre effective".[11]

Ce principe est confirmé par la jurisprudence internationale. Ainsi, le tribunal arbitral, dans l'affaire de *l'indemnité russe,* a admis que "[l]'exécution des engagements est [...] le plus sûr commentaire du sens de ces engagements".[12] De même, la Cour permanente de Justice internationale a aussi pu reconnaitre indirectement que "[l]es faits postérieurs à la conclusion du Traité de Lausanne ne peuvent occuper la Cour que pour autant qu'ils sont de nature à jeter de la lumière sur la volonté des Parties telle qu'elle existait au moment de cette conclusion".[13] Le principe est aussi consacré par la Convention de Vienne sur le droit des traités qui reconnait la pertinence de "toute pratique ultérieurement suivie dans l'application du traité par laquelle est établi l'accord des parties à l'égard de l'interprétation du texte" (art. 31, par. 3, litt. b). La très grande majorité de la doctrine a également reconnu l'existence de ce principe.[14] Enfin, il convient de noter que la Cour internationale de Justice a admis que la notion de pratique subséquente est applicable aussi aux organisations internationales.[15]

[10] Cf. J.-P. JACQUE, *Eléments pour une théorie de l'acte juridique en droit international*, Paris: L.G.D.J., 1972, p. 591.

[11] R. KOLB, *Interprétation et création du droit international*, Bruxelles: Bruylant, 2006, p. 480.

[12] Cour permanente d'arbitrage, *Affaire de l'indemnité russe*, sentence arbitrale de l'11 novembre 1912.

[13] Cour permanente de Justice internationale, *Affaire relative à l'interprétation de l'article 3, paragraphe 2, du Traité de Lausanne (Mossoul)*, avis consultatif du 21 novembre 1925.

[14] Cf. J.-P. COT, *La conduite subséquente des parties à un traité*, in *Revue belge de droit international*, 1966, p. 632 *et seq*.

[15] Elle a admis que la notion de pratique subséquente était applicable notamment aux Nations Unies. Cf. dans ce sens Cour internationale de Justice, *Compétence de l'Assemblée générale pour l'admission d'un Etat aux Nations Unies*, avis consultatif du 3 mars 1950; *Certaines dépenses des Nations*

Il est clair ainsi qu' à la lumière de ce qui vient d'être rappelé, la décision de l'UE de demander au Maroc de lui indiquer si et comment l'accord de partenariat était appliqué en faveur de la population au Sahara, est incompatible avec l'obligation qui est née à sa charge en raison de la pratique subséquente à laquelle elle s'est constamment conformée, depuis la conclusion du premier accord de pêche avec le Maroc en 1988 et qui ne s'est jamais démentie lors de l'application des accords de pêche qui ont été conclus par la suite. La pratique subséquente à tous ces traités a confirmé que l'UE admettait que les eaux du Sahara faisaient partie des eaux sous la souveraineté ou la juridiction du Maroc. Cette pratique n'a fait que révéler la volonté initiale des parties contractantes, au moment de la conclusion du premier accord, celui de 1988, et qui a été renouvelée dans tous les accords qui l'ont suivi depuis, que les eaux du Sahara font parties du territoire marocain. C'est là une réalité connue de tous et les pays européens, dont les ressortissants pratiquent la pêche dans les eaux marocaines, n'auraient jamais réclamé ou appuyé la conclusion de tous ces accords de pêche si ces derniers excluaient de leur champ d'action les eaux du Sahara dans lesquelles leurs bateaux de pêche avaient, depuis des décennies, l'habitude d'opérer. D'ailleurs, l'intérêt accordé à ces accords de pêche par ces pays, ainsi que par une partie de leur opinion publique, a été tel que les péripéties entourant leurs négociations étaient souvent rendues publiques. Du reste, l'UE a elle-même reconnu, et cela à différentes reprises, que les bateaux de pêche européens opéraient dans les eaux du Sahara.[16] Plus important encore est le fait que le Maroc n'aurait jamais accepté de conclure ces différents accords si l'expression "eaux sous la souveraineté ou juridiction du Maroc" sous-entendait que le Sahara n'était pas un territoire marocain. Cette expression est un euphémisme inventé par les diplomates pour signifier que le Sahara relève de la souveraineté marocaine. Partant de là, on peut se demander quel aurait été l'intérêt pour le Maroc de conclure des accords de pêche qui profitent essentiellement à l'UE, s'il ne cherchait pas, simultanément au développement de ses infrastructures de pêche, à faire confirmer la reconnaissance internationale de sa souveraineté sur le Sahara, préoccupation qui n'était nullement ignorée pas les négociateurs européens et qu'ils ont constamment mise à profit en vue d'arracher le maximum de concessions au Maroc.

Unies, avis consultatif du 20 juillet 1962; *Applicabilité de la section 22 de l'article VI de la Convention sur les privilèges et immunités des Nations Unies*, avis consultatif du 15 décembre 1989, par. 48; *Licéité de l'utilisation des armes nucléaires par un Etat dans un conflit armé*, avis consultatif du 8 juillet 1996; *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, avis consultatif du 9 juillet 2004, par. 102 *et seq*.

[16] M. DAWIDOWICZ, *Trading Fish or Human Rights in Western Sahara? Self-Determination, Non-Recognition and the EC-Morocco Fisheries Agreement*, 2012, www.biicl.org, p. 22; E. MILANO, *The New Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco: Fishing Too South?*, in *Anuario español de derecho internacional*, 2006, p. 426.

La décision de l'UE visant à demander au Maroc si et comment était appliqué l'accord de partenariat en faveur de la population locale est aussi incompatible avec l'obligation qui est née pour la même UE vis-à-vis du Maroc en vertu du principe de l'*estoppel*. On le sait, la pratique subséquente peut aussi fonder un *estoppel*.[17] Institution d'origine anglo-saxonne, mais consacrée, par la suite, par la jurisprudence internationale et la doctrine qui y voient un principe général de droit international,[18] l'*estoppel* interdit à un Etat de contredire ou de contester en justice ce qu'il a précédemment dit, fait ou laissé croire. Il y a *estoppel*

> "lorsqu'une Partie, par ses déclarations, ses actes ou ses comportements, a conduit une autre Partie à croire en l'existence d'un certain état de choses sur la foi duquel elle l'a incitée à agir, ou à s'abstenir d'agir, de telle sorte qu'il en est résulté une modification dans leurs positions relatives (au préjudice de la seconde, ou à l'avantage de la première, ou les deux à la fois), la première est empêchée par *estoppel* d'établir à l'encontre de la seconde un état de choses différent de celui qu'elle a antérieurement représenté comme existant".[19]

Conçue, à l'origine, pour être une règle d'ordre procédural dont peut exciper une partie devant le juge international, l'*estoppel* a évolué pour devenir aussi une règle d'ordre matériel qu'il est possible d'invoquer comme fondement d'une action en justice afin de rendre responsable un Etat ou une organisation internationale pour sa violation.[20] Il est admis que l'estoppel peut porter sur une question territoriale et conduire, par exemple, à la reconnaissance d'une frontière,[21] donner naissance à une règle coutumière bilatérale,[22] et lier une organisation internationale, dont notamment l'UE, ainsi que nous le verrons ci-après, et cela que ce soit dans ses relations internes (avec les pays membres) ou externes (avec des pays non-membres).

Partant de la notion d'*estoppel* et des considérations qui précèdent, il est bien clair qu'une obligation coutumière est née à la charge de l'UE en se cristallisant en dehors du cadre conventionnel qui la lie au Maroc dans le domaine de la pêche. C'est parce que l'UE a constamment laissé croire au Maroc qu'elle reconnaissait sa souveraineté sur le Sahara que ce dernier en est venu à accepter de conclure les différents accords de pêche, durant les trente dernières années, et d'accepter qu'une coopération étroite

[17] Cf. R. KOLB, *Interprétation et création du droit international*, cit., p. 481.

[18] Pour une vue d'ensemble sur cette jurisprudence et la doctrine internationaliste, voir T. COTTIER, J.P. MÜLLER, *Estoppel*, in R. WOLFUM (dir.), *The Max Planck Encyclopedia of Public International Law*, Oxford: Oxford University Press, 2008, p. 671 *et seq*.

[19] A. MARTIN, *L'estoppel en droit international. Précédé d'un aperçu de la théorie de l'estoppel en droit anglais*, Paris: Pedone, 1979, p. 260.

[20] Sur cette évolution, v. T. COTTIER, J.P. MULLER, *Estoppel*, cit.

[21] Cf. Cour internationale de Justice, *Affaire du Temple Preah Vihéar* (Cambodge c. Thaïlande), arrêt du 15 juin 1962, par. 6 et 32.

[22] Cf. Cour internationale de Justice, *Droit de passage sur territoire indien* (Portugal c. Inde), arrêt du 25 avril 1960, par. 6 et 39.

s'instaure en matière de pêche entre lui et l'UE. Certes, l'UE était libre d'accepter ou de refuser la conclusion de l'accord de partenariat avec le Maroc, mais elle n'était pas libre de changer sa position pour ce qui est de la reconnaissance de la souveraineté du Maroc sur le Sahara sans que cela crée un grave dommage pour ce dernier. Il en est ainsi parce que l'UE est liée par sa conduite subséquente, laquelle de surcroit a, par le biais du principe de l'*estoppel*, donné naissance à une règle coutumière par laquelle elle a reconnu la souveraineté marocaine sur le Sahara. Une règle coutumière peut, comme cela vient d'être rappelé, naitre dans un cadre bilatéral. Elle peut aussi émerger dans les relations entre un Etat et une organisation internationale. A cet égard, il convient de souligner que l'UE reconnait le principe de l'*estoppel*. Elle reconnait aussi que ses effets obligent tous les pays membres de l'UE, y compris ceux qui ont pris une position contre des actes par lesquels elle a fait naitre, par le jeu de l'*estoppel*, une règle coutumière qui la lie à des pays non-membres. Dans son étude sur la question de savoir si l'UE peut lier ses pays membres par des coutumes de droit international à la naissance desquelles elle a directement contribué, y compris par le biais de l'estoppel, Vaughan Lowe a clairement montré qu'un pays membre ne peut refuser d'être lié par ces règles lorsqu'elles touchent des matières qui relèvent de la seule compétence de l'UE, comme cela le cas, dit-il, de la conclusion des accords de pêche.[23]

Ainsi, il apparait clairement que l'UE n'est pas en droit de qualifier le statut du Maroc au Sahara de puissance administrante. Mais, on l'a vu, le Service juridique du Parlement européen a cherché à la pousser dans ce dernier sens en s'inspirant de la note de Hans Corell qui, après avoir admis l'idée que le Maroc serait une puissance administrante, estime que ce dernier est en droit d'exploiter les ressources naturelles, à condition que cela se fasse dans l'intérêt des populations locales. Néanmoins, l'UE va revenir à sa position initiale.

Certes, les pressions étrangères exercées sur l'UE ont amené celle-ci à ne pas adopter le protocole qui devait remplacer le protocole de 2006 qui est arrivé à expiration le 27 février 2011. Mais elles n'ont pas été suffisantes pour amener l'UE à adopter leurs thèses. Au contraire, le nouveau protocole, signé le 20 décembre 2013 et entré en vigueur par la suite, et qui fixe les possibilités de pêche et la contrepartie financière prévues par l'accord de partenariat dans le secteur de la pêche entre l'Union européenne et le Royaume du Maroc, admet, d'abord, qu'il est applicable aux côtes marocaines, y compris les côtes sahariennes. Il admet, ensuite, que la contrepartie financière pour le développement du secteur de la pêche doit être utilisée notamment en faveur des populations locales (art. 6). Or, il ne spécifie à aucun moment qu'il entend par ces dernières les populations sahraouies. Le protocole vise en fait l'ensemble de la population

[23] V. LOWE, *Can the European Community Bind the Member States on Questions of Customary International Law?*, in M. KOSKENNIEMI (dir.), *International Law Aspects of the European Union*, The Hague: Kluwer Law International, 1998, p. 164.

marocaine concernée par le secteur de la pêche. Afin de vérifier la bonne exécution de cette disposition, le protocole oblige le Maroc à présenter régulièrement des rapports détaillés sur l'utilisation de cette contrepartie financière. Le protocole prévoit aussi la création d'un comité mixte afin de contrôler la manière avec laquelle cette aide est utilisée. Or, ces différents contrôles n'ont aucune résonance politique particulière car ils ne visent pas la population du Sahara et elle-seule, à l'exclusion du reste de la population marocaine concernée. Ainsi qu'on peut le constater, l'on est bien loin des thèses des adversaires du Maroc qui estiment que l'UE n'est pas en droit de conclure ledit protocole parce que le Maroc serait une puissance occupante ou de celles qui exigent la consultation préalable du Polisario en tant que, avancent-ils, unique représentant légitime du peuple sahraoui. La signature du nouveau protocole suscite la colère des adversaires du Maroc, en particulier celle du Polisario, qui introduit le 14 mars 2014 un recours en annulation devant la Cour de justice. Ce recours est encore à l'étude. Mais avant ce recours, le Polisario avait le 19 novembre 2012 introduit une requête auprès du Tribunal en vue d'obtenir l'annulation de la décision 2012/247/UE du Conseil de l'UE concernant la conclusion de l'accord agricole[24] entre le Maroc et l'UE. C'est à l'occasion de l'examen de cette question que la justice européenne refuse, d'une façon manifestement infondée, de reconnaitre la souveraineté du Maroc sur le Sahara.

III. La non-reconnaissance par la justice européenne de la souveraineté du Maroc sur le Sahara lors de l'examen de la validité de l'accord de 2012 relatif aux mesures de libéralisation

La justice européenne a refusé de reconnaître la souveraineté du Maroc sur le Sahara à la suite de l'examen de la question de la validité de l'accord de 2012 relatif aux mesures de libéralisation. Elle l'a fait à travers deux décisions, l'arrêt du Tribunal en date du 10 décembre 2015 et l'arrêt de la Cour de justice du 21 décembre 2016. Une analyse rigoureuse de ces deux décisions montre que celles-ci sont contestables tant du point de vue de la procédure que sur le fond.

III.1. L'arrêt du Tribunal du 10 décembre 2015

Le 10 décembre 2015, le Tribunal accepte le recours du Polisario et prononce l'annulation de l'accord agricole.[25] Or, cet arrêt est juridiquement infondé et cela au niveau tant de la reconnaissance de la compétence que sur le fond.

[24] Accord, sous forme d'échange de lettres, entre l'Union et le Maroc, relatif aux mesures de libéralisation réciproques en matière de produits agricoles, de produits agricoles transformés, de poissons et de produits de la pêche.

[25] *Front populaire pour la libération de la Saguia-el-hamra et du Rio de Oro (Front Polisario) c. Conseil de l'Union européenne*, cit.

Il convient de souligner, au préalable, que le Tribunal commet un excès de pouvoir manifeste et cela avant même de se prononcer sur sa compétence. En effet, dans son arrêt, il commence par donner son interprétation du statut du Sahara qu'il considère comme étant toujours un territoire non autonome. Il parvient à cette conclusion à travers une lecture du conflit du Sahara qui adopte le point de vue du Polisario et laisse de côté celui du Maroc.

L'incompétence du Tribunal est manifeste, d'abord, au regard du TFUE. Celui-ci dispose en son art. 263, alinéa 4, que toute personne physique ou morale peut former un recours contre les actes de l'UE dont elle est le destinataire ou qui la concernent directement et individuellement, ainsi que contre les actes réglementaires qui la concernent directement et qui ne comportent pas de mesures d'exécution. Le statut de la Cour de justice ajoute, à cet égard, qu'une personne morale ne peut formuler un tel recours que si elle est légalement constituée conformément au droit d'un Etat membre ou d'un Etat tiers. Mais cette exigence a été atténuée par la jurisprudence de la Cour, qui a admis qu'à défaut de création de la personne concernée selon la loi d'un pays donné, il suffisait que celle-ci fournisse la preuve qu'elle est dotée de la capacité à agir de façon autonome et qu'elle le soit effectivement dans la réalité concrète. Or, le Polisario a été dans l'incapacité de fournir à la Cour la preuve qu'il s'est constitué conformément à la législation d'un Etat donné. Il a soutenu devant la Cour qu'il était un sujet de droit international en tant que *mouvement de libération nationale* et que de ce fait il n'était pas requis de se constituer conformément au droit d'un Etat donné. Or, l'invocation de cet argument n'était pas en faveur du Polisario parce que ce dernier n'est pas autonome.

Certes, il est difficile d'établir avec exactitude les conditions dans lesquelles le Polisario a été créé. Selon des auteurs, favorables aux thèses du Polisario, celui-ci aurait été créé clandestinement le 10 mai 1973 à la frontière entre la Mauritanie et le Sahara[26] et qu'à l'origine, il aurait reçu l'appui financier de la Libye.[27] Ces mêmes auteurs observent aussi que le Polisario a été placé sous le contrôle de l'Algérie, dans les camps de Tindouf, après la prise de possession du Sahara par le Maroc en 1976.[28] Par ailleurs, il est vrai aussi que l'Assemblée générale semble avoir reconnu le Polisario, dans certaines de ses résolutions, mais elle n'a jamais formellement admis qu'il était l'unique représentant du *peuple* du Sahara. De surcroit, cette reconnaissance n'a pas été pleine et entière en raison du fait que le Polisario ne s'est pas vu octroyer le statut d'observateur qui est accordé aux

[26] V.J. Soroeta Liceras, *International Law and the Western Sahara Conflict*, Oisterwijck: Wolf legal Publishers, 2014, p. 43. Cet auteur ne cache pas sa sympathie à l'égard des thèses du Polisario.

[27] V.T. Hodges, *Sahara occidental. Origines et enjeux d'une guerre du désert*, Paris: L'Harmattan, 1987, p. 206 *et seq.*; J. Damis, *Conflict in Northwest Africa. The Western Sahara Dispute*, Stanford: Hoover Institution Press, 1983, p. 40.

[28] T. Hodges, *Sahara occidental*, cit., p. 206 *et seq.*; J. Damis, *Conflict in Northwest Africa*, cit., p. 40. Sur les conditions objectives, qui empêchent le Polisario d'agir d'une façon autonome, v. A. El Ouali, *La face cachée du conflit du Sahara*, Casablanca: Editions Maghrébines, 2014, p. 111 *et seq*.

mouvements de libération reconnus par les Nations Unies, comme cela a été le cas, par exemple, pour l'Organisation du peuple du Sud-Ouest africain (SWAPO)[29] dans le passé, et, aujourd'hui, pour l'Organisation pour la libération de la Palestine (OLP).[30] Cela n'a pas empêché le Tribunal d'estimer que le Polisario aurait pu se constituer selon le droit du Sahara, mais s'il ne l'a pas fait c'est parce que ce dernier était sous le contrôle d'une puissance étrangère, le Maroc, contre laquelle il mène la lutte pour obtenir l'indépendance de ce territoire. Or, ainsi que nous venons de le voir, le Polisario a été créé avant même que le Maroc ne retrouve en février 1976 la possession du Sahara, et qu'il l'a été sur un territoire étranger avec l'assistance de puissances non moins étrangères.

L'incompétence du Tribunal est, ensuite, manifeste au regard du principe de la nécessité de l'existence d'un intérêt pour agir. Lors de l'examen de cette question, les parties défenderesses, le Conseil et la Commission, ont soutenu que le Sahara était un territoire non autonome et qu'aucune institution de l'UE n'a jamais reconnu qu'il relevait de la souveraineté du Maroc et que de ce fait ledit territoire n'était pas concerné par l'accord dont le Polisario cherche à obtenir l'annulation. Les parties défenderesses ont aussi soutenu que, partant de là, l'accord n'a jamais été appliqué au Sahara. Mais, le Tribunal a montré, à cet égard, ce qui est vrai, que le Conseil et la Commission n'ignoraient pas que l'accord était aussi appliqué au Sahara, fait qu'ils reconnaitront par la suite. Néanmoins, à supposer que le Sahara soit encore un territoire non autonome, il reste qu'il est nécessaire de tenir compte de la pratique constante des Nations Unies qui n'ont jamais requis – à l'exception du cas du Sud-Ouest africain, qui du reste était un territoire sous tutelle et non un territoire non autonome – que les mouvements de libération devaient donner leur avis sur l'exploitation des richesses des territoires autonomes[31] car une puissance administrante renoncerait au rôle qui lui est attribué par les Nations Unies si elle venait à faire dépendre la conception et l'exécution des programmes de développement des territoires sous son contrôle de l'accord d'un mouvement de libération nationale, accord que, du reste, elle n'obtiendrait jamais en raison de l'opposition que ne manquerait pas d'afficher ce mouvement.

Enfin, l'incompétence du Tribunal est manifeste parce que ce dernier est le juge d'une organisation internationale et non un juge international. Sa compétence s'exerce seulement par rapport aux pays membres de l'UE et dans le cadre des questions qui relèvent de son domaine de compétence. Le Tribunal n'est pas de ce fait en droit de se prononcer sur la validité d'un traité liant l'UE à un pays étranger, laquelle question ne peut être examinée que par un tribunal international dont la compétence aurait été re-

[29] Assemblée générale, résolution 31/152 du 20 décembre 1976, Statut d'observateur pour la South West Africa People's Organization, UN Doc. A/RES/31/152.

[30] Assemblée générale, résolution 3210 (XXIX) du 14 octobre 1974, Invitation à l'Organisation de libération de la Palestine; résolution 3237 (XXIX) du 22 novembre 1974, Statut d'observateur pour l'Organisation de libération de la Palestine.

[31] V.A. El Ouali, *Le conflit du Sahara au regard du droit international*, cit., pp. 171-176.

connue par ce pays. En matière de justice internationale, il convient de le rappeler, il est un principe fondamental du droit international, celui de la nécessité du consentement express de l'Etat "à être attrait devant un tiers".[32] Ce principe est consacré par la jurisprudence internationale qui admet que le juge international ne peut, dans une instance opposant deux parties, se prononcer sur les droits et intérêts d'un Etat tiers (au procès).[33] La Cour internationale de Justice a rappelé l'extrême importance de ce principe et cela même lorsqu'est en cause une norme *erga omnes*, comme le droit à l'autodétermination. C'est ainsi qu'elle a pu affirmer, dans l'affaire relative au Timor Oriental, que

> "[l]'opposabilité *erga omnes* d'une norme et la règle du consentement à la juridiction sont deux choses différentes. Quelle que soit la nature des obligations invoquées, la Cour ne saurait statuer sur la licéité du comportement d'un Etat lorsque la décision à prendre implique une appréciation de la licéité du comportement d'un autre Etat qui n'est pas partie à l'instance. En pareil cas, la Cour ne saurait se prononcer, même si le droit en cause est opposable *erga omnes*".[34]

Il est aussi un principe fondamental du droit processuel qu'un tribunal international ne peut se prononcer sur la validité d'un accord international que si toutes les parties à cet accord acceptent de participer à la procédure. Ce principe est rappelé par S. Hamamoto, qui écrit que

> "[m]ême si la compétence d'une juridiction internationale est, par grande chance, acceptée par les parties à un différend relatif à la validité d'un acte juridique international, cette juridiction ne peur régler ce différend qu'entre les parties. Il s'ensuit que l'annulation d'un acte par une juridiction internationale n'est possible que lorsque toutes les parties intéressées acceptent la compétence de cette juridiction. Il en résulte qu'une telle annulation ne saurait être opposable à des parties qui n'en acceptent pas la compétence".[35]

Les droits et intérêts d'un pays tiers à une instance juridictionnelle ne peuvent, dès lors, être examinés par un tribunal international à moins que le pays tiers en question en fasse la demande par la mise en œuvre du droit d'intervention, qui est prévu notamment par le statut de la Cour internationale de Justice[36] ainsi que le statut de la

[32] N. Quoc Dinh, P. Dailler, M. Forteau, A. Pellet, *Droit international public*, Paris: L.G.D.J., 2009, p. 966.

[33] V. Cour internationale de Justice, *Affaire de l'or monétaire pris à Rome en 1943*, arrêt du 15 juin 1954.

[34] Cour internationale de Justice, *Affaire relative au Timor Oriental* (Portugal c. Australie), arrêt du 30 juin 1995, par. 29.

[35] S. Hamamoto, *Eléments pour une théorie de la nullité en droit international public*, thèse, Université Paris II, p. 107.

[36] Art. 63 du statut. Sur son application et l'effet juridique de cette application, v. A. El Ouali, *Effets juridiques de la sentence internationale. Contribution à l'étude de l'exécution des normes internationales*, Paris: L.G.D.J., 1984, pp. 89-90.

CJUE.[37] Or, le Maroc est resté étranger à l'instance devant le Tribunal car il n'a pas fait usage du droit d'intervention.

Certes, l'on assiste, depuis quelque temps, à une extension des compétences des juges de l'UE pour contrôler la légalité d'actes juridiques internationaux, tels que des résolutions du Conseil de sécurité ou des accords internationaux conclus avec des pays tiers par la même UE. Cette extension s'est faite par le biais du Traité de Lisbonne ou de la propre initiative de ces juges.[38] Mais il n'en demeure pas moins que les jugements que ces juges prononcent sur la légalité de ces actes juridiques sont *res inter alios acta* par rapport à ces pays tiers[39] et que l'UE engage sa responsabilité internationale en cas de dommages causés à ces derniers.[40] En effet, le droit international est sans ambigüité, à cet égard, car, ainsi que le rappelle le Professeur E. Neframi, "L'annulation de l'acte de conclusion d'un accord international entraine la non-application de l'accord dans l'ordre juridique de l'Union. Or, l'annulation est inopposable aux Etats tiers cocontractants et la responsabilité de l'Union peut être engagée".[41]

Ainsi, il est bien clair que le Tribunal a admis sa compétence dans une question qui ne relève pas de son ressort. Mais l'excès de pouvoir du Tribunal ne se limite pas à l'aspect procédural, il affecte aussi la décision sur le fond.

Sur le fond, le Polisario a avancé 11 moyens de droit pour obtenir l'annulation de la décision du Conseil adoptant l'accord en question. Ces moyens ont tous été rejetés par le Tribunal. Mais cela n'a pas empêché ce dernier de prononcer l'annulation de l'accord au motif que le Conseil n'a pas veillé à s'assurer que l'exploitation des ressources naturelles du Sahara devait se faire au profit des populations locales. Or, en procédant ainsi, le Tribunal tourne, là aussi, le dos au droit international.

Il tourne, d'abord, le dos au droit international car ce dernier ne comporte aucune règle qui permet à un Etat ou à une organisation internationale, y compris l'UE, d'exiger d'un autre Etat de lui indiquer comment l'accord qui les lie est ou doit être exécuté en faveur de sa population locale. En effet, il est un principe bien établi que le droit international laisse aux parties la liberté de déterminer les conditions d'application des traités qui les lient. Ce principe est rappelé par Charles Rousseau, qui a pu écrire que "tout le problème de l'exécution est dominé par le *principe de l'indépendance de l'Etat* d'après lequel l'Etat exécute le traité par lui-même, en vertu de sa compétence et de sa

[37] Art. 40.

[38] V. M. Nekmouch, *L'extension des compétences de la Cour de justice*, in J. Rossetto, A. Berramdane, W. Cremer, A. Putter (dir.), *Quel avenir pour l'intégration européenne?*, Tours: Presses Universitaires François-Rabelais, 2010, p. 57 *et seq*.

[39] V. A. El Ouali, *Effets juridiques de la sentence internationale*, cit, pp. 82-90.

[40] V. I. Brownlie, *Principles of Public International Law*, Oxford: Oxford University Press, 2003, p. 665.

[41] E. Neframi, *Statut des accords internationaux dans l'ordre juridique de l'Union européenne*, in *Encyclopédie Jurisclasseur*, fasc.192, 30 août 2011, par. 72.

responsabilité".[42] Il est aussi rappelé par Joe Verhoeven, qui a pu souligner que "[l]a souveraineté des Etats et leur liberté de s'organiser comme ils l'entendent s'opposent a ce que le droit international détermine les conditions concrètes dans lesquelles sont exercés les droits qu'il confère ou sont mises en œuvre les obligations qu'il impose".[43] Ce principe ne souffre aucune exception et est applicable à tous les traités internationaux, y compris ceux relatifs aux droits de l'homme.[44] Il est aussi applicable à toutes les situations, dont notamment celle des territoires non-autonomes, à moins que les parties n'en décident autrement en vertu de l'art. 29 de la Convention de Vienne sur le droit des traités.[45] Il est dès lors applicable à la population du Sahara à supposer que ce dernier soit un territoire non autonome comme le prétend le Tribunal.

Le Tribunal tourne, ensuite, le dos au droit international car il ne possède pas la compétence d'annuler un accord international conclu entre un Etat étranger et une organisation internationale. En effet, il ne prend pas compte de la Convention de Vienne du 21 mars 1986, relative aux traités conclus entre États et organisations internationales ou entre organisations internationales,[46] qui dispose en son art. 46, par. 2, que "le fait que le consentement d'une organisation internationale à être liée par un traité a été exprimé en violation des règles de l'organisation concernant la compétence pour conclure des traités ne peut être invoqué par cette organisation comme viciant son consentement, à moins que cette violation n'ait été manifeste et ne concerne une règle d'importance fondamentale", et qui énonce aussi dans le par. 3 du même article, qu'une violation n'est manifeste que "si elle est objectivement évidente pour tout État ou toute organisation internationale se comportant en la matière conformément à la pratique habituelle des États et, le cas échéant, des organisations internationales et de bonne foi". En prononçant l'annulation de l'accord, le Tribunal réduit ainsi à néant le principe de base du droit des traités, le principe *pacta sunt servanda*, et, ce faisant, crée un grave problème de responsabilité internationale à l'UE car "[i]l eût sans doute été souhaitable que le juge se préoccupât de la question de savoir si ces exigences, résultant tant des conventions de Vienne sur le droit des traités que du droit international coutumier des traités, étaient remplies, faute de quoi la responsabilité internationale de l'Union pourrait être engagée, ce que la Cour avait d'ailleurs admis antérieurement".[47]

[42] C. ROUSSEAU, *Droit international public*, Paris: Sirey, 1970, p. 193.

[43] J. VERHOEVEN, *Droit international public*, Bruxelles: Larcier, 2000, p. 36.

[44] Cf. O. SCHACHTER, *The Obligation to Implement the Covenant in Domestic Law*, in L. HENKIN (dir.), *The International Bill of Rights – The Covenant on Civil and Political Rights*, New York: Columbia University Press, 1981, p. 311.

[45] Voir *infra* à l'occasion du commentaire sur l'arrêt de la Cour de justice.

[46] Cf. E. NEFRAMI, *Statut des accords internationaux dans l'ordre juridique de l'Union européenne*, cit., par. 72.

[47] D. SIMON, A. RIGAUX, *Le Tribunal et le droit international des traités: un arrêt déconcertant*, in *Europe. Actualité du droit de l'Union européenne*, février 2016, par. 34.

Entaché ainsi d'un excès de pouvoir manifeste, tant sur la forme que sur le fond, l'arrêt du Tribunal n'a pas manqué d'être qualifié, par certains auteurs, de "nouveau cas de schizophrénie",[48] de jugement "faisant (une) application approximative du droit international",[49] "déconcertant", "désinvolte", au "raisonnement très contestable" et "péremptoire", "fragile en droit", un arrêt qui "marque une tendance à perdre de vue certains 'fondamentaux' du recours en annulation", un arrêt qui fait preuve d'une "méconnaissance du contexte politique et diplomatique, extrême faiblesse du raisonnement sur la recevabilité de ce recours individuel, fragilité du motif d'annulation, ces éléments ne peuvent qu'affaiblir la portée de la *jurisdictio* du Tribunal, dont les chambres gagneraient, quand elles abordent des questions faisant appel à la mise en œuvre du droit international public, à se souvenir que dans 'jurisprudence', il y a 'prudence'".[50] Malheureusement, cette prudence manquera aussi au juge d'appel.

III.2. L'arrêt de la Cour de justice du 21 décembre 2016

Comme cela était prévisible, le Conseil de l'UE saisit la Cour de justice pour lui demander de prononcer l'annulation de l'arrêt du Tribunal du 10 décembre 2015. La Cour de justice rend sa décision le 21 décembre 2016 dans laquelle elle reconnait la validité de l'accord agricole, mais affirme que le Sahara est un territoire "tiers" par rapport au Maroc. Cette décision est, elle-aussi, infondée et cela pour différentes raisons.

Comme le Tribunal, la Cour de justice a une lecture étriquée du conflit du Sahara qui se confond purement et simplement avec celle du Polisario. C'est ainsi qu'elle admet d'une façon péremptoire que le Sahara est toujours un territoire non autonome[51] et se contente de reprendre à son compte l'avis subjectif de Hans Corell, qui n'accorde aucune espèce d'importance à l'accord de Madrid. Comme lui, elle ne cherche à déterminer la signification juridique de l'attitude de l'Assemblée générale visant, depuis la rétrocession du Sahara à la suite de la conclusion de cet accord, ni à demander au Maroc, à supposer que ce dernier soit une puissance administrante, des informations sur le territoire conformément à l'obligation qui est faite à toutes les puissances administrantes par l'art. 73, litt. e), de la Charte des Nations Unies et la pratique constante de la même Assemblée générale. Elle n'examine pas non plus le recours à l'assemblé locale, la Jemaâ, prévu par l'accord de Madrid pour faire entériner ce dernier par la population locale, à lumière de la pratique des Nations Unies en vigueur à l'époque, qui réservait une place primordiale à la consultation des assemblées représentatives par rapport à la

[48] L. Coutron, *Un nouveau cas de schizophrénie au Tribunal de l'Union européenne: l'arrêt* Front Polisario c. Conseil, in *Revue trimestrielle de droit européen*, 2016, p. 425 *et seq*.

[49] F. Dubission, G. Poisonnier, *La question du Sahara occidental devant le Tribunal de l'Union européenne: une application approximative du droit international aux territoires non autonomes*, in *Journal du droit international*, 2016, p. 503 *et seq*.

[50] D. Simon, A. Rigaux, *Le Tribunal et le droit international des traités*, cit., par. 1, 2, 5, 29, 41.

[51] *Conseil de l'Union européenne c. Front Polisario* [GC], cit., par. 23.

procédure référendaire. Elle ne mentionne pas que c'est le Maroc qui a recommandé en 1982 le recours au référendum afin de mettre fin à un conflit artificiel. Elle n'accord aucune attention au fait que le recours au référendum a été rendu irrémédiablement inapplicable à la suite de la manipulation de l'opération d'identification du corps électoral dans le cadre de la mise en œuvre du Plan de règlement (1990).

La Cour de justice ne tient pas compte non plus du fait que les Nations Unies ne sont plus aveuglément attachées au droit à l'autodétermination qui mène à l'indépendance, ainsi que cela était le cas dans les années 1960, et qui avait pour effet de susciter la désintégration des Etats. Désormais, elles préfèrent, à un moment où la mondialisation fragilise les Etats, accorder la prééminence à l'autodétermination démocratique, à travers l'octroi de l'autonomie territoriale dont elle est en train de devenir, ainsi que cela est admis par l'écrasante majorité de la doctrine qui s'est intéressée à la question,[52] la composante la plus importante. La Cour ne tient pas compte non plus du fait que tous les Secrétaires généraux des Nations Unies ont préconisé, depuis 1991, le recours à l'autonomie

[52] Cf. S. CALOGEROPOULOS-STRATIS, *Le droit des peoples à disposer d'eux-mêmes*, Bruxelles: Bruylant, 1973, p. 199 *et seq.*; R. LAPIDOTH, *Some Reflections on Autonomy*, in *Mélanges offerts à P. Reuter*, Paris: Pedone, 1981, p. 379 *et seq.*; I. BROWNLIE, *The Rights of Peoples in Modern International Law*, in J. CRAWFORD (dir.), *The Rights of Peoples*, Oxford: Oxford University Press, 1988, p. 1 *et seq.*; A. EIDE, *The Universal Declaration in Space and Time*, in J. BERTING, P.R. BAEHR, J.H. BURGERS, C. FLINTERMAN, B. DE KLERK, R. KROES, C.A. VAN MINNEN, K. VANDERWAL (dir.), *Human Rights in a Pluralistic World: Individuals and Collectives*, Middelburg: Roosevelt Study Center, 1990, p. 15 *et seq.*; H.J. STEINER, *Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities,* in *Notre Dame Law Review*, 1991, p. 1539 *et seq.*; H. HANNUM, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights*, Philadelphia: University of Pennsylvania Press, 1990, p. 473 *et seq.*; L. CHU CHEN, *Self-Determination and World Public Order*, in *Notre Dame Law Review*, 1991, p. 1288; A. BUCHANAN, *Self-Determination and the Right to Secede*, in *Journal of International Affairs*, 1992, p. 351 *et seq.*; A. HERACLIDES, *Secession and Third-Party Intervention*, in *Journal of International Affairs*, 1992, p. 400; M. HALPERIN, P.L. SMALL, D.J. SCHEFFER, *Self-Determination in the New World Order: Guidelines for US Policy*, Washington DC: Carnegie Endowment for International Peace, 1992, p. 47; G. BINDER, *The Case for Self-Determination*, in *Stanford Journal of International Law*, 1993, p. 248 *et seq.*; H. HANNUM, *Rethinking Self-Determination*, in *Virginia Journal of International Law*, 1993, p. 64 *et seq.*; C. TOMUSCHAT, *Self-Determination in a Post-Colonial World*, in C. TOMUSCHAT (dir.), *Modern Law of Self-Determination*, The Hague: Martinus Nijhoff, 1993, pp. 13-17; A. EIDE, *In Search of Constructive Alternatives to Secession*, *ibid.*, pp. 170-173; A. CASSESE, *Self-Determination of Peoples. A Legal Reappraisal*, Cambridge: Cambridge University Press, 1995, pp. 352-359; H. CLEVELAND, *Birth of a New World*, New York: Basic Books, 1995, p. 75; L. HANNIKAINEN, *Self-Determination and Autonomy in International Law*, in M. SUKSI (dir.), *Autonomy: Applications and Implications*, The Hague: Kluwer Law International, 1998, p. 90; M. SUKSI, *On the Retrenchment of Autonomy*, *ibid.*, p. 164; R.A. FALK, *The Right of Self-Determination Under International Law: The Coherence of Doctrine Versus the Incoherence of Experience*, in W. DANSPECKGRUBER, A. WATTS (dir.), *Self-Determination and Self-Administration. A Sourcebook*, Boulder: Lynne Rienner Publishers, 1997, p. 63; R. LAPIDOTH, *Commentary*, *ibid.*, p. 68; H. OWADA, *Commentary*, *ibid.*, p. 77; D.J. ELAZAR, *Commentary*, *ibid.*, p. 91; F.W. RIGGS, *Commentary*, *ibid.*, p. 126; M. WALZER, *Commentary*, *ibid.*, p. 128; F. FREEMAN, *The Right to Self-Determination in International Politics: Six Theories in Search of a Policy,* in *Review of International Studies*, 1999, p. 370; E.J. CARDENAS, M.F. CANAS, *The Limits of Self-Determination*, *ibid.*, p. 159.

territoriale, non seulement afin de tenir compte du nouveau paradigme en matière d'autodétermination, mais aussi parce qu'il leur est apparu qu'il était devenu impossible de mettre en application un référendum d'autodétermination.[53]

La décision de la Cour de justice repose aussi sur une interprétation erronée de principes de base du droit international, en particulier ceux relatifs au droit des traités. Cette interprétation a pour effet de vider de sa substance l'expression "territoire du Royaume du Maroc" figurant à l'art. 94 de l'accord d'association de 1996, et de justifier la position de la Cour que le Sahara ne fait pas partie de ce territoire. Elle cite, à cet égard, l'art. 29 de la Convention de Vienne sur le droit des traités qui, rappelons-le, dispose que, "à moins qu'une intention différente ne ressorte du traité ou ne soit par ailleurs établie, un traité lie chacune des parties à l'égard de l'ensemble de son territoire". Or, dit-elle, les parties n'ont jamais spécifié que l'accord agricole devait s'appliquer à une autre partie du territoire comme, par exemple, le Sahara pour conclure, d'une façon tautologique que "la règle coutumière codifiée à l'article 29 de la convention de Vienne s'opposait elle aussi a priori à ce que le Sahara occidental soit considéré comme relevant du champ d'application territorial de l'accord d'association".[54] Or, la pratique internationale montre, très souvent, que les parties ne disent rien sur le domaine territorial auquel est applicable leur accord pour la simple raison que ce domaine est supposé être connu. Les parties ne précisent la configuration dudit domaine territorial que lorsqu'elles entendent exclure ou adjoindre, pour une raison ou une autre, un territoire donné. C'est ainsi que, par exemple, les puissances coloniales européennes incluaient parfois dans leur traités la fameuse "clause coloniale", par laquelle ils déclaraient que ces traités s'appliquaient ou non à leurs colonies.[55] A cet égard, il convient de signaler que la question du recours à la clause coloniale a été très discutée lors de la troisième Conférence des Nations Unies sur le droit de la mer et que finalement une résolution, la résolution III, a été adoptée dans laquelle il est affirmé que

> "dans le cas d'un territoire dont le peuple n'a pas accédé à la pleine indépendance ou à un autre régime d'autonomie reconnu par les Nations Unies, ou d'un territoire sous domination coloniale, les dispositions relatives à des droits ou intérêts visés dans la Convention sont appliquées au profit du peuple de ce territoire dans le but de promouvoir sa prospérité et son développement".

De façon générale, la règle qui a toujours prévalu en la matière est que, en l'absence d'une indication contraire, le traité s'applique à tout le territoire des parties, y

[53] Cf. A. El Ouali, *Saharan Conflict. From Self-Determination/Independence to Territorial Autonomy as a Right to Democratic Self-determination*, London: Stacey International, 2008, p. 88 *et seq*.

[54] *Conseil c. Front Polisario* [GC], cit., par. 97.

[55] V. I. Mc Taggart Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester: Manchester University Press, 1984, pp. 87-92.

compris les colonies.[56] L'interprétation que donne la Cour de l'art. 29, qui codifie la pratique internationale, est donc totalement erronée.

Ainsi, il apparait clairement que l'UE (et avant elle la CEE) et le Maroc avaient bien à l'esprit une notion claire de la configuration du territoire marocain, laquelle configuration englobait le Sahara, et que cette notion s'est amplement précisée avec le temps, du fait de la conduite subséquente, notamment de la partie européenne.

La décision de la Cour de justice étend abusivement la notion de *tiers* au *peuple*. Elle croit pouvoir se fonder, à cet égard, sur l'art. 34 de la Convention de Vienne sur le droit des traités. Cet article, peut-on le rappeler, dispose qu'"[u]n traité ne crée ni obligations ni droits pour un Etat tiers sans son consentement". Ainsi qu'on peut le noter, le *tiers* dont il s'agit est un *Etat*. Or, la Cour étend l'application de cet article au *peuple*. La Cour mérite d'être citée *in extenso* pour la manière, hésitante, incertaine et très particulière, avec laquelle elle cherche à justifier cette extension. Elle affirme, à ce propos, que:

> "la Cour internationale de justice a souligné, dans son avis consultatif sur le Sahara occidental, que la *population* de ce territoire jouissait, en vertu du droit international général, du droit à l'autodétermination, ainsi que cela est exposé aux points 90 et 91 du présent arrêt, étant entendu que, pour sa part, l'Assemblée générale de l'ONU a, au point 7 de sa résolution 34/37 sur la question du Sahara occidental, citée au point 35 du présent arrêt, recommandé que le *Front Polisario, 'représentant du peuple du Sahara occidental*, participe pleinement à toute recherche d'une solution politique juste, durable et définitive de la question du Sahara occidental', ainsi que le Tribunal l'a indiqué au point 14 de l'arrêt attaqué et que la Commission l'a rappelé devant la Cour.
> Compte tenu de ces éléments, *le peuple du Sahara occidental doit être regardé comme étant un 'tiers' au sens du principe de l'effet relatif des traités*, ainsi que M. l'Avocat général l'a en substance relevé au point 105 de ses conclusions. En tant que tel, ce tiers peut être affecté par la mise en œuvre de l'accord d'association en cas d'inclusion du territoire du Sahara occidental dans le champ d'application dudit accord, sans qu'il soit nécessaire de déterminer si une telle mise en œuvre serait de nature à lui nuire ou au contraire à lui profiter. En effet, il suffit de relever que, dans un cas comme dans l'autre, ladite mise en œuvre doit recevoir le consentement d'un tel tiers. Or, en l'occurrence, l'arrêt attaqué ne fait pas apparaître que le peuple du Sahara occidental ait manifesté un tel consentement".[57]

Ainsi qu'on peut le constater, la Cour assimile la notion de *peuple* à celle d'*Etat* et laisse entendre qu'une telle assimilation est admise par la Convention de Vienne sur le droit des traités. Or, la Convention de Vienne sur le droit des traités n'est applicable qu'aux Etats et eux seuls.[58] Quant à la notion de *tiers*,[59] elle renvoie, elle-aussi, unique-

[56] Cf. A.D. McNAIR, *The Law of Treaties*, Oxford: Oxford University Press, 1961, pp. 116-117.

[57] *Conseil c. Front Polisario* [GC], cit., par. 104-106 (c'est nous qui soulignons).

[58] L'art. 2, par. 1, litt. a), de la Convention de Vienne sur le droit des traités dispose à cet effet: "Aux fins de la présente Convention: a) l'expression 'traité' s'entend d'un accord international conclu par écrit entre Etats et régi par le droit international, qu'il soit consigné dans un instrument unique ou dans deux ou plusieurs instruments connexes, et quelle que soit sa dénomination particulière".

ment aux Etats. Certes, un traité peut aussi être conclu entre un Etat et une organisation ou entre deux ou plusieurs organisations internationales. C'est pour cette raison qu'il est admis aujourd'hui que "le mot traité désigne tout accord conclu entre deux ou plusieurs sujets du droit international, destiné à produire des effets de droit et régi par le droit international".[60] Or, les *peuples* ne sont pas des sujets de droit international. Certes, il est vrai, que les *peuples coloniaux* peuvent jouir d'un certain nombre de droits sur le plan international. Mais, faut-il le rappeler, ni la Cour internationale de Justice ni l'Assemblée générale n'ont jamais reconnu l'existence d'un *peuple* sahraoui. Très significatif, à cet égard, est le fait est que toutes les deux font usage des expressions *populations* et *habitants*, qui ont une connotation démographique et non pas juridique. Ainsi, dans sa résolution 2229 du 20 décembre 1966, la première en la matière, on observe que l'Assemblée

> "invite la Puissance administrante à arrêter le plus tôt possible, en conformité avec les aspirations de la population autochtone du Sahara espagnol et en consultation avec les Gouvernements marocain et mauritanien et toute autre partie intéressée, les modalités de l'organisation d'un référendum qui sera tenu sous les auspices de l'organisation des Nations Unies afin de permettre à la population autochtone du territoire d'exercer librement son droit à l'autodétermination".

L'Assemblée générale fait usage des mêmes expressions dans toutes les résolutions qu'elle a adoptées par a suite. Ainsi en est-il, par exemple, de la résolution 3162 du 14 décembre 1973 dans laquelle elle réaffirme

> "son attachement au principe de l' autodétermination et son souci de voir appliquer ce principe dans un cadre qui garantisse aux habitants du Sahara sous domination espagnole l'expression libre et authentique de leur volonté, conformément aux résolutions pertinentes de l'Organisation des Nations Unies dans ce domaine".

Quant à la Cour internationale de Justice, elle a fait aussi appel, dans son avis consultatif, à l'expression "populations du territoire" lorsqu'elle a affirmé qu'elle

> "n'a donc pas constaté l'existence de liens juridiques de nature à modifier l'application de la résolution 1514 (XV) quant à la décolonisation du Sahara occidental et en particulier l'application du principe d'autodétermination grâce à l'expression libre et authentique de la volonté des *populations du territoire*".[61]

A supposer que les Nations Unies aient effectivement admis que la population du Sahara constituait un peuple, il reste qu'il est nécessaire de déterminer qui représente

[59] L'art. 2, par. 1, litt. h), de la Convention de Vienne sur le droit des traités dispose que "l'expression 'Etat tiers' s'entend d'un Etat qui n'est pas partie au traité".

[60] N. Quoc Dinh, P. Dailler, M. Forteau, A. Pellet, *Droit international public*, cit., p. 132.

[61] Cour internationale de Justice, *Sahara Occidental*, avis consultatif du 16 octobre 1975, par. 162 (c'est nous qui soulignons).

ce dernier afin de lui demander son avis. Le droit et la pratique des Nations Unies, faut-il le rappeler, admettent, à cet égard, qu'il est nécessaire que l'Assemblée générale adopte une résolution expresse, à la suite d'une recommandation faite par une organisation régionale, par laquelle elle reconnait formellement qu'un mouvement de libération nationale donné est le représentant (l'unique représentant) d'un peuple déterminé.[62] Or, là aussi, les Nations Unies n'ont jamais admis, ainsi que nous l'avons aussi rappelé précédemment, que le Polisario était l'unique représentant du *peuple* sahraoui.

Dans sa décision, la Cour fait sienne l'idée du Polisario que l'obligation d'obtenir le consentement de ce dernier à la conclusion de tout accord concernant l'exploitation des ressources naturelles du Sahara découlerait du principe de la souveraineté permanente sur les ressources naturelles (PSPRN). Or, contrairement à ce qui a pu être affirmé parfois, le PSPRN est un attribut non pas des peuples[63] mais des Etats.[64] L'idée que la PSPRN serait un attribut des peuples suppose que ces derniers soient des sujets de droit international. Or, il convient de le rappeler, ce dernier ne reconnait pas aux peuples la capacité juridique d'agir sur le plan international, laquelle seule permet de jouir de droits et d'assumer des devoirs et obligations.

Il n'est dès lors pas étonnant que l'Assemblée générale n'a jamais cherché à faire appliquer le PSPRN à un territoire non indépendant, à l'exception du cas du Sud-Ouest Africain (Namibie). Mais il convient de le souligner, celle-ci n'était pas un territoire non-autonome, mais un territoire sous mandat/tutelle. De même, les Nations Unies n'en sont venues à chercher à appliquer le PSPRN à la Namibie qu'après avoir déclaré que l'occupation de ce territoire était illégale et que les Etats membres (des Nations Unies) étaient dans l'obligation de ne pas reconnaitre une telle occupation. Enfin, l'implication des Nations Unies a été un véritable *fiasco* dans la mesure où l'Afrique du Sud et les compagnies étrangères ont continué à exploiter les ressources naturelles de la Namibie, ce qui a valu une sévère perte de crédibilité aux Nations Unies, qui ont, par la suite, évité de reproduire ailleurs cette expérience.[65]

Il convient de souligner que, contrairement à ce que laissent croire certains auteurs,[66] le PSPRN n'a jamais pu être érigé en règle coutumière du droit international.[67]

[62] Cf. I. BROWNLIE, *Principles of Public International Law*, cit., p. 62.

[63] V. notamment A. CASSESE, *The Self-Determination of Peoples*, in L. HENKIN (dir.), *The Bill of Human Rights: The Covenant on Civil and Political Rights*, New York: Columbia Unversity Press, 1981, p. 103; T. VAN BOVEN, *Human Rights and Rights of Peoples*, in *European Journal of International Law*, 1995, p. 470.

[64] V. notamment S.M. SCHWEBEL, *The Story of the UN's Declaration on Permanent Sovereignty over Natural Resources*, in *American Bar Association Journal*, 1963, p. 464; J. CRAWFORD, *Some Conclusions,* in J. CRAWFORD (dir.), *The Rights of Peoples*, cit., p. 171.

[65] Cf. R. GOY, *L'indépendance de la Namibie*, in *Annuaire français de droit international*, 1991, p. 390.

[66] V. notamment K.N. GESS, *Permanent Sovereignty over Natural Resources. An Analytical Review of the United Nations Declarations and Its Genesis*, in *International and Comparative Law Quarterly*, 1964, p. 400; N. SCHRIJVER, *Sovereignty Over Natural Resources. Balancing Rights and Duties*, Cambridge: Cambridge Uni-

Attachés au caractère répétitif et incantatoire de certaines résolutions de l'Assemble, ces auteurs tournent le dos à la réalité concrète qui est celle de l'échec patent de ce principe.[68] Or, ce dont la Cour ne fait pas cas est que cet échec du PSPRN a poussé à l'exploration de nouvelles approches afin de permettre aux populations locales de profiter réellement des ressources naturelles de leurs pays. Parmi ces approches, il y a celle qui entrevoit d'aborder la question de l'exploitation des ressources naturelles sous l'angle des droits de l'homme.[69] Cette approche a non seulement permis d'engager des poursuites judiciaires contre les gouvernements et les compagnies concernés, mais aussi de donner naissance à un certain nombre de principes. Certes, ces derniers sont encore à l'état embryonnaire, mais ils ont tendance à susciter une adhésion croissante auprès des juges internes dans différents pays. Parmi ces principes, il y a notamment l'obligation pour les Etats de consulter les populations concernées avant le lancement d'un projet d'exploration et/ou d'exploitation des ressources naturelles. Certains auteurs estiment, à cet égard, que les Etats ont l'obligation non seulement de consulter les populations concernées, mais aussi d'obtenir leur consentement.[70] Ils parlent, à cet égard, du principe du consentement préalable et éclairé (CPLE).[71] Mais, les gouvernements ont montré de fortes résistances à l'égard du principe du CPLE en raison du droit de veto que ce dernier accorde aux populations concernées, lequel droit de véto constitue, à leurs yeux, une atteinte à la souveraineté de leurs Etats et une entrave à la fixation des priorités nationales dans la mesure où l'intérêt local pourrait l'emporter sur l'intérêt national. On comprend ainsi que la recherche d'un équilibre entre les intérêts de l'Etat et les populations autochtones soit un enjeu majeur des négociations relatives au développement des ressources locales car la mise en œuvre du CPLE

versity Press, 1997, p. 373; J.A. HOFBAUER, *The Principle of Permanent Sovereignty over Natural Resources and Its Modern Implications*, Faculty of Law, University of Iceland, 2009, skemmans.is, p. 3.

[67] Cf. D. ROSENBERG, *Le principe de la souveraineté des Etats sur leurs ressources naturelles*, Paris: L.G.D.J., 1983, pp. 100, 111 *et seq*.

[68] V. E. DURUIGBO, *Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law*, in *The George Washington International Law Review*, 2006, p. 34 *et seq*.

[69] L. APONTE MIRANDA, *The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-Based Development*, in *Vanderbilt Journal of Transnational Law*, 2012, p. 810.

[70] Cf. E. LINDE, *Consultation or Consent? Indigenous People's Participatory Rights with Regard to the Exploration of Natural resources according the UN Declaration on the Rights of Indigenous Peoples*, Thesis, University of Toronto, 2009, tspace.libary.utoronto.ca.

[71] Cf. P. TAMANG, *An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices*, United Nations, Workshop on Free, Prior and Informed Consent, New York, 17-19 janvier 2005, www.un.org; F. DESMARAIS, *Le consentement préalable, libre et éclairé des peuples autochtones en droit international: la nécessaire redéfinition de son caractère conceptual,* in *Revue québécoise de droit international*, 2006, p. 161 *et seq*.

> "tend fréquemment à opposer plutôt qu'à rendre complémentaire l'intérêt national à l'intérêt local. En conséquence, certains gouvernements considèrent qu'octroyer à une petite partie de sa population nationale un droit décisionnel sur un projet susceptible de faire fructifier l'économie du pays revient à hypothéquer son pouvoir souverain sur les richesses naturelles de l'État".[72]

C'est pour ces raisons que le principe du CPLE n'est pas admis par le droit positif. Certes, la position des gouvernements peut encore évoluer, mais dans l'état actuel des choses, la seule obligation qui est reconnue est celle de la consultation des populations concernées.[73] Frédéric Desmarais, qui est un des plus fervents défenseurs du principe du consentement préalable, libre et éclairé des peuples autochtones, admet que "nonobstant le développement foisonnant du principe autant au niveau conventionnel, jurisprudentiel et doctrinal en droit international qu'au niveau de la législation domestique de certains Etats, il demeure chancelant. Sans relever du mythe, sa mise en œuvre effective en droit international est loin d'être une réalité".[74]

Les peuples non encore indépendants jouissent, comme tous les autres peuples, du droit d'aspirer au bien-être et à la prospérité. C'est là l'objet du fameux art. 73 de la Charte des Nations Unies qui dispose que les membres des Nations Unies, qui ont ou qui assument la responsabilité d'administrer des territoires dont les populations ne s'administrent pas encore complètement elles-mêmes, reconnaissent le principe de la primauté des intérêts des habitants de ces territoires.[75] A supposer que la population du Sahara soit, comme l'admet la Cour de justice, un peuple non encore indépendant, comment permettre à ce dernier de jouir de ce droit fondamental lorsqu'on le considère comme un *tiers* par rapport à un accord conçu pour lui assurer le bénéfice de ce droit? Partant de là, on peut aussi se demander pourquoi l'Assemblée générale n'a pas jugé nécessaire, conformément à l'obligation qui lui est faite par l'art. 73, litt. e), de la Charte, de réclamer au Maroc des informations sur ce qu'il faisait en faveur de la population du Sahara pour assurer son bien-être et sa prospérité. C'est là une question que ne se pose pas la Cour alors qu'elle est au cœur de la notion de territoire non autonome.

Allons plus loin, et supposons, par pure hypothèse, que le Sahara soit un territoire sous occupation étrangère, le droit régissant celle-ci – et qui constitue le standard minimum en matière d'assistance à une population se trouvant dans une situation de dé-

[72] V. LUBUIS, *Le libre consentement préalable et éclairé. Contribution synthétique sur une pratique en développement*, Institut d'Etudes Internationales de Montréal, UQAM, Faculté de Droit, 2009, p. 10.

[73] V. l'étude minutieuse effectuée, à cet effet, par T. WARD, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, in *Northwestern University Journal of International Human Rights*, 2011, p. 54 *et seq.*; L. APONTE MIRANDA, *The Role of International Law in Intrastate Natural Resource Allocation*, cit.

[74] F. DESMARAIS, *Le consentement préalable*, cit., p. 163.

[75] V., pour une analyse approfondie de cet article, A. EL OUALI, *Le conflit du Sahara au regard du droit international*, cit., p. 119 *et seq*.

pendance – interdit de mettre en danger le bien-être et la survie de la population de ce territoire du fait que ce dernier serait soumis à une telle occupation. En effet, le droit relatif à l'occupation, tel que codifié par le Règlement de La Haye de 1907[76] et la quatrième Convention de Genève,[77] s'il autorise la puissance occupante à se conduire comme une autorité territoriale, il l'oblige aussi à veiller au développement du peuple occupé.[78] Il est curieux de constater, à cet égard, que les auteurs, qui soutiennent l'idée que le Maroc est une puissance occupante, ne tiennent pas compte du fait que le droit de l'occupation, sur lequel ils fondent leur thèse, oblige la puissance occupante à veiller à assurer le développement et le bien-être de la population, à travers notamment l'exploitation des ressources naturelles.[79]

L'obligation pour la puissance occupante de veiller à créer les conditions permettant d'assurer le bien-être de la population locale a été confirmée par la Cour internationale de Justice dans son avis consultatif sur les conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé. Dans cet avis, la Cour a rappelé que la puissance occupante était tenue non seulement par les obligations prévues à cet effet par le Règlement de La Haye de 1907 et la quatrième Convention de Genève, mais aussi par l'obligation de ne pas faire obstacle à l'application des dispositions du Pacte de 1966 relatif aux droits économiques, sociaux et culturels.[80] Ce Pacte, il convient de le rappeler, dispose, en son art. 11, par.1, que

> "[l]es Etats parties au présent Pacte reconnaissent le droit de toute personne à un niveau de vie suffisant pour elle-même et sa famille, y compris une nourriture, un vêtement et un logement suffisants, ainsi qu'à une amélioration constante de ses conditions d'existence. Les Etats parties prendront des mesures appropriées pour assurer la réalisation de ce droit et ils reconnaissent à cet effet l'importance essentielle d'une coopération internationale librement consentie".

La nécessité du respect de l'obligation contenue dans cet article par la puissance occupante a été rappelée par le Comité des droits de l'homme à l'occasion de l'examen

[76] Règlement concernant les lois et coutumes de la guerre sur terre annexé à la quatrième Convention de La Haye du 18 octobre 1907.

[77] Convention (IV) de Genève relative à la protection des personnes civiles en temps de guerre, 12 août 1949.

[78] Cf. J. CARDONA LLORENS, *Le principe du droit des peuples à disposer d'eux-mêmes et l'occupation étrangère*, in *Droit du pouvoir, pouvoir du droit. Mélanges offerts à Jean Salmon*, Bruxelles: Bruylant, 2007, p. 821 *et seq*.

[79] V., entre autres, L.S.F. LAWALATA, *The Current EU-Morocco Fisheries Partnership Agreement through th Perspective of the Sahrawi People Right to Self-Determination & Permanent Sovereignty over Natural Resources. Exploitation of Natural Resources in Western Sahara*, Tilburg University, 2012, arno.uvt.nl, pp. 57-58.

[80] *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, cit., par. 96 à 113.

de la question de savoir si les personnes résidant dans les territoires palestiniens occupés par Israël relevaient de la compétence de ce dernier aux fins de l'application du Pacte. C'est ainsi que, à la suite du refus d'Israël d'admettre que les obligations qui lui incombent en vertu du Pacte ne s'étendaient pas au-delà de son propre territoire, notamment en Cisjordanie et à Gaza, le Comité a pu clarifier que

> "dans les circonstances actuelles, les dispositions du Pacte s'appliquent au profit de la population des territoires occupés, en ce qui concerne tous les actes accomplis par les autorités ou les agents de l'Etat partie dans ces territoires, qui compromettent la jouissance des droits consacrés dans le Pacte et relèvent de la responsabilité de l'Etat d'Israël conformément aux principes du droit international public".[81]

La puissance occupante est ainsi tenue d'appliquer dans le territoire qui se trouve sous son autorité les dispositions du Pacte de la même manière qu'elle est censée le faire sur son territoire national. Les dispositions du Pacte n'étant pas séparables les unes des autres, la puissance occupante est aussi autorisée à solliciter l'aide et l'assistance étrangère afin d'assumer ses obligations à l'égard de la population concernée. Il convient de rappeler, là aussi, que le Pacte relatif aux droits économiques, sociaux et culturels dispose en son art. 2, par. 1, que

> "[c]hacun des Etats parties au présent Pacte s'engage à agir, tant par son effort propre que par l'assistance et la coopération internationales, notamment sur les plans économique et technique, au maximum de ses ressources disponibles, en vue d'assurer progressivement le plein exercice des droits reconnus dans le présent Pacte par tous les moyens appropriés, y compris en particulier l'adoption de mesures législatives".

Afin de créer les conditions pouvant assurer le bien-être de la population placée sous son autorité, la puissance concernée est ainsi tenue de mobiliser le maximum de ses ressources à cet effet, et, lorsque les moyens arrivent à lui manquer ou sont insuffisants, de faire appel à la coopération internationale, notamment sous la forme d'une sollicitation des investissements étrangers. S'agissant du Sahara, cette sollicitation est une condition absolument nécessaire en raison non seulement de l'ampleur des besoins de la population locale qui a été complètement délaissée par le colonialisme espagnol pendant près un siècle, mais aussi de la nature des potentialités économiques du territoire qui sont limitées aux deux ressources que sont les phosphates et la pêche et dont l'exploitation ne peut, dans les circonstances présentes, être optimisée que par le biais d'une aide étrangère, sous la forme d'investissements privés et d'aide publique étrangère. A supposer, encore une fois par pure hypothèse, que le Maroc ait violé le droit international en *occupant* le Sahara, et que son statut sur ce territoire serait celui

[81] Comité des droits de l'homme, observations finales du 21 août 2003, *Israël*, CCPR/CO/78/ISR, tbinternet.ohchr.org, par. 11.

d'une puissance occupante, il se rendrait responsable d'une autre violation, plus grave celle-là, de ce même droit international, celle d'abandonner à elle-même la population de ce territoire. On le voit, la Cour ne semble pas réaliser la gravité de son exigence du consentement de la population, d'autant plus qu'une telle exigence n'existe aucunement en droit international.

Enfin, la Cour de justice rejette, sans en donner aucune explication, la conclusion à laquelle est parvenu le Tribunal et qui consiste à admettre l'existence d'une conduite subséquente attestant que l'UE a, par une attitude constante, reconnu, lors de l'application des accords la liant au Maroc, que ce dernier était le souverain territorial au Sahara. La Cour n'a, en effet, pas été en mesure de justifier juridiquement ce rejet. Elle se contente d'affirmer que l'application de l'accord agricole revêtait un "caractère *de facto*",[82] que le Tribunal n'a pas recherché, contrairement à ce que prescrit l'art. 31, par. 3, litt. b), de la Convention de Vienne, si une telle application, dans certains cas, traduisait l'existence d'un accord entre les parties visant à modifier l'interprétation de l'art. 94 de l'accord d'association et qu'en tout état de cause une telle application est nécessairement inconciliable avec le principe d'exécution des traités de bonne foi, qui constitue pourtant un principe obligatoire du droit international général applicable aux sujets de ce droit qui sont parties contractantes à un traité.[83] Le raisonnement de la Cour est, là aussi, très peu convaincant. Il en est ainsi, d'abord, parce que toute application d'un traité est en soi un élément de fait sans lequel une telle application ne peut s'incarner dans la réalité concrète. Dans le cas d'espèce, ce sont des faits continus et homogènes qui se sont reproduits régulièrement à travers le temps, sous forme d'attitudes et de comportements similaires et identiques de la part des parties concernées, en particulier la partie européenne, qui ont fini par s'incarner en une conduite subséquente consistant en une reconnaissance implicite de la souveraineté du Maroc sur le Sahara. Il en est ainsi, ensuite, parce que les parties n'ont jamais cherché à modifier la signification et la portée de l'art. 94 de l'accord d'association, qui étaient présentes, ainsi que nous l'avons vu, dans leur esprit, et cela dès le départ, sinon l'accord en question n'aurait jamais été conclu par la partie marocaine. Il en est ainsi, enfin, parce que les parties n'ont jamais fait preuve de mauvaise foi l'une par rapport à l'autre, étant donné qu'elles ont toujours été d'accord sur la signification et la portée de l'art. 94. C'est, en fait, un nonsens de parler de mauvaise foi lorsque les parties accordent à une disposition donnée la même signification et la même portée juridique et sont satisfaites de la manière dont elle est appliquée. Faut-il le rappeler, le principe de bonne foi vise à protéger la confiance réciproque dans un rapport juridique donné. Etymologiquement, le terme bonne

[82] *Conseil c. Front Polisario* [GC], cit., par. 118 et 121.
[83] *Ibid.*, par. 122, 123 et 124.

foi signifie lier, relier, entrelacer des parties par l'établissement entre elles d'un rapport de confiance réciproque.[84] La bonne foi tend de ce fait à faire

> "naître des droits et obligations d'une interaction sociale afin de protéger la confiance légitime qu'un sujet de droit a provoqué chez un autre par ses actes, omissions, déclarations ou comportements. Elle protège le sujet qui s'est de bonne foi fié à une certaine régularité de comportements extérieurs d'autrui et ne permet pas à l'auteur de ces attitudes d'opposer au sujet confiant les aléas de sa volonté réelle".[85]

Partant de là, il est inapproprié d'affirmer que les parties contractantes à l'accord agricole n'ont pas respecté le principe de bonne foi en donnant à une disposition donnée de cet accord la même interprétation, le même sens et la même portée.

On le voit, l'arrêt de la Cour de justice est surprenant tant par sa perception approximative de certaines règles de base du droit international que par le manque de rigueur du raisonnement sur lequel il se fonde. Il est aussi surprenant parce qu'il se prononce sur le statut d'un territoire qu'un pays étranger, en l'occurrence le Maroc, considère comme faisant partie intégrante de son territoire national. C'est là un excès de pouvoir manifeste. La Cour de justice n'est pas une cour mondiale mais le tribunal d'une organisation régionale. A supposer qu'elle le soit, une cour internationale ne peut se prononcer sur le statut d'un territoire que si la demande lui en est expressément faite par les parties concernées[86] sous peine de voir sa décision entachée d'excès de pouvoir.[87] Or, en la matière, la Cour de justice a été saisie par une seule partie au conflit, le Polisario, qui, de surcroit, n'est pas reconnu par les Nations Unies comme l'unique représentant des populations sahraouies. Il est clair de ce fait que l'on est en présence d'une usurpation de pouvoir et d'une ingérence caractérisée dans un conflit qui ne concerne pas l'Union européenne. L'arrêt de la Cour est plus sévère à l'égard du Maroc que ne l'a été l'arrêt du Tribunal du 10 décembre 2015, qui a eu le courage de pousser le Conseil et la Commission à admettre qu'ils avaient constamment appliqué l'accord agricole au Sahara, ce qui, admet-il, est au regard du droit international une reconnaissance de la souveraineté du Maroc sur ce territoire.

L'arrêt a laissé perplexes certains commentateurs. Ainsi, pour Eva Kassoti, cet arrêt repose sur une approche artificielle et sélective du droit international. Elle montre, à cet égard, dans son minutieux commentaire de cet arrêt, que

[84] R. KOLB, *La bonne foi en droit international public*, in *Revue belge de droit international*, 1998, p. 672.

[85] *Ibid.*, p. 685.

[86] Cf. A. OYE CUKWURAH, *The Settlement of Boundary Disputes in International Law*, Manchester: Manchester University Press, 1967, pp. 29 et 31; C. DE VISSCHER, *Les effectivités en droit international public*, Paris: Pedone, 1967, p. 102 *et seq*.

[87] K.H. KAIKOBAD, *The Quality of Justice: "Excès de Pouvoir" in the Adjudication of Territorial and Boundary Disputes*, in G.S. GOODWIN-GILL, S. TALMON (dir.), *Reality of International Law. Essays in Honour of Ian Brownlie*, Oxford: Oxford University Press, 1999, p. 239 *et seq*.

> "l'approche retenue par la Cour des règles d'interprétation des traités laisse beaucoup à désirer. Son insistance partiale sur l'art. 31, para 3, litt. c), de la Convention de Vienne sur le droit des traités; son refus de faire appel (alors que cela est de rigueur au regard du droit international) à toutes les règles d'interprétation prévues par cette Convention dans le même article; son appel à des règles du droit international dont la pertinence est douteuse; son refus de tenir compte de la 'pratique subséquente' des parties, tout cela jette le doute sur le bien-fondé de ses conclusions et sape la prétention de l'UE d'être un 'pouvoir normatif' dédié au strict respect du droit international".[88]

De même, Hugo Flavier, après avoir noté "l'apport pour le moins ambivalent" de cet arrêt, se pose la question:

> "À présent, et si l'on réfléchit à plus long terme, la position de la Cour de justice risque de rendre pour le moins complexes certains accords futurs. Imaginons que, dans quelques années, probablement nombreuses, l'Union européenne décide de conclure un accord d'importance avec la Russie. Comme il est fort probable que la Crimée continue de faire partie intégrante de la Fédération de Russie, quelle devra être l'attitude des institutions européennes? Devraient-elles demander à la Russie qu'elle accepte explicitement que le champ d'application de l'accord ne s'étende pas à la Crimée alors même que celle-ci figure expressément comme sujet de la Fédération dans la Constitution russe? Comment imaginer que la Russie fasse une telle concession? Un tel accord sera tout simplement impensable".[89]

Par contre, d'autres commentateurs[90] ne semblent pas surpris par la décision de la Cour, laquelle s'inscrirait, à leurs yeux, dans le cadre de la transformation que l'UE est en train de connaître, et qui fait d'elle un empire, où, bien que la structure du pouvoir y soit lâche et ténue, se comporte en puissance impériale à l'égard de certains de ses partenaires, dont paradoxalement ceux qui se sont le plus rapprochés d'elle, comme le Maroc.

L'arrêt de la Cour de justice est apparemment le premier du genre[91] à porter, au niveau du fond, sur la validité d'un acte juridique de l'UE ayant trait aux relations extérieures de celle-ci. Il est à espérer que la Cour fasse, à l'avenir, preuve d'une plus grande rigueur juridique dans les instances similaires dont elle aura à connaitre. Il y va de la crédibilité de l'UE ainsi que des intérêts nationaux des pays étrangers. En tout état de cause, il va sans dire que, valide ou pas, l'arrêt de la Cour ne lie pas le Maroc en vertu

[88] E. KASSOTI, *The* Council v. Front Polisario *Case: The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation (Second Part)*, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, pp. 40-41 (traduction de l'auteur).

[89] H. FLAVIER, *La Cour de justice, juge de droit international? Réflexions sur l'affaire* Polisario, in *Journal d'actualité des droits européens*, 16 juin 2016, revue-jade.eu.

[90] V. G. COUPEAU, *The (European) Empire Strikes back?: Applying the Imperial Paradigm to Understand the European Court of Justice's Imbroglio in Western Sahara*, London School of Economics and Political Science, European Foreign Policy Unit Working Paper No. 2017/1, April 2017, www.lse.ac.uk.

[91] A. RASI, Front Polisario*: A Step Forward in Judicial Review of International Agreements by the Court of Justice?*, in *European Papers*, 2017, Vol. 2, No 3, www.europeanpapers.eu, p. 967 *et seq.*

du principe de la relativité de la chose jugée[92]. Et que l'UE assume toutes les conséquences des dysfonctionnements de sa justice.

IV. Conclusion

En définitive, il apparait clairement que nous sommes en présence d'une position contradictoire de l'UE vis-à-vis de la question du Sahara. Cette position se reflète, d'un côté, dans la reconnaissance par les organes politiques (Conseil et Commission) de l'UE de la souveraineté du Maroc sur le Sahara, et, de l'autre, dans la non-reconnaissance de cette souveraineté par la CJUE. Cette ambivalence est dommageable à la crédibilité de l'UE ainsi qu'aux droits souverains d'un pays étranger.

Certes, l'UE est liée par la décision de la Cour de justice. Mais elle ne demeure pas moins liée aussi par la règle coutumière qui s'est créée au fil du temps par laquelle elle a reconnu, à travers sa conduite subséquente, la souveraineté du Maroc sur le Sahara.

L'UE devrait se rendre à l'évidence, la CJUE est une cour interne à son système juridique et non pas une cour internationale chargée de se prononcer sur les litiges internationaux. Les traités internationaux que conclut l'UE ne sont pas du droit *dérivé* dont connaissent habituellement le Tribunal et la Cour de justice. Ce sont des instruments internationaux régis par le droit international et non le droit européen. Partant de là, l'examen de leur validité juridique relève des gouvernements des pays concernés (ou des juges internationaux qu'ils auront choisis pour se prononcer sur une telle question) et non du juge interne ou du juge d'une organisation régionale. Le Royaume-Uni a clairement rappelé, au moment de l'ouverture des négociations sur le Brexit, que la CJUE ne pouvait trancher les litiges qui l'opposeraient à l'UE. La même règle doit prévaloir entre l'UE et les pays étrangers. Car une organisation internationale, aussi importante soit-elle, ne peut être juge et partie dans une question donnée.

[92] Cf. A. El Ouali, *Effets juridiques de la sentence internationale*, cit., p. 82 *et seq*.

DIALOGUES
A DIALOGUE ON *FRONT POLISARIO*

FRONT POLISARIO AND THE EXPLOITATION OF NATURAL RESOURCES BY THE ADMINISTRATIVE POWER

ENRICO MILANO*

ABSTRACT: Drawing from the recent *Front Polisario* judgments of the General Court (judgment of 10 December 2015, case T-512/12, *Front Polisario v. Council of the European Union*) and the Court of Justice (judgment of 21 December 2016, case C-104/16 P, *Council of the European Union v. Front Polisario* [GC]), the present *Dialogue* questions whether and to what extent international law limits the power of a State administering a non-self-governing territory to dispose of the latter's natural resources. While in recent times we have seen a distinctive consolidation of international practice backed by a widespread expression of *opinio juris* pointing to the emergence of a customary rule substantially limiting the powers and rights over natural resources of States exercising authority over non-self-governing territories, elements of uncertainty remain as to the precise content of such rule and its coordination with concurring and potentially applicable legal regimes. It is also submitted that the recent judgment of the Court of Justice, while avoiding to rule on the matter in point, has reinforced the view that exploitation of natural resources in NSGTs shall be conducted with a full and substantial involvement of the representatives of the people.

KEYWORDS: non-self-governing territories – exploitation of natural resources – powers and obligations of administrative power – Western Sahara – consultation – CJEU.

I. THE EU JUDICIARY FACED WITH THE EXPLOITATION OF NATURAL RESOURCES IN WESTERN SAHARA

The judgments rendered by the General Court and by the Court of Justice in *Front Polisario* are noteworthy in two respects.[1] Firstly, after more than 40 years of Moroccan

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[1] General Court, judgment of 10 December 2015, case T-512/12, *Front Polisario v. Council of the European Union*; Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council of the European Union v. Front Polisario* [GC].

administration of Western Sahara, for the very first time, a judicial body has been faced with and has addressed in the merits the Polisario's claims concerning the exploitation of natural resources in Western Sahara by Morocco and third States and international organizations cooperating in such endeavour. Secondly, albeit with different arguments and reasoning, both the General Court and the Court of Justice have come to the conclusion that the 2012 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 fisheries products (hereinafter "Liberalisation Agreement") shall not apply to the territory of Western Sahara. Little surprise that Polisario has welcomed both judgments as historical victories in their quest for self-determination of the Sahrawi people.

In terms of international legal issues raised by proceedings and by the ensuing judgments, one stands out in the legal challenge brought by Polisario and yet, relatively underscrutinised in the two judgments: namely, the right and power of the State administering a non-self-governing territory (NSGT), whose people have not yet exercised their right to self-determination, to exploit its natural resources, such as gas and oil fields, other mineral resources, fisheries, forestry and agricultural products. While the General Court's annulment of the Liberalization Agreement as far as it concerned Western Sahara was based on the consideration that no adequate effort was made by the EU institutions to ensure that the exploitation of natural resources would benefit the local population, the judgment of first instance rejected all challenges based on international law and came to its conclusion in the context of scrutinizing the way political discretion in concluding an international agreement was exercised. The issue has not been directly considered in the judgment of the Court of Justice: according to the Court, any misconduct by the EU had to be based on the assumption that the Liberalization Agreement extended to Western Sahara, an assumption that could not be sustained on the basis of a systematic interpretation of the agreement in light of other applicable rules of international law.[2]

The present *Dialogue* examines the state of the art concerning the regulation under international law of the exploitation of natural resources in NSGTs, drawing significant insights from the EU practice of concluding agreements with Morocco allowing a cooperative effort in the exploitation of natural resources in Western Sahara.

II. Administrative powers and the exploitation of natural resources in non-self-governing territories

A first conceptual clarification is in order. When we employ the expression "administrative power" with reference to a NSGT, such as Western Sahara, we indicate any governmental authority which is displaying full control and jurisdiction over the territory in question, re-

[2] *Council of the European Union v. Front Polisario* [GC], cit., paras 81-106.

gardless of the latter's designation as "administering power" under Chapter XI of the UN Charter or as "occupying power" under the law of belligerent occupation. The choice to employ the category of "administrative power" for Morocco's control over Western Sahara is warranted by the fact that Morocco cannot qualify as administering power under Chapter XI and that its designation as occupying power is not uncontroversial.[3]

The starting point in order to ascertain the "state of the art" in international law on the application of the principle of permanent sovereignty over natural resources in NSGTs – as well as sticking point in the arguments variably employed by the Commission, by States in the Council and by members of the European Parliament in arguing against or in favour of the conclusion of bilateral agreements applying to Western Sahara and facilitating the exploitation of natural resources and trade in agricultural and fishing products – is the 2002 legal opinion rendered by the UN Legal Counsel concerning the exploitation of natural resources in NSGTs, in particular in Western Sahara.[4] The legal advice was issued upon request by the UN Security Council on the matter of the legality of the actions taken by the Moroccan authorities consisting in the offering and signing of contracts with foreign companies for the exploration of mineral resources in the seabed off the coast of Western Sahara. The UN Legal Counsel pointed to the significant evolution of international law on the matter, exemplified by a series of General Assembly (GA) resolutions, highlighting the shift from a general prohibition of exploitation of natural resources in NSGTs towards a regime where international law only prohibits "those economic activities which are not undertaken in accordance with the interests and wishes of the people of the territory and deprive them of their legitimate rights over their natural resources".[5] The UN Legal Counsel concluded that the exploratory concessions *per se* were not in violation of the right to permanent sovereignty over natural resources of the people of Western Sahara and yet "if further exploration and exploitation activities were to proceed *in disregard of the interests and wishes of the people of Western Sahara*, they would be in violation of the international law principles applicable to mineral resource activities in Non-Self-Governing-Territories".[6]

The UN Legal Counsel's reference to the normative standards as developed in the practice of the GA seems essentially correct. Since 1995, the GA has adopted a series of resolutions on the regime regulating economic activities in NSGTs that corroborate the

[3] C. Ruiz Miguel, *El acuerdo de Pesca UE – Marruecos o el intento español de considerar a Marruecos como "potencia administradora" del Sahara Occidental*, in *Anuario español de derecho internacional*, 2006, pp. 395-412; M. Pertile, *La relazione tra risorse naturali e conflitti armati nel diritto internazionale*, Padova: CEDAM, 2012, p. 189.

[4] Letter from the Under-Secretary-General for Legal Affairs, the Legal Counsel, of 29 January 2002 from, addressed to the President of the Security Council, UN Doc. S/2002/161.

[5] *Ibid.*, paras 21-24.

[6] *Ibid.*, para. 25, emphasis added.

conclusions drawn by the UN Legal Office in 2002. In the latest resolution adopted on 6 December 2016, the GA has re-affirmed

> "the value of foreign economic investment undertaken in collaboration with the peoples of the Non-Self-Governing Territories and in accordance with their wishes in order to make a valid contribution to the socio-economic development of the Territories, especially during times of economic and financial crisis" and "its concern about any activities aimed at the exploitation of the natural resources that are the heritage of the peoples of the Non-Self-Governing Territories [...] to the detriment of their interests, and in such a way as to deprive them of their right to dispose of those resources".[7]

The GA is not calling upon States, especially administering Powers, to refrain from any economic activity in NSGTs as inherently prejudicial to the people's permanent sovereignty over natural resources; it is only prohibiting those which are detrimental to the interests of the population and disregard their wishes. The wording employed by the GA considerable differs from that found in the resolutions adopted before 2002 in which "foreign economic investment" in collaboration with the administering power for the exploitation of natural resources in the NSGTs was cast under a wholly negative light and considered as an obstacle to the realization of the right to self-determination.[8] It is also in tune with the provision of Chapter XI, in particular Art. 73 of the UN Charter, according to which administering powers undertake to promote the economic progress of the territories and peoples under their administration; the provision clearly stresses an active role by the administering powers, which is hard to reconcile with an understanding of international law as setting an absolute prohibition on the undertaking of economic activities in NSGTs. The fact that the above resolutions have been adopted with a large majority of States voting in favour, together with the fact that they have been adopted by the UN organ compe-

[7] General Assembly, Resolution 71/103 of 6 December 2016, Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories, UN Doc. A/RES/71/103, paras 2 and 4 (emphasis added).

[8] See for instance General Assembly: Resolution 48/46 of 10 December 1992, Activities of foreign economic and other interests which impede the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Territories under colonial domination, UN Doc. A/RES/48/46; Resolution 49/40 of 9 December 1994, Activities of foreign economic and other interests which impede the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Territories under colonial domination, UN Doc. A/RES/49/40. The view that economic activities undertaken by Morocco and foreign States and actors are generally prohibited is still maintained in the recent Legal Opinion issued by the Office of the Legal Counsel and Directorate for Legal Affairs of the African Union (Office of the Legal Counsel and Directorate for Legal Affairs of the African Union, Legal Opinion on the Legality in the Context of International Law, Including the Relevant United Nations Resolution and OAU/AU Decisions, of Actions allegedly Taken by the Moroccan Authorities or Any Other State, Group of States, Foreign Companies or Any Other Entity in the Exploration and/or Exploitaion of Renewable or Non-Renewable Resources or Any Other Economic Activity in the Western Sahara, 14 October 2015, www.au.int).

tent for matters of decolonization, is indicative of a widespread *opinio juris* backing the emergence of a rule under customary international law, which is direct expression of the principle of permanent sovereignty over natural resources.

The practice related to the fisheries agreements between the EU/EC and Morocco, currently also challenged before the EU judicial institutions, is quite interesting in this respect as it shows that the normative standards expressed in the UN Legal Counsel opinion and in the practice of the GA, albeit with some degree of ambiguity, are applied in the current practice of States and international organizations.

A protocol extending the 2006 Fisheries Partnership Agreement (FPA) between Morocco and the European Community had been rejected by the European Parliament in 2011 as it was considered too expensive for the EU, environmentally unsustainable, and not in compliance with the rights of the population of Western Sahara under international law.[9] In the resolution stating the dismissal of the protocol, the Parliament had called on the Commission "to ensure that the future protocol *fully respects international law and benefits all the local population groups affected*".[10]

The rejection of the protocol in point was directly linked to the vexed question of the territorial scope of application of the FPA, namely whether the latter extended to the waters off the coast of Western Sahara, hence prompting the question of its compatibility with international law. Already in May 2006, Sweden had voted against the approval by the Council of the FPA following the consideration that the agreement did not take "into full consideration that Western Sahara is not a part of the territory of Morocco under international law [...]"; and that "*all concerned [were] not ensured to benefit from the implementation of this agreement in accordance with the will of the people of Western Sahara*, as provided by international law" (emphasis added). Similar concerns, regarding in particular the implementation of the FPA, had been put forward by Finland and the Netherlands in their statement of abstention.[11] The decision of the Council to eventually approve the FPA, and the positive opinion expressed by the Parliament, had been significantly influenced by the positive legal advices of the respective Legal Services.

According to the Parliament's Legal Service, the agreement did not exclude, nor include, the waters of Western Sahara, and, in any case, it would be the duty of Morocco to comply with its international obligations *vis-à-vis* the people of Western Sahara; the Community could eventually enter into consultations with a view to suspending the agreement, should the implementation by Morocco have disregarded the interests of

[9] Regulation (EC) 764/2006 of the Council of 22 May 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco.

[10] European Parliament Resolution P7_TA(2011)0573 of 14 December 2011 on the future protocol setting out the fishing opportunities and financial compensation provided for in the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, para. 9, emphasis added.

[11] E. Milano, *The New Fisheries Partnership Agreement between the European Community and Morocco: Fishing too South?*, in *Anuario español de derecho internacional*, 2006, pp. 413-457, footnote 61.

the local population.[12] In 2009, as a result of several parliamentary questions presented by MEPs, the Commission "disclosed" the first data revealing that the fishing licenses issued by the Moroccan authorities, and distributed to the fishing operators through the Delegation of the European Commission in Rabat, extended also to fishing areas off Western Sahara's shores. After this revelation, the Committee on development of the EU Parliament asked the Parliament's Legal Service for a new legal opinion. In the document, issued on 13 July 2009, the Legal Service acknowledged the extension of the scope of application of the FPA to the waters of Western Sahara. It also maintained that there was no evidence that the EU financial contribution had been used for the benefit of the Sahrawi population. As the EU (back then European Community) is bound by the principle of permanent sovereignty over natural resources, the EU should have resorted to the implementation mechanisms envisaged by the EC-Morocco joint committee in order to ensure that the local population would actually take advantage from the European financial contribution. Had these conditions not been met, the EC should have refrained from requesting further fishing licenses in the waters of Western Sahara or should have suspended the FPA.[13] The legal opinion in point was decisive in leading the Parliament to reject the provisional protocol in December 2011. Within the Council, Sweden, Denmark and the Netherlands decided to cast a negative vote against the protocol, while United Kingdom, Cyprus, Austria and Finland abstained, because of the potential breaches of international law.

As far as the 2013 protocol is concerned – which has eventually been concluded and is currently into force –, the Commission has followed through the invitation of the Parliament to negotiate and draft a new protocol in full compliance with international law, in particular through the strengthening of implementation mechanisms concerning the European financial contribution outreach in regard to the development of fishing industry and of the coastal population in general.[14] For that purpose, Art. 1 of the Protocol sets out a new provision: the protocol shall be implemented in compliance with the democratic conditionality clause and with human rights, as provided for by Art. 2 of the Association Agreement between the EU and Morocco.[15] These adjustments have

[12] Legal Opinion by the European Parliament's Legal Service of 20 February 2006 regarding the Proposal for a Council Regulation on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco – Compatibility with the principles of international law, SJ-0085/06, D(2006)7352, para. 45.

[13] Legal Opinion regarding the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco by the European Parliament's Legal Service, 14 July 2009, SJ 0269/09, D(2009)37828.

[14] Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement, in OJ L 328 of 12 July 2013.

[15] Art. 2 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, in OJ L 70 of 18 March 2000.

not been found fully persuasive by some States within the Council: Sweden and Denmark have voted against; Finland, the United Kingdom and the Netherlands abstained. The declaration of the Dutch representative is particularly significant in this regard:

> "The protocol does not explicitly refer to the Western Sahara, but allows for its application to maritime areas adjacent to the Western Sahara that are not under the sovereignty or jurisdiction of Morocco. Morocco, as the administering power of the Western Sahara, *may not disregard the interests and wishes of the people of the Western Sahara, when applying the protocol to such maritime areas. The Netherlands notes that the protocol does not contain any provision ensuring that Moroccan authorities will use the amount paid for access to the resource in accordance with their obligations under international law owed to the people of Western Sahara*. The Netherlands considers that, under international law, a proportionate share of this amount should benefit the people of the Western Sahara. Compliance with international law will therefore depend on the implementation of the protocol by Moroccan authorities".[16]

Support for the proposition that exploitation of natural resources shall be conducted for the benefit of the population and in accordance with its wishes can also ben found in the UN Secretary General (SG) report of 10 April 2014, concerning the situation in Western Sahara. The document stated that

> "Moroccan and international investments in the part of the Territory under Moroccan control, as well as in the territorial waters adjacent to Western Sahara, were the subject of contention between Morocco and the Frente Polisario, given the longstanding status of Western Sahara as a Non-Self-Governing Territory. A new protocol of the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco was signed in the final quarter of 2013 and came into effect in February 2014, following ratification by Morocco. The Secretary-General of the Frente Polisario wrote to me repeatedly to condemn Morocco's exploitation of the Territory's resources and publicly announced his intention to consider a possible judicial appeal against the Agreement".[17]

The SG mentioned information received from Front Polisario about the extension of the contracts between Morocco and foreign oil companies to explore the continental shelf of Western Sahara, recalling the 2002 legal opinion and quoting the passage regarding the need to respect the interests and wishes of the people.[18]

[16] General Secretariat of the Council, Proposal of 13 December 2013 for a Council Decision on the conclusion, on behalf of the European Union, of the protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement in force between the two parties, UN Doc. 17194/13, ADD 1 COR 1, PECHE 590 (emphasis added).

[17] Security council, Report of the Secretary General of 10 April 2014, on the situation concerning Western Sahara, UN Doc. S/2014/258, para. 11.

[18] *Ibid*., para. 12.

III. "Grey areas" and unsettled issues

Despite the substantial practice and expression of *opinio juris* pointing to the emergence of a rule of customary international law prohibiting economic activities which are not undertaken in the interest and in accordance with the wishes of the people inhabiting a NSGT, some grey areas and unsettled issues still remain.

First of all, as the UN Legal Counsel conceded in 2002, recent instances of State practice supporting the emergence of a customary international law standard "have, for obvious reasons, been few and far apart".[19] The UN Legal Counsel has mentioned the Spanish exploitation of natural resources in Western Sahara in the final phase of its administration, UN practice towards South Africa's administration of Namibia and UN practice in East Timor concerning the joint exploitation of natural resources in continental shelf in cooperation with Australia.[20] The most recent practice related to Western Sahara, as already highlighted, surely contributes to the consolidation of the standard. Also US, French and British economic policies in NSGTs are officially based on the need to act as trustees for the local population in consultation with local institutions. Moreover, remaining NSGTs are few and it is not surprising that the instances of State practice are limited; on balance, the expression of *opinio juris* is likely to play a more prominent role in the consolidation of the relevant customary rule. Hence, it is submitted that the real grey area is not so much the limited instances of practice, but the fact that the relevant GA resolutions titled "Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories" have been regularly met with the opposition of Israel and the United States, with France and United Kingdom regularly abstaining, the three latter countries currently administering a great majority of NSGTs.[21] The few public statements that can be found by the delegates of the three countries in the work of the GA are critical of the general attitude and the "anti-colonial" rhetoric employed by the Special Committee on Decolonization, rather than on specific normative standards, and yet the fact remains that their *opinio juris* is absent in the practice of the GA.[22]

A degree of ambiguity can also be found in the requirement that exploitation shall be conducted "in collaboration and in accordance with the wishes" of the people. In a much quoted passage of the UN Legal Counsel 2002 opinion, the Counsel stated that

> "State practice, though limited, is illustrative of an *opinio juris* on the part of both administering Powers and third States: where resource exploitation activities are concluded in Non-Self-Governing Territories *for the benefit of the people, on their behalf, or in consultation with their representatives*, they are considered compatible with the Charter obliga-

[19] Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, cit., para. 18.

[20] *Ibid.*, paras 18-20.

[21] The three countries administer 14 out 16 remaining NSGTs on the list of the UN. The list also includes Western Sahara.

[22] E.g. UN Doc. A/53/PV.78.

> tions of the Administering Power, and in conformity with the General Assembly resolutions and the principle of 'permanent sovereignty over natural resources' enshrined therein".[23]

The use of the apparently disjunctive "or" has provided interpretative room for EU institutions and some Member States in emphasizing the element of the "benefits" for the population of Western Sahara, neglecting the need to hold consultations with the legitimate representatives of Sahrawi people, stemming from the obligation to ensure that economic activities are "in collaboration with them" and "in accordance with their wishes". For instance, the Legal Service of the Parliament, in the legal advice rendered to the Committee on Fisheries in November 2013, has underlined the obligation under international law that the FPA and related protocols are implemented in a way that will bring about benefits for the Sahrawi population.[24] In the joint declaration of vote issued by Austria, Germany and Ireland, the three countries have asked the Commission to inform the Council on the income resulting for the population of Western Sahara from the application of the agreement and to ensure that an appropriate quota is dedicated to that effect in line with the interests of the local population.[25] During the debate in the parliament regarding the vote on the protocol, the Commissioner on fisheries, Maria Damanaki, has stated the following:

> "I would like to make one point very clear: no legal authority until now – including the United Nations, the European Court of Justice or the Legal Services of any of the EU institutions (Commission, Council and Parliament) – has ever said that an agreement with Morocco covering Western Sahara is illegal. Nobody. What they do say – and rightly so – is that such an agreement must fulfil certain conditions; in particular, referring to the fisheries agreement, that fishing activities must benefit the local population".[26]

Even the General Court, when addressing Front Polisario's request for annulment based on the lack of consultation during the EU legislative procedure, has stated that international law does not impose any obligation to that effect.[27] When identifying the failure of EU political institutions to keep into account the rights of the local population of Western Sahara, it has not mentioned the need to act in accordance with their wishes.[28] The importance of acquiring the consent of the Front Polisario is instead men-

[23] Letter from the Under-Secretary-General for Legal Affairs, the Legal Counsel, of 29 January 2002, addressed to the President of the Security Council cit., para. 24.

[24] Legal Opinion of the Legal Service of the European Parliament, regarding the Proposal for a Council Regulation on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco – Compatibility with the principles of international law, 4 November 2013, SJ 0665-13, D(2013)50041.

[25] General Secretariat of the Council, Proposal for a Council Decision, Doc. 17194/13, cit.

[26] European Parliament debate on North-East Atlantic: deep-sea stocks and fishing in international waters – Status of the North-East Atlantic mackerel fishery, CRE 09/12/2013.

[27] General Court, *Front Polisario v. Council of the European Union*, cit., para. 138.

[28] *Ibid.*, paras 223-247.

tioned in the part the judgment of the Court of Justice dealing with the application of the *pacta tertiis* principle to reinforce the conclusion that the Liberalization Agreement cannot be interpreted to include the territory of Western Sahara.[29]

Already in 2008, Corell had criticised the misuse of the 2002 opinion by the European Commission to justify the conclusion of bilateral fisheries agreements under international law without the involvement of Front Polisario. Corell had declared:

> "I find it incomprehensible that the Commission could find any such support in the legal opinion, unless, of course, it had established that the people of Western Sahara had been consulted, had accepted the agreement, and the manner in which the profits from the activity were to benefit them. However, an examination of the agreement leads to a different conclusion".[30]

Corell also underlined the need to hold consultations and to find an agreement with the representatives of the population. In a more recent speech, published in 2017, he has further elaborated on the requirements entailed in his opinion:

> "[...] if you are to use the resources of a Non-Self-Governing-Territory for the benefit of the people, this is the first condition: it has to be for the benefit of the people, and you have to be able to prove that. You have to consult with them or their representatives, whoever it is depending on the situation in the decolonization as it were. And then you have to also realize that it has to be done either on behalf of or in consultation with representatives of the people. What do I mean by 'on behalf of" that I draw from resolutions by the General Assembly over the years? This means that they must have come so far in the decolonization process that they have a representative body that can decide to hand over and ask an administering power to deal with this matter and to sell for their benefit resources from the territory".[31]

There is a strong case to be made that the EU attitude on the matter has been dictated by reasons of political convenience and opportunism. It was unthinkable that Morocco could agree to an economic deal, which involved, even though only through consultation, Front Polisario. The emphasis on the element of the benefit for the "local population", rather than the "people" of Western Sahara, has also to do with "realities on the ground": namely, that most of the population currently living in Western Sahara has been settled from Morocco in the last decades, with most of the original Sahrawi living in the Algerian refugee camps of Tindouf. Be that as it may, the fact remains that the practice emerging from the EU/Morocco international agreements casts a shadow

[29] *Council of the European Union v. Front Polisario* [GC], cit., para. 106.

[30] H. CORELL, *The Legality of Exploring and Exploiting Natural Resources in Western Sahara*, Conference on Multilateralism and International Law with Western Sahara as a Case Study, Pretoria, 4-5 December 2008, www.havc.se, p. 242.

[31] H. CORELL, *The Principle of Sovereignty of Natural Resources and its Consequences*, in M. BALBONI, G. LASCHI (eds), *The European Union Approach Towards Western Sahara*, Brussels: Peter Lang, 2017, p. 131.

over the adherence to and the compliance with the requirement of consultation, even in a case in which the people do have a representation with an international standing. Also, consultation does not equal consent: practice and the 2002 UN Legal Opinion are inconclusive as to whether the representatives of the people must express consent to any exploitation of natural resources or whether any involvement in the decision-making process is in itself sufficient to fulfil the international requirement.

Another relatively unsettled issue in State practice is that of the coordination between the legal regime of NSGTs and that of belligerent occupation. The 2002 UN Legal Opinion does not shed light on the possible intersection between the two regimes. This is what Corell had to say in 2008 with regard to the relevance of the law of occupation in the case of Western Sahara:

> "In preparing for the formulation of the opinion I had my collaborators look at several options. Among those was certainly the option of basing the opinion on the laws of occupation, all the more so since I had officers with particular expertise in this matter in my Office. However, in view of the way in which the UN had addressed the situation in Western Sahara and the result of the various analyses, I came to the conclusion that the best way to form a basis for the legal opinion was to make an analysis by analogy taking as a point of departure the competence of an administering Power. Any limitation of the powers of such entity acting in good faith would certainly apply *a fortiori* to an entity that did not qualify as an administering Power but *de facto* administered the Territory".[32]

Regardless of the application of the law of belligerent occupation to a situation such as Western Sahara – an application that is highly dependant upon the controversial proposition that the conflict was internationalized at its very outset in the 1970s –, the conclusion of the UN Legal Counsel seems essentially correct. The law pertaining to NSGTs is *lex specialis* with regard to any occupation of the territory as it is specifically targeted at regulating a specific decolonization context and ultimately aimed at a higher level of protection of the people inhabiting the territory. Even assuming, for instance, that the rules of usufruct under Art. 55 of the 1907 Hague Regulations would in principle apply where an international conflict has taken place,[33] such broad rules should be interpreted in conformity with the other obligations incumbent upon the administrator, including those deriving from the specific status of the occupied territory and from the principle of self-determination: hence any exploitation of natural resources should be conducted for the benefit of the people and in consultation with their representatives, once a political representation is in place. Even in a case of traditional inter-state conflict with the clear application of the law of belligerent occupation, such as the Anglo-American occupation of Iraq between 2003 and 2004, the UN Security Council in Resolu-

[32] H. CORELL, *The Legality of Exploring and Exploiting Natural Resources in Western Sahara*, cit., p. 238.

[33] Art. 55 of the Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War (The Hague Regulations), adopted on 18 October 1907.

tion 1483, after recalling in the preamble "the right of the Iraqi people freely to determine their own political future and control their own natural resources", unanimously endorsed the establishment of a Development Fund to which most proceeds from export of oil and gas resources should be transferred, the Fund being directed "to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq";[34] in the subsequent Resolution 1546 it decided that an additional voting member should be added in the International Monitoring and Advisory Board to include a representative of the Iraqi Interim Government.[35]

Finally, another issue of regime coordination can arise with regard to the regime of non-recognition of situations produced by gross violations of peremptory norms. In this latter respect, one must underline that the problem of regime coordination has to do with the rights and obligations of third parties, rather than powers and obligations of the administrative authority. And yet the alleged existence of an absolute prohibition upon third parties to conclude agreements with the administrator, when the relevant territorial situation is deemed to be consequential to a gross violation of peremptory norms, inevitably curtails the possibility of the administrator exercising its powers with regard to the NSGT. To put it simply with regard to Western Sahara: even if the Moroccan authorities, in cooperation with the EU, were to devise a mechanism of full consultation of the Sahrawi representatives with the aim of transferring the proceeds of any economic activity to the local population, the EU in concluding such agreement may be found in violation of its obligation of non-recognition under general international law.[36] A practical deal specifically benefitting the local population would likely fall under the purview of the so-called "Namibia exception", according to which the non-recognition of the legality of a territorial situation should not result in the depriving the people of the territory of any advantages derived from international cooperation. In particular, the ICJ famously stated that "invalidity [...] cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory".[37] However, it is hard to believe that any international economic agreement, extending to Western Sahara, however beneficial to the people of the territory, could fall under the above exception, as it would clearly imply a right to act internationally on behalf of the territory despite the alleged gross violation of a peremptory norm.

[34] Security Council, Resolution 1483 of 22 May 2003, UN Doc. S/RES/1483 (2003), preamble and para. 14.

[35] Security Council, Resolution 1546 of 8 June 2004, UN Doc. S/RES/1546 (2004), para. 24.

[36] International Court of Justice, *Legal Consequences for States of the Continued Presence of South-Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*, advisory opinion of 21 June 1971, p. 56.

[37] *Ibid.*, p. 55.

As rightly shown by Kassoti, the obligation in point has been clearly circumvented by the General Court, when it has asserted that no obligation under international law prevents a State from concluding an international agreement with a third party with regard to a "disputed territory".[38] The possibility of "circumvention" is magnified by the fact that absent a mechanism of authoritative third-party determination for the triggering of the obligation of non-recognition, outside those rare instances in which it is the Security Council to determine a gross violation of peremptory norms (e.g. Iraq in 1990 or Namibia in 1970), it is in the hands of each State or international organization to make its own legal qualification of a given territorial situation.[39]

IV. Of the uncertainty principle and of *Voelkerrecthsfreundlichkeit*

In his famous enunciation of the "uncertainty principle" in 1927, Werner Karl Heisenberg revolutionised quantum mechanics in pointing to the impossibility of detecting with certainty the position in space and time of atomic particles.[40] The more accurate the measurement of the position in space of the particle, the more indeterminate the moment in time in which such position was achieved; and *vice versa*. The "uncertainty principle", *mutatis mutandis*, often applies when ascertaining the content of customary international law. The more *opinio juris* becomes precise in determining the scope an obligation arising under customary international law, the more State practice is led to depart or deviate from the normative standard. On the other hand, identifying a core of sufficiently widespread and consistent State practice often entails watering down the expression of *opinio juris* and hence the normative content of the customary rule. The rule conditioning the rights and powers of States administering NSGTs is a good case in point. On balance, there is increasing support in the *opinio juris* of States and international organizations towards the consolidation of a rule of customary international law prohibiting exploitation of natural resources contrary to the interests and wishes of the people, with State practice generally supporting the rule, but with important deviations as to the involvement and consultation with the representatives of the people and extent thereof.

One could not reasonably expect the General Court or the Court of Justice to cast definitive light over such a complex issue of international law. The CJEU is generally concerned with upholding and guaranteeing the consistency and coherence of the EU

[38] E. Kassoti, *The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part)*, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, pp. 352-353.

[39] S. Talmon, *The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?*, in C. Tomuschat, J. Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, Leiden: Martinus Nijhoff, 2006, p. 99.

[40] D. Cassidy, *Uncertainty: The Life and Science of Werner Heisenberg*, San Francisco: W.H. Freeman & Co, 1994.

legal order, rather than contributing to the development of international law or projecting the image of the EU as a *Voelkerrechtsfreundlich* actor. And yet it is submitted that the judgment of the Court of Justice is an important milestone in the search for justice of the Sahrawi people and should be seen as ultimately *Voelkerrechtsfreundlich*. The Court of Justice has clearly and strongly reaffirmed Western Sahara's distinct territorial status, the right of self-determination of the Sahrawi people and the *erga omnes* nature of such right.[41] Most importantly, it has affirmed the need to acquire the consent of the people of Western Sahara and its representatives in decisions affecting their rights and interests.[42] In this latter respect, one can see a strong interpretation of the principle of involvement and consultation (requiring consent) entering through the back door and reinforcing the international norm that exploitation of natural resources in a NSGT, however legally framed, is an activity that, while not generally prohibited, shall be conducted in the interest and according to the wishes of the people.

[41] *Council of the European Union v. Front Polisario* [GC], cit., paras 88-92.
[42] *Ibid*., para. 106.

INSIGHTS

FRONT POLISARIO: A STEP FORWARD IN JUDICIAL REVIEW OF INTERNATIONAL AGREEMENTS BY THE COURT OF JUSTICE?

AURORA RASI*

ABSTRACT: In *Front Polisario* (judgment of 21 December 2016, case C-104/16 P, *Council of the European Union v. Front Polisario* [GC]), the Court of Justice was called to assess the validity of a decision that had concluded an agreement providing for reciprocal liberalisation measures on agriculture and fishery products between the EU and the Kingdom of Morocco. The agreement had been implemented by the parties as covering also products originating from Western Sahara, a non-self-governing territory militarily occupied by Morocco. In its previous case law, the Court of Justice had mainly limited to procedural aspects the judicial review of acts related to the EU's foreign relations. In *Front Polisario* it took a different view, and assessed the validity of the decision also on the merits. This *Insight* examines the technique used by the Court of Justice, and tries to identify which reasons led it to depart from its traditional standard of judicial review.

KEYWORDS: judicial review of political choices – external action – Council competences – CJEU competences – principle of self-determination – violation by the EU of international peremptory law.

I. PRELIMINARY REMARKS: JUDICIAL REVIEW OF INTERNATIONAL AGREEMENTS BETWEEN SELF-RESTRAINT AND JUDICIAL ACTIVISM

Judicial review of international acts, or of their implementing domestic acts, often proves to be a tough task for domestic courts.

From an inward-looking perspective, there is no reason to depart from the classical view that, insofar as international agreements produce effects – directly or indirectly – within the domestic legal order, they are subject to judicial review, as is the case for purely domestic acts.[1] However, it should be considered that judicial review of interna-

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[1] See the famous dictum in *Kadi*: "[t]he Courts of the European Union must ensure the review, in principle the full review, of the lawfulness of all European Union acts in the light of fundamental rights" (Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission* [GC], para. 326).

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tional agreements or of their implementing legislation, unlike that of purely domestic acts, has a significant impact on the sphere of international relations. In other words, by interpreting international acts or by judging their validity, domestic courts may interfere with foreign relations: a field that is normally the competence of the executive.

This explains why domestic courts, when asked to review the validity of an international act, or of its implementing domestic acts, are faced with a dilemma: should they defer to the view of the executive organs, or should they superimpose their view on that of the executive, thus creating international embarrassment and breaching the principle that international actors must speak with one voice in the sphere of international affairs?

There is no well-grounded answer to this dilemma in legal theory and practice. Whereas in certain legal orders courts have traditionally maintained self-restraint, in others they seem to have been inspired by a judicial activism.[2]

The case law of the CJEU has been constantly inspired by a third approach, which may be called the *procedural approach*.

The CJEU maintained that the acts adopted by the Council, and related to the EU's foreign relations power, are not exempted from judicial scrutiny. However, the CJEU also maintained it has to respect the wide discretion possessed by the Council in shaping EU foreign relations. Therefore, it generally considered itself prevented from evaluating the merit of the acts adopted by the Council in this area. It could not verify, for instance, if those acts represent the only or the best possible measures to deal with an international situation. The judicial scrutiny was thus limited to formal aspects, namely to the evaluation of the correctness of the procedure followed by the Council for the adoption of the relevant acts. For example, the Court assessed whether those acts were manifestly inappropriate, having regard to the objective which the competent institution was seeking to pursue, or whether the Council based its choice on objective criteria, or whether, in exercising its wide discretion, the Council had fully taken into account all the interests involved.[3]

[2] For an account of a never ending debate, see J.P. COLE, *The Political Question Doctrine: Justiciability and the Separation of Powers*, Congressional Research Service: Informing the Legislative Debate since 1914, 23 December 2014, fas.org. On the judicial review of international agreements, see E. CANNIZZARO, *Trattati internazionali e giudizio di costituzionalità*, Milano: Giuffré, 1991; G. GAJA, *Trends in Judicial Activism and Judicial Self-Restraint Relating to Community Agreements*, in E. CANNIZZARO (ed.), *The European Union as an Actor in International Relations*, The Hague: Kluwer Law International, 2002, p. 117 *et seq.*; M. MENDEZ, *Constitutional review of Treaties: Lessons for Comparative Constitutional Design and Practice*, in *International Journal of Constitutional Law*, 2017, p. 95 *et seq.*

[3] See Court of Justice, judgment of 8 June 2010, case C-58/08, *Vodafone et al.* [GC], para. 52: "the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue". The manifest inappropriateness standard has been adopted in Court of Justice, judgment of 1 March 2016, case C-440/14, *National Iranian Oil Company v. Council* [GC]: in that case the Court, asked to rule on the validity of two Council Decisions related to the field of the Common Foreign and Security Policy, clarified that: "the Union legislature must

II. The decision of the General Court in *Front Polisario* and the procedural approach

The procedural approach also inspired the ruling of the General Court in *Front Polisario v. Council of the European Union*.

The General Court was asked to rule on the validity of a Council Decision that had concluded an international agreement between the EU and Morocco, aimed to facilitate the exchange of agricultural and fisheries products originating from the territory of either party (the liberalisation agreement). The applicant asked the General Court to annul the contested decision because it concluded a treaty which violated, among others, the international peremptory principle of self-determination. The applicant, Front Polisario, argued that the agreement had been indeed implemented by the parties as covering also products originating from Western Sahara, a non-self-governing territory unlawfully occupied by Morocco and entitled to self-determination.[4]

The General Court remarked that the Council possessed "wide discretion" in deciding "whether it is appropriate to conclude an agreement with a non-member State". Thus, the "judicial review must necessarily be limited to the question whether [...] the Council, by approving the conclusion of an agreement [...], made manifest errors of assessment".[5]

be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. [...] [T]he legality of a measure adopted in those fields can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue" (para. 77). See also Court of Justice: judgment of 1 February 2007, case C-266/05, *Sison v. Council*, para. 33; judgment of 10 January 2006, case C-344/04, *IATA and ELFAA* [GC], para. 80; judgment of 10 March 1998, case C-122/95, *Germany v. Council*, para. 79; judgment of 28 November 2013, case C-348/12 P, *Council v. Manufacturing Support & Procurement Kala Naft*, para. 120. Among the most recent example of the procedural approach, see Court of Justice, judgment of 17 October 2013, case C-101/12, *Schaible*, paras. 47-50. On the identification of the objective criteria for judicial review, see Court of Justice, judgment of 16 December 2008, case C-127/07, *Arcelor Atlantique et al.* [GC], paras. 57-59.

[4] Front Polisario is a liberation movement allegedly representative of the Saharawi people, a large part of the population of Western Sahara, an area added in 1963 by the UN to the list of non-self-governing territories and still today occupied by Morocco. Historical surveys of the facts are collected in General Court, judgment of 10 December 2015, case T-512/12, *Front Polisario v. Council of the European Union*, paras. 1-16; Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council of the European Union v. Front Polisario* [GC], paras. 21-37; Opinion of AG Wathelet delivered on 13 September 2016, case C-104/16 P, *Council of the European Union v. Front Polisario*, paras. 5-20.

[5] Expressly, the General Court relied on the procedural approach in the precedent of *Odigitria v. Council and Commission* (judgment of 6 July 1995, case T-572/93, par. 38). In a question concerning the judicial review of two fishing agreements concluded by the EU with two States (Senegal and Guinea Bissau), the General Court, upholding a self-restraint approach, clarified that the Council possessed "a wide discretion in the field of the Community's external economic relations". In that case, the applicant asked the Court to assess whether the Council overlapped its discretion by not taking into account all interests involved in the circumstances, and in particular by disregarding the dispute between Senegal and Guinea Bissau for the delimitation of their maritime zones. The General Court, however, did not enter on the

The General Court found that, in the specific case, the Council was required to evaluate "carefully and impartially, all the relevant facts in order to ensure that the production of goods for export [was] not conducted to the detriment of the population of the territory concerned, or entails infringements of fundamental rights". The General Court concluded that the Council had not taken into consideration those elements and, thus, since it "failed to fulfil its obligation to examine all the elements of the case before the adoption" of an act, the contested decision was to be annulled.[6]

It is worth noting that the adoption of the procedural approach by the General Court in that particular case did not turn out to uphold the course taken by the EU political institutions.

Indeed, the General Court annulled the contested decision and, by so doing, it interfered with the conduct of the foreign relations powers of these Institutions. However, for the reasons that will be expounded in the subsequent sections, the interference was quite limited. The annulment was pronounced only because the Council failed to examine "carefully and impartially all the relevant facts of the individual case, facts which support the conclusions reached".[7] In particular, the Council "should have satisfied itself that there was no evidence of an exploitation of the natural resources of the territory of

merits of the Council evaluation of the interests involved in the case, nor did it examine whether the Council would have had to pay attention to the dispute between the two States. On the contrary, the General Court limited itself to reiterate Council's argumentations on the matter.

[6] *Front Polisario v. Council of the European Union*, cit., paras. 223-225, 241, 247. That the General Court did not evaluate Council's action on the merits, but it was only because of procedural errors that it declared the illegitimacy of the contested decision, is confirmed by Opinion of AG Wathelet, *Council of the European Union v. Front Polisario*, cit., paras. 234-236. It is worth noting that the judgment of the General Court complied with the previous case law of the Court of Justice not only because it upheld the procedural approach, but also for another aspect. In determining the territorial scope of the agreement between the EU and Morocco, the General Court relied on the customary international rules transposed in Art. 31, para. 3, let. b) of the 1969 Vienna Convention on the Law of Treaties (VCLT). It thus took into account the practice of the parties of the treaty following its adoption and found that the EU, while fully aware of the application of the treaty by Morocco to Western Sahara, did not protest. This lack of contestation was considered, by the General Court, as an implicit acceptation of the inclusion of Western Sahara in the territorial scope of the agreement (cf. *Front Polisario v. Council of the European Union*, cit., paras. 94, 98-103; *Council of the European Union v. Front Polisario* [GC], cit., par. 119). At a closer look, this reasoning does not seem alien to the case law of the Court of Justice. Only few moths before the General Court issued its judgement in *Front Polisario v. Council of the European Union* the Court of Justice, in *Oberto and O'Leary*, applied Art. 31, para. 3, let. b) VCLT. In that case the Court of Justice stated that "the subsequent practice followed in the application of a treaty may override the clear terms of that treaty if that practice reflects the parties' agreement". Then, it found that a practice, which has never "been the subject of challenge by the parties to that convention [...] must be regarded as reflecting their tacit agreement to such a practice" (Court of Justice, judgment of 11 March 2015, joined cases C-464/13 and C-465/13, *Oberto and O'Leary*, paras. 38, 60-66).

[7] *Front Polisario v. Council of the European Union*, cit., para. 225.

Western Sahara under Moroccan control likely to be to the detriment of its inhabitants and to infringe their fundamental rights".[8]

In consequence of this finding, the Council could have re-issued the contested decision stating the reasons requested by the General Court or, possibly, re-open the negotiations in order to conclude the liberalisation agreement anew by including a process of verification that the implementation of the agreement to the territory of Western Sahara was not made to the detriment of the population and of their fundamental rights.

III. The substantive approach in the decision of the Court of Justice in *Front Polisario*

Ruling on appeals, the Court of Justice has abandoned the procedural approach. The Court of Justice found that the General Court's decision was based on a number of errors of law and, therefore, it annulled it.[9]

For the purposes of the current *Insight*, it is worth noting that the Court of Justice conducted a careful assessment on the merits. In particular, the Court of Justice found that the provision, that determined the territorial scope of the agreement, ought to be construed in accordance with the international peremptory principle of self-determination, even if this interpretation was at odds with the practice followed by the parties in implementing the agreement.

In the view of the Court, such practice did not establish the existence of an agreement between the parties regarding its interpretation, under Art. 31, par. 3, let. b), VCLT and, therefore, should be discarded. On that basis, the Court easily concluded that products originating from Western Sahara did not fall within the territorial scope of the agreement and that the provision that determined the territorial scope of the agreement ought to be construed in a way that contradicted the practice followed by the parties, in order to be compatible with the international peremptory principle of self-determination.[10]

[8] *Ibidem*, para. 241.

[9] Cf. *Council of the European Union v. Front Polisario* [GC], cit., paras. 86, 89, 93, 99, 103, 108, 115-116, 122, 125, 127. It is worth noting that the Court of Justice did not examine the argument, upheld by the Council in its appeal, related to an alleged misconstruction of "the extent to which [the General Court] was able judicially to review [Council's] discretion" in the field of EU's "external economic relations". (see paras. 72 and 126).

[10] An analogous issue has dealt with by the Court of Justice in *Brita* (judgment of 25 February 2010, case C-386/10). The Court was asked to interpret the territorial scope of the association agreement between the EU and Israel, in order to assess whether it was applicable to the West Bank. The Court of Justice read the statutory provision of the association agreement in light of other international norms: the customary principle *pacta tertiis nec nocent nec prosunt* and Art. 73 of the association agreement between the EU and the PLO, which states that the agreement applied to the "territories of the West Bank and the Gaza Strip" (paras. 43-47). It concluded that the territorial scope of the association agreement between the EU and Israel "must be interpreted as meaning that [...] the West Bank do[es] not fall within

The consequence of these findings is that the EU is bound to interpret the liberalisation agreement as excluding from its scope products originating from Western Sahara. By so doing, the Court imposed thus a radically different course in the conduct of the EU foreign relations relations with Morocco.

This conclusion leads one to investigate the reasons which prompted the methodological shift from the procedural approach traditionally followed in the case law of the Court of Justice to a substantive approach, and whether these reasons may reveal the development of a new standard of judicial review.[11]

IV. The decision of the Court of Justice between self-restraint and activism

The shift in the case law of the Court of Justice has occurred almost inadvertently.

From a superficial glance, the Court of Justice in *Front Polisario* has upheld all the request by the appellant: it annulled the decision of the General Court; it adopted the interpretation of the territorial scope of the liberalisation agreement suggested by the Council; it rejected the idea that the practice, followed by the EU political Institutions, did create acquiescence to the interpretation of the agreement suggested by Morocco, comprehending Western Sahara in its territorial scope.[12] Yet, if one looks under the veneer, the deference towards the position of the EU political Institutions appears to be

the territorial scope of that agreement" (para. 53). Still, while the assessment demanded of the Court of Justice in *Brita* may appear similar to the one asked in *Front Polisario* insofar as the interpretation of the territorial scope of an agreement is concerned, the differences be-tween the two cases should be highlighted. In the fist place, in *Brita* the Court was required to issue a preliminary ruling on the interpretation of a statutory provision, and not a ruling on the validity of an act as in *Front Polisario*. Therein lies the main discrepancy with *Front Polisario*, as well as the reason why *Brita* does not seem relevant in examining the criteria applied by the Court for the judicial review of political acts of the Council: it is not a case of judicial review at all. The second key difference between *Brita* and *Front Polisario* is that *Brita* arose because the EU refused to apply the association agreement with Israel to an area not pertaining to Israel's territory. In *Front Polisario*, as seen, the case was instead prompted because the EU accepted the application of the liberalisation agreement with Morocco to an area not pertaining to Morocco's territory.

[11] For more comprehensive analysis of the judgment, see E. Kassoti: *The* Front Polisario v. Council *Case: The General Court,* Völkerrechtsfreundlichkeit *and the External Aspect of European Integration (First Part)*, in *European Papers*, 2017, Vol. 2, No 1, p. 339 *et seq*., www.europeanpapers.eu; *The* Council v. Front Polisario *Case: The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation (Second Part)*, in *European Papers*, 2017, Vol. 2, No 1, p. 23 *et seq*., www.europeanpapers.eu; V. Kube, *The* Polisario *case: Do EU fundamental rights matter for EU trade policies?*, in *EJIL: Talk!*, 3 February 2017, www.ejiltalk.org; C. Ryngaert, *The* Polisario Front *Judgment of the EU Court of Justice: a Reset of EU-Morocco Trade Relations in the Offing*, in *Renforce Blog*, 15 January 2017, blog.renforce.eu; Markus W. Gehring, *EU/Morocco relations and the Western Sahara: the ECJ and international law*, in *EU Law Analysis*, 23 December 2016, eulawanalysis.blogspot.it; S. Hummelbrunner, A.-C. Prickartz, *EU-Morocco Trade Relations Do Not Legally Affect Western Sahara – Case C-104/16 P* Council v Front Polisario, in *European Law Blog*, 5 January 2017, europeanlawblog.eu.

[12] Cf. *Council of the European Union v. Front Polisario* [GC], cit., paras. 92, 96, 114, 126-127 and 134.

more formal than real, and the effects prompted by the Court of Justice's ruling prove to be dramatically diverging from those wished by the Council and by the Commission. To explain what clearly appears to be an iron fist in a velvet glove, it seems indispensable to enter into some more detail in the factual and legal context, and in the line of reasoning followed by the Court.

The territorial scope of the liberalisation agreement is determined by Art. 94 of the 1996 association agreement between the EU and Morocco, which the liberalisation agreement legally refers to. The provision states that the association agreement applies "to the territory of the Kingdom of Morocco". In order to determine the territorial scope of the liberalisation agreement it was thus necessary to ascertain the meaning of the expression "the territory of the Kingdom of Morocco".

As remarked by AG Wathelet, both the Council and the Commission asked the Court of Justice to interpret the agreement as not applying to the territory of Western Sahara. Both, however, seemed to maintain that, beyond the formal interpretation of the agreement, Morocco could continue to apply *de facto* the agreement to the products of Western Sahara.[13] Strangely enough, neither the Commission nor the Council seemed to be aware of the fact that a discrepancy between the legal reality and the factual reality cannot but amount to a breach of the law.

Beyond the hypocrisy of this claim, there is a revealing passage in the chain of assumptions of the Council that may explain it. The Council, although "put[ting] forward different and even contradictory views", and although never formally accepting that Western Sahara was part of the territory of Morocco, nonetheless added that the EU and Morocco "have a mutual understanding", whereby "the European Union accepts the application of the agreement to the territory of Western Sahara" and Morocco will "not use this as an argument in support of its claim to sovereignty".[14]

The possibility for the agreement to be *de facto* applied to Western Sahara was indeed embraced in its core spirit, as "Morocco would never have accepted the agreement if" the EU "had included in it a clause explicitly excluding its application to Western Sahara".[15] It thus seems that the Council conceived of the principle of self-determination as not obliging the EU to ask that Morocco, in implementing the agreement, gives faithful compliance with the right of self-determination of Saharawi people.[16]

[13] Cf. Opinion of AG Wathelet, *Council of the European Union v. Front Polisario*, cit., paras. 64-67, 83.

[14] *Ibidem*, paras. 65-67.

[15] *Ibidem*, para. 300.

[16] Cf. *Council of the European Union v. Front Polisario* [GC], cit., para. 123. Similar considerations may be expressed with regard to the interpretation of the principle of self-determination upheld by the Commission, which intervened in the case in support of the Council. Indeed the Commission admitted it was aware that the application of the liberalisation agreement to Western Sahara may have been regarded as a violation of peremptory norms of international law (Opinion of AG Wathelet, *Council of the European Union v. Front Polisario*, cit., para. 182). Once it is excluded that the Commission intended to breach international peremptory rules, the only remaining option is to conclude that the Commission interpreted

It is precisely on this point that the Court of Justice took a different course, and a very radical one indeed.

The Court read the principle of self-determination as preventing the EU from tolerating the conduct, performed by Morocco, of applying the liberalisation agreement to Western Sahara. Indeed, the Court specified that all States, under this principle, were required to recognise a separate and distinct status, from that of any State, to all non-self-governing territories. Not only it would have been unacceptable to interpret Art. 94 as including Western Sahara in the territorial scope of the agreements between the EU and Morocco. More broadly, the Court of Justice drew, from the principle of self-determination, the full "inapplicability of the [association and liberalisation agreements] to that territory".

In the Court's reasoning, the EU was thus undoubtedly barred from considering the liberalisation agreement as applicable, *de facto* or *de jure*, to Western Sahara. This consideration would have indeed entailed, for the EU, "to implement [the agreement] in a manner incompatible with the principle of self-determination".[17]

There was, then, a huge discrepancy between the Council and the Court of Justice's identification of the conducts forbidden by the principle of self-determination. While the Council upheld a narrow interpretation of the principle of self-determination,[18] the Court of Justice read it as having a much wider scope.

The Court of Justice clearly conceives of this principle as an all-embracing guarantee for peoples living in a non-self-governing territory. They are fully protected against the possibility of a State applying a treaty to which it is a party to their territory. Thus, while for the Council the principle of self-determination would have precluded international actors only from *explicitly* violating or accepting a violation of the principle itself, for the Court it would have also banned all conduct resulting in an *implicit* acceptance of an infringement of the right to self-determination.

Regardless of its merits, the Court of Justice's reading of the principle of self-determination inescapably affected the position of the Council with regard to the implementation, by Morocco, of the liberalisation agreement. Albeit not explicitly, the Court of Justice affected the course of foreign policy determined by the Council at the

the principle of self-determination as not precluding for the EU the acceptance of a *de facto* application of the liberalisation agreement by Morocco to Western Sahara.

[17] *Council of the European Union v. Front Polisario* [GC], cit., paras. 88-93, 105, 123.

[18] It does not seem unreasonable to recognise, in the Council's interpretation of the principle of self-determination, a formalistic approach. This principle seems to have been observed almost exclusively as a criterion for the interpretation of statutory provisions. The principle of self-determination would have indeed forbidden the interpretation of Art. 94 as entailing a violation of the right to self-determination, but the same principle would have not barred States from implicitly accepting its infringement when committed *de facto*.

international level and, thus, strongly interfered with the Council competence in shaping EU foreign relations.

Consequently, the practice followed by the EU, i.e. that of accepting the *de facto* application by Morocco to Western Sahara of the liberalisation agreement, has to be fully abandoned. Moreover, the ruling of the Court prevents the EU from acceding to whatever understanding, tacit or implicit, directly or indirectly related to a breach of the principle of self-determination. The Council is compelled to modify its position about the implementation of the liberalisation agreement, and not to tolerate any longer the application of the agreement to Western Sahara.

V. Concluding remarks

In the light of the above, it would be quite arduous to maintain that, in *Front Polisario*, the Court of Justice upheld the procedural approach and did not appraise, on the merits, the conduct of the Council in the EU external action field. On the contrary, it is evident that, in *Front Polisario*, the Court of Justice adopted a very activist approach in performing the judicial review of Council acts related to the area of EU foreign relations.

Such a radical shift appears to have been prompted by the peremptory status of the international rules involved. From the reasoning of the Court, it emerges that it has considered, albeit implicitly, the risk of the EU aiding or abetting a breach of the principle of self-determination by Morocco. Since this indirect complicity of the EU flowed from the Council's misconstruction of the principle of self-determination, a mere procedural review of the contested decision would not have prevented the Council from continuing to read this principle as not forbidding conducts which were, as far as the Court was concerned, entirely prohibited by customary international law.

It thus seems reasonable to conclude that, in Front Polisario, the Court of Justice resorted to a new standard for the judicial review of acts related to the foreign affairs area, because of the interests involved in the specific case. The interest in protecting the prerogatives of the Council in dealing with EU foreign relations would be recessive, in particular, when the interest to fulfil international peremptory law comes at stake. In turn, the interest of the EU to not infringe fundamental rights through its international conduct would also allow the Court of Justice to interfere with the Council in shaping EU foreign relations.

All in all, the Court of Justice in *Front Polisario* seems to have developed a sort of *subsidiary approach*. When the Council is not able to develop EU foreign relations in a way that proves to be compatible with customary international law and with the protection of fundamental rights, the Court of Justice will step in, in order to protect the EU's main objectives on the international plane.

INSIGHTS

A European Court of Human Rights' Systematization of Principles Applicable to Expulsion Cases

Gloria Fernández Arribas*

ABSTRACT: The European Court of Human Rights has developed a large case-law regarding expulsion cases, of which cases linked to asylum applications constitute a significant number. This *Insight* analyses the case of *J.K. et al. v. Sweden* [GC] (judgment of 23 August 2016, no. 59166/12), which constitutes an attempt on the part of the Court to systematise the main principles and to clarify the procedure and elements to be taken into account by national authorities when deciding on expulsion cases, and therefore on asylum applications. The Court first enumerates and briefly analyses the applicable principles: the risk of ill-treatment by private groups, the principle of *ex nunc* evaluation of the circumstances, the principle of subsidiarity, the assessment of the existence of a real risk, distribution of the burden of proof, past ill-treatment as an indication of risk, membership of a targeted group. Second, the Court applies the principles to the case of *J.K. et al. v. Sweden*, but the interpretation and application of those principles is the object of dissenting opinions of seven judges, which are also taken into account in this *Insight*.

KEYWORDS: asylum – expulsion – real risk – burden of proof – benefit of the doubt – ill-treatment.

I. Introduction

In the judgement in the case of *J.K. et al. v. Sweden* [GC],[1] the European Court of Human Rights referred to its previous case-law with a view to determining the general principles applicable to expulsion cases and to clarifying the procedure and elements to be taken into account by national authorities when deciding on asylum applications.

This judgment has been the object of dissenting opinions from seven judges out of the seventeen in the Grand Chamber, focusing, in particular, on the way in which the

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[1] European Court of Human Rights, judgment of 23 August 2016, no. 59166/12, *J.K. et al. v. Sweden* [GC].

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Court analyses these principles, specifically past ill-treatment as an indication of risk, the applicant's credibility regarding the assessment of a real risk and the burden of proof.

The applicants were a family of Iraqi nationals who, in 2010, applied for asylum and residence permits in Sweden on the grounds that if they returned to Iraq they would be subject to persecution by non-state actors, namely Al-Qaeda. The first applicant had a construction and transport business and was working with American clients in Baghdad, and because of having US clients he was the target of a murder attempt, and also a bomb was placed next to the family's house by Al-Qaeda. The family left Iraq in 2006 and returned in 2008, and since then had not been personally threatened. As it has been mentioned, in 2010 the applicants applied for asylum in Sweden. After various stages and appeals, the application was finally rejected in 2012 on the grounds that the Iraqi forces were able and willing to protect the family.

The applicants lodged an application against Sweden with the Court[2] on the grounds that expulsion to Iraq would entail a violation of Art. 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms. The Chamber held that "the implementation of the deportation order in respect of the applicants would not give rise to a violation of article 3",[3] since the evidence was insufficient to conclude that there was a real risk of being subject to treatment contrary to Art. 3 if they returned to Iraq. In 2015, the applicants referred the case to the Grand Chamber, whose judgment is analysed in this *Insight*.

II. General principles and their application

Before deciding on the applicants' case, the Court refers to the general principles to be applied on expulsion cases, for which the Court takes into account not only its previous case-law, but also European Union Law,[4] United Nations High Commissioner for Refugees (UNCHR) guidelines and other materials.

Even though it is well-known that the European Convention of Human Rights (ECHR) does not include the right of asylum and the principle of *non-refoulement*, it is worth mentioning that the interpretation given by the Court of Art. 3 of the Convention has led to the development of the principle of *non-refoulement*, which has become a key notion in expulsion cases regarding asylum claims. Also, this principle is essential in order to prevent the applicant from being sent back to a country where their life may be en-

[2] European Court of Human Rights, judgment of 4 June 2015, no. 59166/12, *J.K. et al. v Sweden*.

[3] *J.K. et al. v. Sweden* [GC], cit., para. 4.

[4] Regarding the European Court of Human Rights interpretation of the Charter of Fundamental Rights of the European Union see G. Gaja, *The Charter of Fundamental Rights in the Context of International Instruments for the Protection of Human Rights*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 791 *et seq*.

dangered, so States have been "forced" to grant international protection to those applicants as a solution to the risk they face if they return.[5]

The present judgement goes a step further. Beyond with the restatement of the principle of *non-refoulement* in its relation with Art. 3, the Court lays down other principles, maybe in an attempt to systematise the main legal framework applicable to expulsion cases which has emerged from the large case-law. These principles are: the risk of ill-treatment by private groups, principle of *ex nunc* evaluation of the circumstances, principle of subsidiarity, assessment of the existence of a real risk, distribution of the burden of proof, past ill-treatment as an indication of risk, membership of a targeted group.

In regard to Art. 3, the Court first recognises the absoluteness of this prohibition that must also be respected in "the most difficult circumstances", and must be prohibited in "absolute terms".[6] Even though the Court does not refer in this section to the UNCHR guidelines, it is worth noting that the UNCHR has also recognised that the *non-refoulement* principle is not subject to derogation.[7] Finally, the Court points out that, in order to determine in a specific case the obligation not to deport because of the existence of substantial grounds to believe that the applicant would face a real risk of being subjected to a treatment included in Art. 3, the Court must examine the conditions in the destination country.

The next principle refers to the risk of ill-treatment by private groups, that concerns practices of persecution by private entities (organisations or individuals). Interestingly, the Court links this principle with the issue of relocation inside the country of destination, relying on the internal flight alternative, but establishing a number of guarantees that must be respected: "the person to be expelled must be able to travel to the area concerned, gain admittance and settle there" and guarantees that the person will not end up in a part of the country where they may be the object of ill-treatment.[8] Even though it is not mentioned by the Court, we consider that the area's safety should be analysed in a broader sense, which means taking into account the country's stability and the possibility of long-term protection, and therefore having in mind that, in armed conflicts, safe areas may change quickly.

We will focus next on the controversial part of the judgement, sharply contested by concurring or dissenting opinions.

[5] See. C. COSTELLO, *The Human Rights of Migrants and Refugees in European Law*, Oxford: Oxford University Press, 2016, p. 157.

[6] *J.K. et al. v. Sweden* [GC], cit., para. 77.

[7] For further reference, see J. ALLAIN, *The Jus Cogens Nature of Non-Refoulement*, in *International Journal of Refugee Law*, 2003, p. 539.

[8] *J.K. et al. v. Sweden* [GC], cit., para. 80.

II.1. The assessment of the risk

Regarding the risk, the Court refers in this case to its previous case-law in which it has been clearly established that there must exist a *real* risk. For a real risk to exist, it is necessary to establish with a high degree of probability that the applicant will suffer treatment proscribed by Art. 3 if he is sent to a third country. The Court considers that the examination to establish such a risk must be especially rigorous. In principle, the demonstration must refer to the personal circumstances of the asylum seeker and the general situation in the country.[9] Alternatively, it is possible to refer just to a general situation of violence in the country, but only in the most extreme cases of violence.[10]

In order to assess the existence of the real risk, the Court will take into account not only the evidence provided by the applicants, but also materials provided by governments, NGOs or other actors as well as materials obtained *motu propio*.

In the present applicants' case, the Court concludes that the general situation of violence in Baghdad has not reached the threshold of an extreme case of violence, so the risk of the applicants' ill-treatment must be analysed with regard to their personal circumstances.

It is in this context that further element of risk assessment comes into play. According to the Court, past ill-treatment provides a "strong indication of a future, real risk of treatment contrary to Article 3",[11] something that, according to the Court, is confirmed by the previous case-law, by the EU Qualification Directive[12] and by the UNHCR Note on Burden and Standard of Proof in Refugee Claims.[13] The word "strong" has been subject to criticism in Judge O'Leary's concurring opinion and Judge Ranzoni's dissenting opinion. In both cases, the judges refer to the Qualification Directive which includes the previous ill-treatment as a *serious* indication. Therefore, the word "strong" would be a crea-

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

[10] It is worthy to notice that this interpretation has been the object of an evolution in the Court's case-law, since firstly the evidence must be linked to the applicant's personal situation and the general situation in the destination State. This led in an initial case-law to the personalisation of the risk, meaning that a context of general war would not be enough to be able to claim the presence of a real risk. This case-law evolved, as has been mentioned, in such a way that, although the Court now only accepts as grounds of real risk the existence of general violence, it clarifies that the violence must be of such significance that there is a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.

[11] *J.K. et al. v. Sweden* [GC], cit., para. 102.

[12] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

[13] *J.K. et al. v. Sweden* [GC], cit., paras 99-101.

tion of the Court in the present case since, as Judge Ranzoni manifests, it hadn't been used in that context in the previous case-law.[14]

In the case at hand, two periods of time can be established regarding past ill-treatment as an indication of future ill-treatment: the first from 2004 until 2008, and the second from 2008 until 2010. The existence of past ill-treatment during the first period has not been contested. However, the evidence of past ill-treatment during the second period shows some weaknesses,[15] which the Court set aside by considering that the applicants' account of events was generally coherent and credible. The weaknesses of the accounts were largely considered in the six judges' dissenting opinion,[16] which concluded that the applicants' account of the events was not generally credible. In this situation, the principle of the benefit of the doubt and the burden of proof should be examined.

II.2. Principles of the benefit of the doubt and the burden of proof

According to the UNHCR, if "the applicant's story is on the whole coherent and plausible; any element of doubt should not prejudice the applicant's claim";[17] therefore the applicant does not need to prove all the facts. In the present case, it can be said that the clearness and evidence of ill-treatment during the initial time period would entail a disadvantage in establishing the credibility of the applicants' story during the second period, where the evidence was not very clear, and in some cases had not been proved. Therefore, a comparative analysis of both time periods may lead to a lack of general credibility of the existence of past ill-treatment from 2008 to 2010. In this sense, it seems that the six judges in their dissenting opinion took the applicants' delay in providing some facts, and the lack of evidence of the facts, as an indicator that their account of events was not generally credible.[18] This may be a restricted interpretation of the UNHCR guidelines, which refer only to a coherent and credible story, without demanding proof of all facts. In addition, during the analysis of the general principles the Court establishes that, "the lack of direct documentary evidence thus cannot be decisive *per se*", and even though some details "may appear implausible", none should detract the Court from the credibility of the applicant's claim.[19]

[14] European Court of Human Rights, judgment of 23 August 2016, no. 59166/12, *J.K. et al. v. Sweden* [GC], dissenting opinion of judge Ranzoni, para. 8. But the previous ill-treatment as strong indication of a real risk seems to have been the minority position of the Commission in the Cruz Varas report of 9 June 1999. See R. Alleweldt, *Protection Against Expulsion Under Article 3 of the European Convention on Human Rights*, in *European Journal of International Law*, 1993, p. 368.

[15] *J.K. et al. v. Sweden* [GC], cit., paras 70-75.

[16] European Court of Human Rights, judgment of 23 August 2016, no. 59166/12, *J.K. et al. v. Sweden* [GC], joint dissenting opinion of judges Jäderblom, Griţco, Dedov, Kjølbro, Kucsko-Stadljmayer and Poláčková.

[17] *J.K. et al. v. Sweden* [GC], cit., para. 53.

[18] Joint dissenting opinion of Judges Jäderblom, Griţco, Dedov, Kjølbro, Kucsko-Stadljmayer and Poláčková , *J.K. et al. v. Sweden* [GC], cit., paras 5 and 6.

[19] *J.K. et al. v. Sweden* [GC], cit., paras 92 and 93.

This interpretation has been also contested by Judge Ranzoni, who considers that the accounts must be coherent and credible, not *generally* coherent and credible as the Court established in this judgment. The judge refers to previous judgments in which there were references to coherent and credible accounts without the term "generally", and concludes that this is an addition of the Court in order to lower the credibility threshold and shift the burden of the proof to the government. The two cases referred by Judge Ranzoni do not mention the term "generally", but they do modulate credibility by adding the terms "overall"[20] and "sufficiently".[21] Thus, the Court did not refer in those cases to an exclusive coherent and credible account of the facts, but did apparently seem to relax the threshold of credibility.

In the present case, the findings of the Court regarding the credibility of the applicants' story led the burden of proof being shifted to the government in order to dispel any doubts about the risk. This finding is in line with the previous analysis regarding the distribution of the proof, in which the Court held that the special situation the asylum seekers found themselves in made it difficult for them to supply evidence, and therefore it was necessary to give them the benefit of the doubt when analysing the statements and documents.[22] It is this benefit of the doubt which led the burden of proof being shifted to the government, even though in principle, as the Court established, the burden of proof lies on the applicants since they are the parties who are able to provide the information.[23]

Once this aspect, a reference to the opinion of Judge Bianku appears the most opportune. This opinion has a special interest in order to establish the obligations of the national authorities when examining the applications, since the judge states that: "When absolute rights are at stake, the national authorities cannot discharge their obligations by concluding that it is likely that these rights will not be violated in the country of destination. The rigorous test requires that in their assessment the authorities should check whether there are substantial grounds to believe that there would be no real risk for the applicants' rights in the event of their return to Iraq".[24]

According to the Court, the Swedish Migration Agency did not comment on the applicants' credibility, and focused mainly on the lack of evidence. Neither the Migration Agency nor the Migration Court exclude the existence of a risk from Al-Qaeda. In addition, the

[20] European Court of Human Rights, judgment of 5 July 2005, no. 2345/02, *Said v. The Netherlands*, para. 53.

[21] European Court of Human Rights, judgment of 26 July 2005, no. 38885/02, *N. v. Finland*, paras 155 and 156.

[22] *J.K. et al. v. Sweden* [GC], cit., para. 92.

[23] *Ibid.*, para. 96.

[24] Concurring opinion of Judge Bianku, *J.K. et al. v. Sweden* [GC], cit.

Court refers to two reports from 2009 and 2014[25] released by the UK Home Office, which confirm that people who had been working for the occupying forces are still being subject to persecution and targeted by Al-Qaeda and other groups. Therefore, the Court held that the family would face a real risk of persecution if they returned to Iraq.

II.3. Targeted group and inability to protect

In their dissenting opinion, the six judges claimed that the applicants' past ill-treatment must not be the main basis for assessing the risk of persecution, and in this regard even though the Court pays special attention to those facts, it also refers to the present situation of targeted groups in Iraq. According to previous analysis of the general principles, the Court is reliant on the applicant's account of the events and the information of the country of origin to determine if the person belongs to a targeted group.[26]

As we have mentioned, the applicant J.K. worked with the occupying powers in Baghdad, and therefore belonged to a group targeted by Al-Qaeda. As the Court states, from the UK Home Office reports it cannot be assumed that these people were free of being targeted once the relationship with the American forces had ended.[27]

In this situation, where the persecution comes from private entities, it is necessary to analyse whether the State can provide adequate protection. The Court refers to the Qualification Directive,[28] and, in particular, to its Art. 7, para. 2, in order to establish the standards of protection: an "effective legal system for the detection, prosecution and punishment". The ECJ has interpreted this article in the sense that "verification means that the competent authorities must assess, in particular, the conditions of operation of the institutions, authorities and security forces, on the one hand, and, on the other hand, all groups or bodies of the third country which may, by their action or inaction, be responsible for acts of persecution against the recipient of refugee status if he returns to that country", together with "the laws and regulations of the country of origin and the manner in which they are applied".[29]

In the present case, the Court considers the level of efficiency of the Iraqi security and legal system, concluding that it presents some shortcoming; there is a widespread corruption, the security forces have made limited efforts to respond to violence, and even though the Swedish Migration Court found in 2012 that the government was willing and able to protect targeted groups, the situation has deteriorated since then (*ex*

[25] The period of time to analyse the existence of previous ill treatment is from 2008 to 2010, but the Court developed an *ex nunc* evaluation of the circumstances therefore the present situation in Iraq can be taken into account in order to decide on a decision taken in 2012. See *ibid.*, para. 83.

[26] *J.K. et al. v. Sweden* [GC], cit., para. 105.

[27] *Ibid.*, para. 117.

[28] *Supra*, footnote 12.

[29] Court of Justice, judgment of 22 March 2010, joined cases C-175/08, C-176/08, C-178/08 and C-179/08, *Abdulla*, para. 71.

nunc assessment), and the government is not in control of large parts of the territory.[30] Therefore, the Court concludes that, while acknowledging the capability of the Iraqi system to protect the public in general, the State is not able to protect targeted groups, and thus there is a real risk of ill-treatment if they return to Iraq.

III. Concluding remarks

This judgment entails important progress in the protection of asylum seekers against *refoulement*, since it clarifies the main principles applicable to these cases, and also pays attention to the special and difficult situation in which the applicants find themselves. The systematization of the principles was not the subject of the main dissenting opinion, which focused, rather, on applying those principles to the case at hand. Arguably, this means that the principles restated in this judgment can be considered to be widely accepted by the members of the Court. This systematization of principles could amount to an emerging judicial "regulation" of the right of asylum in the context of the Convention.

The restatement of general principles is based not only on the Court case-law and the European Convention of Human Rights, but also on UNHCR's documents and EU law, which the Court takes into account in order to analyse the content of the principles and to support its interpretation. The reference made by the ECHR to EU asylum law, which it considers applicable to these cases, increases the value of EU law and its case-law when interpreting the rights protected by the Convention. These references also confirm the extent to which EU asylum law has contributed to the development of ECHR principles for protecting asylum seekers and highlight the beneficial effect of a combined consideration of the two systems.

The applicants' special circumstances may have as a consequence the shift of the burden of proof to the government in application of the principle of the benefit of the doubt, in cases where the account of events is consistent and generally credible. This "pro-asylum applicant" analysis may prevent national institutions from adopting too a restrictive approach towards asylum applications in European countries, and may constitute a considerable hurdle to the measures recently taken by the EU and its Member States to face the refugee crisis.[31]

[30] *J.K. et al. v. Sweden* [GC], cit., para. 120.

[31] See E. Cannizzaro, *Disintegration Through Law?*, in *European Papers*, Vol. 1, No 1, 2016, www.europeanpapers.eu, p. 3 *et seq.*; J.C. Hathaway, *A Global Solution to a Global Refugee Crisis*, in *European Papers*, Vol. 1, No 1, 2016, www.europeanpapers.eu, p. 93 *et seq.*; B. Nascimbene, *Refugees, the European Union and the "Dublin System". The Reasons for a Crisis*, in *European Papers*, 2016, Vol. 1, No 1, www.europeanpapers.eu, p. 101 *et seq.*; T. Spijkerboer, *Minimalist Reflection on Europe, Refugees and Law*, in *European Papers*, 2016, Vol. 1, No 2, www.europeanpapers.eu, p. 553 *et seq.*; E. Tsourdi, *Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office*, in *European Papers*, Vol. 1, No 3, 2016, www.europeanpapers.eu, p. 997 *et seq*.

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