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The EU human rights obligations on trade agreements applicable in disputed and occupied territories: the EU Law perspective

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Summary: 1. The EU as international economic actor promoting its values abroad – **2.** Human rights compliance of the trade agreements concluded by the EU: practice and case law – **3.** Human rights obligations and responsibility of the EU during the implementation of trade agreements and the individual remedies available – **4.** The EU Court of justice case law on trade agreements applicable to disputed and occupied territories: which role for the human rights? – **5.** Conclusion, a proposal for the development of a coherent approach in the CCP towards disputed and occupied territories "human rights" oriented.

1. The EU as international economic actor promoting its values abroad

The EU is one of the most prominent international economic actors; moreover, several relevant occupied and contested territories are located in its neighbourhood and maintain with it economic relations[1]. The EU is also a unique legal entity under International law, resulting from a complex system of integration among its Member states, which includes a wide range of action in many fields. Differently from other International Organizations, the EU constitutes a new legal order, with autonomous normative power, whose subjects are its Member States and the individuals (more precisely, natural and legal persons) that have rights and duties coming directly from the EU law[2].

Since from its early days, the EU (and the EC, before) conducts its external relations with the purpose of promoting its values abroad[3]. In this context, trade relations are considered the powerful mean to spread

[*] Peer reviewed.

[1] Cfr. EUROSTAT, *International trade, investment and employment as indicators of economic globalisation*, http://ec.europa.eu/eurostat/statistics-explained/index.php/International_trade,_investment_and_employment_as_indicators_of_economic_globalisation (last visited April 18, 2017).

[2] The principle of direct effect, as enshrined by the ECJ in its famous decision on the case 26/62, *Van Gend en Loos,* 5 February 1963, with which it established that the individuals might immediately invoke EU acts with determinate characteristics before a national or EU Court.

[3] About the EU external relations see, among many: E. CANNIZZARO (ed), *The European Union as an Actor in International Relations*, The Hague, 2002; M. CREMONA (ed.) *Developments in EU External Relations Law*, Cambridge, 2008; L. DANIELE, *Le relazioni esterne dell'Unione nel nuovo millennio,* Giuffrè Editore, Milano, 2001; P. EECKHOUT, *EU external relations law,* OUP, Oxford, 2011; A. DASHWOOD, M. MARESCEAU (Eds.), *Law and Practice of EU External Relations. Salient Features in a Changing Landscape*, Cambridge, 2008; P. KOUTRAKOS, *EU International Relations Law*, Hart Publishing, Oxford, 2006; P.J. KUIJPER, J. WOUTERS, F. HOFFMEISTER, G. DE BAERE, T. RAMOPOULOS, *The Law of EU External Relations,* OUP, Oxford, 2015; M. MARESCEAU

its values – included human rights – in partner countries. In doing so, the EU declares the aim to realize an effective positive connection between trade and human rights[4]. The Common Commercial Policy (CCP) is probably the main instrument of the EU to promote abroad principles and values[5]. Its trade policy has been implemented through both multilateral agreements concluded in the WTO (and before in the GATT) framework, likewise autonomously. Since its creation, the EU sets up many agreements choosing its partners on geographical/regional considerations (like the partnerships with its Neighbourhood or the ACP countries) or on pure economic considerations (i.e. the agreements concluded or negotiated with the so-called BRICs countries[6]). The form of the agreements includes association agreements, partnership agreements and development cooperation agreements[7]. Under a substantial point of view, the trade agreements concluded by the EU are remarkably different each other, including purely trade relationship likewise broader partnerships in which trade is only one of the aspects considered. Recently, the tendency is to conclude complex forms of integration partnership between the EU and one or more Countries (or entire geographical regions), including forms of deep trade cooperation and foreign direct investments[8].

The Lisbon Treaty introduces an integrated mechanism called "External Action" which constitutes a complex integration among the political actions with the material actions of the EU in a unitary system. The CCP is now included together with the CFSP and the ESDP in this mechanism[9]. Principles and goals

(ed), *Studies in EU External Relations,* Brill, 2014; A. MIGNOLLI, *L'azione esterna dell'Unione europea e il principio di coerenza*, Napoli, 2009; VAN VOOREN, WASSEL (eds), *EU External Relations Law,* 2014.

4 European Parliament resolution *Human rights and social and environmental standards in international trade agreements* (2009/2219(INI)), 25 November 2010, Par. 19.

5 Since the beginning, the CCP was an exclusive competence of the EEC (European Economic Community), then EC (European Community) and finally EU with the Lisbon Treaty.

6 EU COMMISSION, *Global Europe: Competing in the world. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions,* 4 November 2006, COM(2006) 567 final. About the topic see, G. SILES-BRŸGGE, *Constructing EU Trade Policy – A Global Idea of Europe,* Basingstoke, Palgrave-Macmillan, 2014.

7 EU COMMISSION, *Trade, Growth and Development. Tailoring trade and investment policy for those countries most in need, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee,* 27 January 2012, COM(2012).

8 About, C. CELLERINO, *Recent Trends of Common Commercial Policy of the European Union*: *from Global-to-Regional (and Return)?*, in P. PAZARTIZISM, M. GAVOUNELI (eds), *Reconceptualising the Rule of Law in Global Governance, Resources and Trade,* OUP, Oxford, 2015.

9 Among many see: E. BARONCINI, S. CAFARO, C. NOVI, *Le relazioni esterne dell'Unione Europea,* Giappichelli, Torino, 2012; E. BARTOLONI, *Politica estera e azione esterna dell'Unione europea,* Editoriale Scientifica, Napoli, 2012; E. CANNIZZARO, *Il diritto dell'integrazione europea, cit.*, P. CARDWELL (ed), *The EU External Relations Law and Policy in the Post-Lisbon Era,* The Hague, 2012; C. CELLERINO, *Soggettività internazionale, cit.*; M. CREMONA (ed), *Developments of EU External Relations*, OUP, Oxford, 2008; P. EECKHOUT, *EU External Relations Law,* OUP, Oxford, 2011; A. EGAN, L. PECH, *Respect for Human Rights as a General Objective of the EU's External Action*, KU Leuven Working Paper No 2015/161 (last visited November 16, 2017); R. FRID, *The Relations between the EC and the International Organizations,* Brill, 1995; P. KOUTRAKOS (ed), *European Foreign Policy: Legal and Political* Perspectives, Chaltenham, 2011; A. LANG, P. MARIANI (eds), *La politica estera dell'Unione europea: inquadramento*

of the External Action are common to all the matters included in it. Article 5(3) TEU establishes that "*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".* In addition, the Article 21 TEU – the opening article of the Title V named "External Action" – underlines that *"the Union's action on the international scene […] shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations"*[10]. Consistently, Article 207(1) TFEU restates that human rights considerations is one of the principles guiding the Union's external activities.

Therefore, the EU values guide the action of the EU in its external policy. As established by Article 2 Treaty EU, these values are: democracy, rule of law, human rights and fundamental freedoms, human dignity, principles of equality and solidarity, respect for the principles of the UN Charter and the International law. Consistently, the objectives of the External Action, as defined by Article 21(2) Treaty EU, are (among others): *i)* consolidation and support of democracy, human rights and principles of International law; *ii)* prevention of conflicts and strengthen international security; *iii)* foster the sustainable economic, social and environmental development of undeveloped countries; *iv)* encourage the integration of all countries into the world economy, including through the progressive abolition of restriction on international trade[11].

Traditionally, the connection between human rights and trade has been part of the development cooperation and carried out through two main instruments: the so-called conditionality clauses contained in the agreements with third States and with the unilateral adoption of programmes by the EU containing

giuridico e prassi applicativa, Giappichelli, Torino, 2014; S. POLI (ed), *The European Neighbourhood Policy: Values and Principles*, Routledge, 2016.

[10] Cfr. art. 21 TEU.

[11] L. BARTELS, *The EU's Human Rights Obligations in Relations to Policies with Extraterritorial Effects*, in 25 *European Journal of International Law,* 4/2015, p. 1071; E. BARTOLONI, E. CANNIZZARO, *Art. 21 TUE,* in A. TIZZANO (ed), *Trattati dell'Unione europea,* Giuffrè, Milano, 2014, p. 222; F. BENOÎT-ROHMER, *Completing the transformation: Values and Fundamental Rights in the Treaty of Lisbona,* in *European Yearbook on Human Rights,* 2010 p. 49 e ss.; L.S. ROSSI, *Fundamental Values, Principles and Rights After the Treaty of Lisbon: the long journey toward a EU System,* in L.S. ROSSI, G. DI FEDERICO (eds.), *Fundamental Rights in Europe and China. Regional identities and Universalism,* Editoriale scientifica, Napoli, 2013 p. 1; *J.H.H. WEILER, Fundamental rights and fundamental boundaries: on standard and values in the protection of human rights, in N. NEUWAHL, A. ROSAS (Eds.), The European Union and Human Rights, Martinus Nijhoff, The Hague, 1995, p. 60 e ss.*

specific incentives or preferential treatments, like the GPSs[12]. These policies have been criticized during the time for several reasons including the fact that not all the trade agreements concluded by the EU contain conditionality clauses[13]. Moreover, these last are often different in drafting and scope and their monitoring and effective implementation have been difficult and uncertain until now[14]. Upstream, third countries and several scholars contest the lack of legitimacy of the EU policy of imposing its values abroad, since it is not a "Human rights Organization"[15]. Considering the purpose of this study, the fact that the conditionality clause policy is a unilateral tool, which requires the respect of certain standards by the third countries but it does not constitute a positive reciprocal obligation for the EU in terms of human rights, has to be emphasized.

The study proposed, indeed, aims to identify the internal human rights obligations of the EU in the conclusion and implementation of trade agreements applicable to disputed and occupied territories. Particularly, thorough the analysis of the practices of the EU Institutions and the EU Court of justice (ECJ) case law, the study tries to answer the following questions: *i)* Is there any human rights content obligation in the definition of a trade agreement? *ii)* If yes, is there any remedy available for the individuals concerned? *iii)* If the agreement contains human rights obligations, could the EU be responsible for

[12] On conditionality clauses, E. BARONCINI, S. CAFARO, C. NOVI, *Le relazioni esterne dell'Unione europea*, Giappichelli, Torino, 2012; L. BARTELS, *Human Rights Conditionality in the EU's International Agreements*, OUP, Oxford, 2005; ID, *Human Rights and Sustainable Development Obligations in the EU's Free Trade* Agreements, 40 *Legal Issue of Economic Integration,* 2013, p. 297; ID, *A Model Human Rights Clause for the EU's International Trade Agreements,* German Institute for Human Rights, 2014; E. FIERRO, *European Union's Approach to Human Rights Conditionality in Practice*, Leiden, Martinus Nijhoff, 2003; E. REBASTI, *Oltre la politica di condizionalita: l'azione esterna dell'Unione europea e il rispetto delle norme imperative di diritto internazionale*, in A. CALIGURI, G. CATALDI, N. NAPOLETANO (a cura di), *La tutela dei diritti umani in Europa*, Padova, 2010, p. 173; S. WOOLCOCK, *European Union economic diplomacy: the role of the EU in external economic relations*, Farnham, Ashgate, 2012. On the topic of GSP see: J. ORBIE, F. DE VILLE, *Core Labour Standards in the GSP Regime of the European Union: Overshadowed by Other Considerations*, in C. FENWICK, T. NOVITZ (eds), *Human Rights at Work: Perspectives on Law and Regulation*, Hart Publishing, 2010, p. 487; J. VOGT, *A Little Less Conversation: The EU and the (Non) Application of Labour Conditionality in the Generalized System of Preferences (GSP)*, 31 *International Journal of Comparative Labour Law and Industrial Relations*, 2015, p. 285.

[13] There are no human rights conditionality clauses in sectorial agreements, which provide for trade liberalisation or cooperation only in respect of certain products or services (i.e. in the sectors of wood, timber and forestry products, fish and fisheries products, agricultural products, wine and spirits, steel and iron, textiles, oil seeds and aviation. This omission was criticised in the European Parliament resolution on the human rights and democracy clause in European Union agreements [2006] OJ C 290E/107, par. 8. That say, it must be noted that many sectorial agreements are drafted in the form of protocols to broader development cooperation agreements that contain clauses on respect for human rights. Conversely, others agreements like the Forest Law Enforcement, Governance and Trade, concluded with several developing countries, and the so-called Voluntary Partnership Agreements establish some human rights and development rules but do not contain any conditionality clause.

[14] N. HACHEZ, *'Essential Elements' clauses in EU Trade Agreements making trade work in a way that helps human rights?*, *cit.*, p. 12.

[15] A. ROSAS, *Is the EU a Human Rights Organisation?*, CLEER Working Paper No 2011/1, http://www.asser.nl/media/1624/cleer-wp-2011–1-rosas.pdf (last visited 18 April 2017); G. DE BÚRCA, *The Road Not Taken: The European Union as a Global Human Rights Actor*, 105 *American Journal of International Law*, 2011, p. 649; A. WILLIAMS, *EU Human Rights Policies: A Study in Irony, OUP, Oxford, 2004.*

potential human rights violations committed by the third part during the implementation of the agreement in an occupied or disputed territory? *iv)* Additionally, could the EU be responsible for damages suffered by legal or physical persons deriving by the implementation of a trade agreement in an occupied or disputed territory?

2. The human rights compliance of the trade agreements concluded by the EU: practice and case law

In spite of the broad set of objectives laid down by Article 5(3), 21 TEU and 207(1) TFEU, the EU does not have a general competence on human rights[16]. Anyway, this does not mean that the EU has no obligations in this subject. On the contrary, as stated by Article 6(3) TEU, fundamental rights guaranteed in the ECHR and common constitutional traditions of Member States are part of the EU Law as general principles, which means that they work as a legitimacy parameter of all the acts adopted by the EU Institutions[17]. The Lisbon Treaty further enriches the legal framework recalled with the EU Charter of Fundamental Rights (Charter), which has the same legal value of the founding Treaties, *ex* Article 6(1) TEU[18]. The binding value of the Charter undoubtedly contributes to strengthen the protection of human rights in terms of legal certainty, even if it does not enlarge the competences of the EU in the field of human rights. The placement of the Charter at the same legal level of the founding Treaties makes necessary that all the acts adopted by the EU Institutions (and by the Member States in the field of applications of the EU law) respect the Charter[19], other than the principle of which at Article 6(3) TEU,

[16] The literature on the EU-making power is huge, see bibliography cited at note 21 and, among the most recent, P. MENGOZZI, *The Innovations Brought About the Lisbon Treaty to the TEU-Making Power Regime Previously resulting from the Case Law of the ECJ,* in *The Global Community,* 2012, p. 513; B. VAN VOOREN, R.A. WESSEL, *EU External Relations Law,* CUP, Cambridge, 2014.

[17] The Hague Programme: Strengthening Freedom, Security and Justice in the EU, Annex I to the Conclusion of the Brussels European Council of 4-5 November 2004, EU Council doc. 14292/04.

[18] The literature on the EU Charter is wide, among the most recent see: P. CELLE, *La tutela dei diritti fondamentali dell'Unione europea*, Aracne, Roma, 2016; S. DE VRIES, U. BERNITZ, S. WEATHERILL, *The EU Charter of Fundamental Rights as a Binding Instrument—Five Years Old and Growing, Hart Publishing, 2015;* G. DI FEDERICO, *The EU Charter of Fundamental Rigths,* Springer, 2011; T. KERIKMÄE (ed), *Protecting HR in the EU*, Springer, 2014.

[19] On the field of application of the Charter see, among many: M. CARTABIA, *Art. 51–Field of Application,* in W.B.T. MOCK, G. DEMURO (Eds.), *Human Rights in Europe. Commentary on the Charter of fundamental rights of the European Union,* Durham, 2010, p. 315; O. DE SCHUTTER, *The Implementation of the Charter of Fundamental Rights in the EU Institutional Framework,* Study for the AFCO Committee of European Parliament, November 2016, p. 13; H. KAILA, *The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States,* in P. CARDONNEL, A. ROSAS, N. WAHL (Eds.), *Constitutionalising the EU Judicial system—Essays in Honour of Pernilla Lindh,* OUP, Oxford–Portland, 2012; K. LENAERTS, *Exploring the limits of the EU Charter of Fundamental Rights*, in *European Constitutional Law Review*, 2012, p. 377; P. MENGOZZI, *La rilevanza giuridica e l'ambito di applicazione della Carta alla luce della giurisprudenza della Corte di giustizia*, in *Studi sull'integrazione europea*, 1/2015, p. 23; V. MORENO-LAX, C. COSTELLO, *The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model*, in S. PEERS (ed), *The EU Charter of Fundamental Rights: A Commentary*, Hart

the customary International law and the International treaties contracted by the EU. For the purposes of this study, it has to be underlined that the international agreements concluded by the EU, because of their legal "mezzanine" status in the EU legal order[20], must comply with the Charter. Therefore, this last now influences the EU Institutions during the negotiation of new agreements, both working as a normative guideline in policy-making and serving as legal parameter to verify the legitimacy and the validity of any of them[21].

Actually, starting from 2003, the Commission introduced a system of integrated impact assessment (IIAs) with the aim to evaluate *ex ante* the economic, social and environmental impact of all legislative, policy proposals, and non-legislative initiatives, including recommendations for the negotiations of international agreements[22]. Even before its entry into force, the Commission has seek to improve the compliance of its legislative proposals with the requirements of the Charter[23]. In this vein, the Guidelines adopted in 2005 were based on a division between economic, social and environmental impacts, paying due attention to the potential effect on the different policy options on human rights guaranteed in the EU law[24]. With the entry into force of the Lisbon Treaty, the structure of the IIAs changes in a significant way. In relation to trade-related initiatives, the 2012 *Strategic Framework on Human Rights and Democracy*[25], adopted by the Council (together with an Action Plan), called on the Commission to incorporate the human rights in all its IIAs. The aim of the Council was the development of a methodology to aid considerations on human

Publishing, 2014; N. PARISI, *Funzione e ruolo della Carta dei diritti fondamentali nel sistema delle fonti alla luce del Trattato di Lisbona*, in *Il Diritto dell'Unione Europea*, 2009, p. 653.

[20] Accordingly, with an established case law, the agreements concluded by the EU with third States or other International Organizations become automatically and in their original value an integral part of the EU legal order. They do not need any act of execution and, in the hierarchy of the sources of EU law, are placed between the primary law (which always prevail) and the secondary law. Cfr. ECJ, case 181/73, *Haegeman*, 30 April 1974 and cases 21-24/72, *International Fruit Co.*, 12 December 1972.

[21] A. ADINOLFI, *La rilevanza esterna della Carta dei diritti fondamentali*, in AA.VV., *Scritti in onore del prof. Giuseppe Tesauro*, Editoriale Scientifica, Napoli, 2014, pp. 27-63; O. DE SCHUTTER, *The Implementation of the Charter, cit.,* p. 10. See also Paragraph 3.

[22] EU COMMISSION, *Impact Assessment*, Commission Communication COM(2002)a 276 final, 5 June 2002; ID, *European Governance: Better Law Making,* Commission Communication COM(2002)b 276 final, 5 June 2002. About, A.K. BÄCKLUND, *Impact assessment in the European Commission – A system with multiple objectives*, in 12(8) *Environmental Science and Policy,* 2009, p. 1077; G.C. ROWE, *Tools for the control of political and administrative agents: Impact assessment and administrative governance in the European Union,* in H.C.H. HOFMANN, AH TURK (eds), *EU Administrative Governance,* Edward Elgar, Cheltenham, 2006, p. 448.

[23] EU COMMISSION, *Compliance with the Charter of Fundamental Rights in Commission legislative proposal*, Commission Communication COM(2005) 172 final, 27 April 2005.

[24] EU COMMISSION, *Impact Assessment Guidelines,* Commission Communication SEC(2005) 791/3, 15 June 2005. See also EU COMMISSION, *Impact Assessment Guidelines,* Commission Communication SEC(2009) 92, 15 January 2009; ID, *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, Commission Communication COM(2010) 573 final, 19 October 2010.

[25] COUNCIL OF THE EU, *EU Strategic Framework and Action Plan on Human Rights and Democracy*, 11855/12, 25 June 2012.

rights situation in third countries in connection with the launch or conclusion of any trade and/or investments agreements. In order to commit with this act, in 2015, the Commission adopted its *Better Regulation Agenda*[26] and a set of new guidelines[27] covering the entire policy cycle. This last defines the mandatory requirements and obligations for each step in the policy cycle, including the conduct of an impact assessments and evaluations. It constitutes a "first level" guidance, while the *Better Regulation Toolbox* – complementary to the Guidelines – is classified as "second level" guidance to assist in the application of the *Better Regulation Guidelines*. Importantly, the Tool#24[28], titled "Fundamental and Human rights", prescribes that the need to ensure the compliance with and the promotion of fundamental rights is not limited to legislative proposals but should be considered in all Commission acts and initiatives. To this aim, it sets out a structured approach to check the compliance with the Charter. Moreover, in relation to the initiatives with effect outside of the EU, the document recalled establishes that the assessment of the impacts should contain additional considerations based on the International human rights instruments other than the Charter. In order to help with the examination of the potential impacts of a trade related initiative on human rights in both the EU and the partner countries, the Commission's DG Trade developed its in-house *Guidelines on the analysis of HRI on IAs for trade-related policy initiatives*[29]. These Guidelines focuses on the methodology to be followed when carrying out IAs, which are conducted before the Commission proposal for new policy initiatives, such as the opening of a trade negotiation; and SIAs (Sustainable Impact Assessments), which are carried out in parallel with major bilateral and multilateral trade negotiations. Importantly, the document establishes that *"the respect for the Charter in Commission acts and initiatives is a binding legal requirement in relation to both internal policies and external action*". The document restates that, when considering the impact of trade-related initiatives on human rights, the assessment must examine the impact of the measures proposed on the human rights obligations under both the Charter and the International law, including the core UN Human Rights Conventions, the fundamental ILO Conventions, the ECHR, other regional human rights conventions and, when appropriate, the customary International law. In order to show how the IAs should be developed, the document sets out the several steps to carry out.

[26] EU COMMISSION, *Better regulation for better results - An EU agenda*, Commission Communication COM(2015) 215 final, 19 May 2015.
[27] EU COMMISSION, *Better Regulation Guidelines*, Commission Staff Working Document, SWD(2015) 111 final, 19 May 2015 and Id, *Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments*, Commission Communication, Commission Staff Working Document, SWD(2015) 567 final, 6 May 2015.
[28] Tool#24 Fundamental Rights & Human Rights, available at http://ec.europa.eu/smart-regulation/guidelines/tool_24_en.htm, (last visited April 18, 2017).
[29] The document is available here (last visited November 16, 2017).

The new *EU Action Plan on HR and Democracy 2015-2019*[30] underlines again that the EU will integrate the promotion of human rights into its trade and investment policies. So far as relevant, the most significant objective established by the last *Action Plan* in the field of trade and investment is to continue in the development of a robust and methodologically sound approach to the analysis of human rights impacts. This should include *ex-ante* impact assessments, sustainability impact assessments and ex-post evaluations, exploring ways to extend the existing quantitative analysis in assessing the impact of trade and investment initiatives on human rights. In addition, the *Action Plan* sets among its goals the strengthening in the contribution of the IAs to the respect of human rights, with a particular emphasis on proposals, policies and interventions with external effects[31].

The *Action Plan* has to be read together with the following Commission Communication *Trade for all*[32], adopted in October 2015, which sets out a general strategy on external trade. Specifically, the Commission describes an approach, which involves the use of trade agreements and trade preference programmes as levers to promote abroad the EU values. In line with the principles of the *Better regulation agenda,* the recalled Communication establishes that the initiatives in the field of trade policy are subject to an impact assessment. During the negotiation of a new trade agreement is required the conduct of an in-depth analysis of the potential, social and environmental impacts produced by the implementation of the agreement concerned. Among others, human rights and development in the third State involved have to be taken in due consideration. The Commission proposes also an effective analyse of the human rights impact deriving by the implementation of the agreements, carrying out en evaluations *ex post* based on its *Guidelines*.

These documents show the importance of the link between human rights and trade policy among the EU Institutions. The EU has the duty to secure the compatibility of each trade agreement with its primary law, which prescribes the respect of human rights as secured by the Charter and principles based on the

[30] COUNCIL OF THE EU, *The Action Plan on Human Rights and Democracy 2015-2019,* Foreign Affairs Council Conclusions 10897/15, Brussels, 20 July 2015.

[31] The goal is structured as follows: *a)* Building on the existing assessment of the impact of EU actions on fundamental rights, continue to improve the incorporation of human rights in Commission impact assessments for proposals with external effect and likely significant impacts on human rights; developing further guidance on the analysis of human rights impacts, strengthening the expertise and capacities for this type of analysis and ensuring robust consultations of relevant stakeholder groups exposed to major human rights risks. *b)* Incorporate analysis of human rights impacts in Commission ex post evaluations of EU interventions with external effects. *c)* Ensure policy coherence between the analysis of human rights impacts undertaken in Impact Assessments and other human rights related policy instruments, including human rights country strategies, human rights dialogues and budget support/programming of financing instruments, with a view to addressing the identified potential negative impacts and maximise positive ones.

[32] EU COMMISSION, *Trade for All. Towards a more responsible trade and investment policy*, Commission Communication, 2015.

International law, the ECHR and the common constitution traditions of the EU Member States. With the aim to fulfil this obligation, the Commission elaborates a Human Rights Impact Assessment (HRIA) before the conclusion of new trade agreements, in order to define the consequence deriving from their implementation both in the EU and in the third State involved. Of course, the EU primary law, such us the EU secondary law, does not prescribed the adoption of this document, although recommended by the Council. The Commission itself, instead, through acts of *soft law*, affirms its commitment in this regard. Particularly, after the Lisbon Treaty, the Commission adopted in 2015 two main communications, namely the *Better regulation guidelines* and the *Trade for all*. Strictly connected with the first one are the internal Guidelines on the analysis of HRIAs and IAs for trade-related policy initiatives. The communications are atypical acts of the Commission, not provided for in the TFEU, but frequently used by this Institution. While not binding, these acts may create a legitimate expectation and, in some cases, produce legal effects to third parties. Considering their content, the two recalled Communications can be described as "informative", which means that they are intended to foster the dialogue among the Institutions about certain topics and matters in which prefigures the adoption of legislative acts. Considering that, the lack of the HRIAs or the IAs does not seem could be regarded as a cause of nullity of the agreement, despite their indisputable importance. Indeed, a recent decision adopted by the EU Ombudsman established that the unjustified refusal of the Commission to carry out HRIAs for the EU-Vietnam Free Trade Agreement during its negotiations constitutes – at least – a case of maladministration[33].

In relation to the substantial obligations on human rights matter, the EU General Court (GC) – in its annulled decision *Polisario I*[34] – established, in accordance with the *EU Action Plan on HR and Democracy,* that, before the conclusion of a trade agreement, *"the Council must examine, carefully and impartially, all the relevant facts in order to ensure that the production of goods for export is not conducted to the detriment of the population of the territory concerned, or entails infringements of fundamental rights"*. Importantly, the GC explicitly recalled the rights protected by the Charter that have to be secured, namely: "*the rights to human dignity, to life and to the integrity of the person (Article 1 to 3 Charter), the prohibition of slavery and forced labour (Article 5 Charter), the freedom to choose an occupation and right to engage in work (Article 15 Charter), the freedom to conduct a business (Article 16 Charter), the right to property (Article 17 Charter), the right to fair and just working conditions and the prohibition of child labour and protection of young people at work (Article 31 and 32 Charter)"*[35]. The absence of this exam led the GC to annul the Council Decision 2012/497/EU of 8 March 2012 on the conclusion of the EU-

[33] EU OMBUDSMAN, Case 1409/2014/MHZ, Recommendation of 26 March 2015, Final Decision on 26 February 2016.
[34] ECJ, case T-512/12, *Front Polisario* v. *Council (Polisario I),* 10 December 2015.
[35] Cfr. ECJ, *Polisario I*, *cit.*, par. 228.

Morocco Liberalisation Agreement[36] as far as it approves the application of that agreement to the Western Sahara[37].

The Court of justice (ECJ) decision *Polisario II*[38] sets aside this decision without any reference to the EU obligations on human rights matters. The decision of the GC – although questionable for other reasons[39] – had the merit to bind the Council at the respect of procedural and substantial obligations aimed directly at the protection of the populations' interests. In *Polisario II,* the ECJ avoids the topic of the EU obligations on human rights in the conclusion of trade agreements, so leaving open the question about the extension of this obligation. Anyway, it is certainly out of doubts that the EU law establishes that the trade policy must be compatible with the human rights standards prescribed by itself.

3. The EU human rights obligations during the implementation of trade agreements and the individual remedies

As seen, according with the relevant EU law, the EU Institutions are in a legal obligation to respect the EU founding values and the Charter while adopting a new trade agreement. Therefore, if it is not questionable the subsistence of a content obligation in this respect, less clear seems to be the EU responsibilities coming from this obligation.

Considering the EU law, it is doubtful that the Charter confers rights upon people of third countries who do not live and work in the EU, but who are *indirectly* affected by *the* EU policies and its treaty-making power. In other words, even if an EU act may indirectly affect the subjective position of a person living in a third country, this does not automatically imply that the latter can claim the violation of her rights under the Charter before the ECJ[40].

Notwithstanding, further considerations of substantial and procedural nature need to be addressed. Regarding the substantial point of view, the already recalled decision on *Polisario I* called for an active role of the EU Council during the implementation of the EU-Morocco Agreement on the territory of Western Sahara, since the agreement could encourage the violations of Saharawi people rights, above all, its human rights and the illegal exploitations of natural resources. The GC affirmed that, because of the sensitivity of the situation of that disputed territory, the EU Council has to ensure that the exploitation of the natural resources from the Western Sahara conducted by Moroccan entities must go to the benefit of the

[36] 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, OJ [2012] L241/4.
[37] See Paragraph 4.
[38] ECJ, case C-104/16 P, *Council* v. *Front Polisario, (Polisario II)*, 21 December 2016.
[39] See Paragraph 4.
[40] See Paragraph 3.1 and the bibliography cited.

Saharawi people. In the same vein, the EU Council should also examine the relevant facts in order to ensure that the production of goods for exportation in the EU is not directed in detriment of the population, or entails infringements of fundamental rights as prescribed in the Charter.

This represents a very important statement in the process of development of the human rights internal duties in the framework of the CCP. Anyway, such form of active control of the EU Institutions on the activities led by Morocco in order to be legitimate, needs to be prescribed in the agreement concerned and, therefore, it has to be preliminary accepted by the third Part, in this case the Kingdom of Morocco. Moreover, this opens two furthers arguments that will not be addressed in this paper: namely, the proper instruments that should be implemented and the actors that should be involved in order to fulfil this control during the implementation of the agreement. Secondly, the legal limits of the EU in performing this control. Specifically, it is not still clear how far the human rights obligations could be extended in the field of EU external actions, by virtue of its competences.

In relation to the procedural considerations, it must be taken into account the fact that, in the EU judicial system, the natural and legal persons are entitled of a limited right to standing before the ECJ. According with Article 263 TFEU, an action of annulment against an act with which an International Agreement has been concluded can be brought before the ECJ by the EU Institutions, while, the individuals have to demonstrate to be concerned *directly* and *individually* by the contested agreement. In general, according to a well-established case law, an act directly concerns the appellant if the breach suffered has its source in the contested act, which produces its effects on the applicant without the need for further legislative or executive action[41]. With regard to the adverb "individually", the ECJ stated in its *Plaumann*[42] decision that "*persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes, which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed*". Although criticized by many scholars and some of its General Advocates, the ECJ maintained its restrictive approach affirming the entirety of the community judicial system. However, in its decision on the case *Union de Pequeños Agricultores*[43], while departing from the Opinion of the Advocate General Jacobs, the ECJ allowed the possibility of conceiving a system of control of acts of general scope different from that laid down in the Treaties and less restrictive for the individual. However, the ECJ rightly underlined that it does not have the power to act autonomously in this direction, reiterating the necessary

[41] Among many, ECJ, case 62/70, *Bock*, 23 November 1971, case 106/77, *Simmenthal*, 9 March 1978 and more recently, ECJ, case C-15/06 P, *Regione Sicialiana* v. *Commission,* 22 March 2007; case C-445/07 P, *Ente per le Ville vesuviane* v. *Commission*, 10 September 2009.

[42] ECJ, case 25/62, *Plaumann & Co* v. *Commission*, 15 July 1963.

[43] ECJ, case C-50/00 P, *Union de Pequeños Agricultores,* 25 July 2002.

intervention of the Member States by introducing appropriate amendments to the founding Treaties. These last have been finally modified with the Lisbon Treaty, according to which, "regulatory act" may form the subject of an annulment action before brought by nature and legal persons if them are directly concerned by the regulatory act and it does not entail implementing measures[44].

In case of international agreements between the EU and third countries, the demonstration of being directly and individually concerned is particularly hard since; first, it is necessary that the norms of the agreement in question have direct effect on the applicants. The attitude of an international agreement to produce direct effects has been defined by the ECJ through the application of certain criteria identified in its case law. Since its *Kupferberg*[45] decision, the ECJ tends to apply the criteria set out in Article 31 of the 1969 Vienna Convention on the Law of Treaties and, on that basis, first, it assesses the nature and purpose of the agreement thereby establishing its aptitude as a whole to produce direct effects and, then, it values the single provisions of the agreement in question. Schematically, the ECJ develops its analysis along two levels: *i)* a general analysis of the agreement in order to ascertain its aptitude to produce direct effects in relation to its structure, nature and purposes; *ii)* analysis of the single provision invoked, considering its character – precise and unconditional – and the context in which it is inserted. In the subsequent *International Fruit*[46] judgment, the ECJ found in the elements of flexibility present in an international agreement the factors capable of excluding its ability to produce direct effects. Among them, the ECJ indicated: *i)* the provision of specific dispute settlement mechanisms; *ii)* the introduction of safeguard or derogation clauses to enable the Contracting Parties to suspend unilaterally, in certain circumstances, the application of the Agreement. Concluding, therefore, the direct effect of international agreements is recognized if they have clear and precise obligations with regard to terms, subject and nature and do not require the adoption of further implementing acts[47].

The ECJ did not recognize the abovementioned characteristics in many agreements concluded by the EC and the EU. This happens in relation to the GATT, because of the flexibility of several provisions and numerous exceptions contained therein. Thus, starting with the *International Fruit* decision, the ECJ always denies the direct applicability of that agreement and its aptitude to create individual rights. Equally, the ECJ excludes that WTO agreements produce direct effects by virtue of their object and purpose and because of the lack of reciprocity during their negotiation and implementation. The recognition of direct

[44] Art. 263(4) Treaty FEU. About the definition of regulatory act see ECJ, case Case T-18/10, *Inuit Tapirit Kanatami and others* v. *Council and Parliament,* 6 September 2011; case T-262/10, *Microban International Ltd e Microban (Europe) Ltd* v. *Commission,* 25 October 2011; case C-583/11 P, *Inuit Tapiriit Kanatami,* 17 October 2013 and case C-274/12, *Telefónica SA,* 19 December 2013.

[45] ECJ, case 104/81, *Kupferberg,* 26 October 1982.

[46] ECJ, joined cases from 21/72 to 24/72, *International Fruit Company*, 12 December 1972.

[47] See ECJ, case C-240/09, *Lesoochranárske zoskupenie*, 8 March 2011.

effect of WTO rules in the specific case, without reciprocity, would pose the risk of imbalance application[48].

Interestingly, departing from this restrictive approach, the GC, in *Polisario I,* admitted that the EU-Morocco liberalization agreement has provisions containing clear and precise obligations, not subject, in their implementation or in their effects, to the adoption of any subsequent measures. Those provisions[49], therefore, produce direct effects on the legal position of the whole territory to which the agreement applies, including the territory of Western Sahara controlled by Morocco. The effects of those provisions directly concern both the Kingdom of Morocco and the Front Polisario, since this last is the only other participant in the UN-led negotiations with the Kingdom of Morocco with a view to determining the definitive international *status* of Western Sahara. This particular factual situation distinguishes the Front Polisario from all other persons, therefore, it must be regarded as individually concerned by the contested decision. Based on this interpretation, the GC admitted the right to standing of the Front Polisario and its right to bring an action of annulment against the EU Council decision authorizing the conclusion of the contested agreement. The ECJ, on its decision *Polisario II,* limited its analysis on the territorial scope of the agreement contested and, establishing that this last does not apply on the territory of Western Sahara, removes the necessary precondition of which at Article 263(4) TFEU to bring an action of annulment by Front Polisario[50].

Given these individual limitations in the EU judicial system, it is important to look at other remedies available for natural and legal person. In this perspective, the ECJ decision on *Ledra*[51] case appears particularly interesting. The decision recalled concerns an action for extra-contractual liability *ex* Article

[48] ECJ, case C-149/96, *Portugal* v. *Council*, 23 November 1999. About the international agreements effects in the EU legal order see, among many, J.O. BERKEY, *The European ECJ and GATT: A Question Worth Revisiting*, 9 *European Journal of International Law*, 1998, p. 626; C.A. BRADLEY, *Intent, Presumptions and Non Self-executing Treaties*, 102 *American Journal of International Law*, 2008, p. 540; L. DANIELE, *Le relazioni esterne dell'Unione europea nel nuovo millennio,* Giuffrè, Milano, 2001, p. 69; B. DE WITTE, *Direct Effect, Primacy and the Nature of the Legal Order*, in G. De Búrca, P. Craig (eds), *The Evolution of European Union Law,* 2011, p. 323; C. Eckes, *International Law as Law of the EU: The Role of the ECJ*, CLEER Working Papers, 2010; D. EDWARD, *Direct Effect: Myth, Mess or Mystery*, 2 *Diritto dell'Unione Europea,* 2003, p. 215; P. EECKHOUT, *EU External Relations Law,* OUP, Oxford, 2011; M.P. MADURO, L. AZOULAI (eds), *The Past and the Future of European Union Law: Revisiting the Classics on the 50th Anniversary of the Rome Treaty,* 2008; F. MARTINES, *Direct Effect of International Agreements of European Union,* in 25 *European Journal of International Law,* 1/2014, p. 129; M. MENDEZ, *The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques,* 2010; E. CANNIZZARO, P. PALCHETTI, R.A. WESSEL (eds), *International Law as Law of the European Union,*2011; C.M. VASQUEZ, *Judicial Enforcement of Treaties: Self-Execution and Related Doctrines*, 100 *America Society of International Law Proceedings*, 2006, p. 439.

[49] Specifically the provisions establishing the conditions under which agricultural and fishery products may be exported from that territory to the EU or may be imported from the EU into the territory in question. For example, see Protocol 1, art. 1, 5, and Protocol 2, art. 2 of the EU-Morocco liberalization agreement.

[50] See Paragraph 4.

[51] Cfr. ECJ (GC), joined cases C-8/15 P to C-10/15 P, 20 September 2016. See S. PEERS, *Towards a New Form of EU Law? The Use of EU Institutions Outside the EU Legal Framework*, in *European Constitutional Law Review*, 2013, p. 5.

340 TFEU. The decision was about the effects of the financial measures decided by the EU Commission (together with the ECB and the IMF) and the Cypriot authorities, following their request of financial assistant to the Eurogroup, in response to the bank crisis. The application of the measures agreed with the Cypriot authorities resulted in a substantial reduction in the deposits values of several clients of the banks involved: both Cypriot individuals and companies established in Cyprus. Some of them brought actions before the GC to obtain an order requiring the EU Commission and the ECB to pay them a compensation equivalent to the diminution in value of their deposits, allegedly suffered in consequence of the application of the financial measures agreed[52]. Since the GC dismissed the actions, the applicants appealed to the ECJ seeking to have the orders of the GC set aside. In its decision, the Court approved the request but decided on the merits not to uphold those actions, since the conditions necessary to recognize the liability of the EU Commission were not both satisfied.

Leaving aside the conclusion, the ECJ stated that *any* action of the EU Institutions causing damages to *individuals*, in violation of their human rights, gives them the right to act before the ECJ with an extra-contractual action. Importantly, in relation to the *extra-contractual* liability, the Court affirmed that "*in the context of the adoption of a memorandum of understanding […], the Commission is bound, under both Article 17(1) TEU, which confers upon it the general task of overseeing the application of EU law, and Article 13(3) and (4) of the ESM Treaty, which requires it to ensure that the memorandum of understanding concluded by the ESM are consistent with EU law, [including] the fundamental rights guaranteed by the Charter*"[53].

The decision opens unexplored scenarios even in the field of the human rights protection during the implementation of trade agreements on occupied and disputed territories. Particularly, it could offer the opportunity to claim for non-contractual liability in the field of CCP. Depending on the real circumstances, in case of violations of the Charter, deriving from the implementation of a trade agreement, individuals and companies concerned could try to bring an action for extra-contractual liability before the ECJ. As known, the EU law disciplines in a strict way the non-contractual liability of its Institutions. It requires the cumulative presence of three conditions, namely: *i)* the claimant has suffered damage; *ii)* the Institutions or their agents have acted illegally under EU law; *iii)* there is a direct causal link between the damage suffered by the claimant and the illegal act of the EU Institutions or their agents. In case of legislative act, which implies decisions of economic policy, the ECJ elaborated even more strict criteria. Importantly, the EU responsibility may subsist only if the suffered damage derives by a *serious violation* of a superior rule aimed at the protection of individuals. Bigger is the discretion of the

[52] Also, seven Cypriot individuals brought actions before the GC for annulment of the Euro-group statement of 25 March 2013 concerning the restructuring of the Cypriot banking sector.
[53] Cfr. ECJ (GC), Joined Cases C-8/15 P to C-10/15 P, *cit.*, par. 67.

Institution involved, bigger has to be the violation in order to integrate the liability of the EU. The ECJ does not exclude completely the responsibility of the EU in case of wrongful conduct of a national authority if this last is connected to a serious negligence of the EU Institutions in the exercise of their surveillance powers.

Considering the trade agreements concluded by the EU, natural and legal persons could try to act against the EU claiming that its Institutions did not taken in due consideration the negative impact produced by a trade agreement on the human rights of the population leaving in a disputed or occupied territory. For example, because of their negligence in the use of proper technical documents like HRIAs or IAs before the conclusion of the agreement; likewise in the activation of surveillance mechanisms provided by the agreement itself during its implementation[54]. Despite that, the attempt to bring a request of compensation following a violation of human rights deriving from the implementation of a trade agreement could be the opportunity for the ECJ to rule on potential material EU obligations toward peoples of third countries. Taking as example the case of Saharawi People, after the ECJ decision *Polisario II,* the Front Polisario could try to start an action for extra-contractual liability before the GC, seeking a compensation for the damages suffered by the Saharawi People deriving from the implementation of the EU-Morocco liberalization agreement on the Western Sahara. In order to show the existence of an unlawful conduct of the EU Institutions, the Front Polisario could lean on the GC decision *Polisario I*, which established the legal duty of the EU Institutions to ensure that production and export of goods from the Western Sahara by Morocco is conducted for the benefits of the population, respecting its fundamental rights[55].

With regard to the extra-judicial remedies, the individuals concerned may contact the European Ombudsman, which has the duty to investigate on cases of maladministration of EU Institutions and bodies in the field of international trade and CCP. Once ascertained a case of maladministration, the Ombudsman tries a conciliation between the Institution involved and the complainant in order to remove the case, satisficing the complainant. In case of negative outcome, the Ombudsman transmits copy of its recommendation to the EU Parliament and informs the claimants. Lodge a complaint before the European Ombudsman has certainly relevant limits: its report are not binding for the Institutions involved and it can receive denounces only from EU citizens and residents, businesses, NGOs or other bodies with a registered office in the UE.

[54] The same approach could be developed also in the framework of the development cooperation agreements. For example, a voluntary failure in the activation of HRs conditionality clauses or social-labour standard clauses could maybe be advanced as a case of serious negligence of the EU Institutions in the exercise of their surveillance powers, although, in these cases would be particularly hard to prove the existence of the necessary conditions to integrate the EU extra-contractual liability.

[55] See the analysis at paragraph 4.

Despite these considerations, the role of the European Ombudsman is gaining considerable importance in the resolution of cases of maladministration, creating a positive link between the EU Institutions and natural and legal persons. As already seen, with a quite recent recommendation, it has established that the failure of the Commission to carry out proper HRIAs before the conclusion of the negotiation for the agreement between EU and Vietnam was a case of maladministration. Its role in the definition of the EU obligations on human rights in the framework of the CCP, therefore, can be important.

Finally, Article 227 TFEU establishes that any EU citizen and any natural or legal person residing or having its registered office in a Member State shall have the right to address, individually or in association, a petition to the European Parliament on a matter which comes within the Union's fields of activity and which affects him, her or it directly. A permanent commission examines the petitions received and elaborate a report, deciding on the merit. Afterward it transmits its outcomes to the Parliament with the right to ask it to send a copy of its report to the Institution involved. The right of submit a petition is the last instrument at disposal of individual and legal person to communicate with the Parliament and denounce any kind of effective or potential human rights violation occurring in the framework of the CCP.

4. The ECJ case law on trade agreements applicable to disputed and occupied territories: which role for the human rights?

This paragraph analyses diachronically the case law of the ECJ on trade agreements applicable in disputed and occupied territories with the aim to understand which role has been given to the fundamental rights until now.

The ECJ owns the monopoly in the control of the correct and uniform application and interpretation of EU law. In order to achieve this goal, Article 19 Treaty EU states that ECJ rules on actions brought by Member States, EU Institutions and natural or legal persons and gives preliminary rulings on interpretation and validity of EU law when asked by national courts of Member States. Since EU trade agreements are part of the EU law, the ECJ has full control on their compatibility with the EU primary law, included the Charter[56].

[56] On the ECJ competence in this field see, among others, E. BARONCINI, *L'Unione europea e la procedura di conclusione degli accordi internazionali dopo il Trattato di Lisbona*, in 5 *Cuadernos de Derecho Transnacional*, 1/2013, pp. 5-37; P. EECKHOUT, *The Courts and the International Agreements,* in P. EECKHOUT (ed), *The EU External Relations,* OUP, Oxford, 2011.

In the history of the European integration, it has been called several times to decide on questions related to trade agreements and their application on disputed and occupied territories[57]. Analysing these decisions, it is possible distinguish the use of two main alternative approaches, namely, the *practical-trade* and the *political-sovereignty*, in order to define the scope of the trade agreements in question. Briefly, the first one tends to consider the questions related to the rules of origin from a commercial perspective, therefore resolving the relevant questions in accordance with rules of international trade, that emphasize factors like the *de facto* control, jurisdiction and responsibility. On the contrary, the *political-sovereignty* approach gives particular importance to political factors like sovereignty and recognition, using trade as an instrument of foreign policy[58].

In its case law, the ECJ makes also a considerable use of the rules of origin to resolve the case brought before it. Indeed, although their nature of technical rules of international trade law, they can become relevant in case of disputed and occupied territories and used for both commercial and political objectives. The rules of origin are essential elements of any preferential trading regime. They identify the products that – because of their origin – benefit from the favourable treatments provide for in the trade agreement with regard to their importation and commercialization in the EU.

The ECJ followed a *political-sovereign* approach in its *Anastasiou I* decision, concerning the certificates of origin of products manufactured in the disputed territory of Northern Cyprus, likewise in its *Brita* decision about the application of the rule of origin on goods produced in Israeli settlements in West Bank and Gaza Strip.

The case *Anastasiou I*[59] tried origin by a preliminary request of a British Court in order to understand if the EC-Republic of Cyprus Association Agreement[60], signed in 1972, read together with the directive 77/93/EEC[61], admitted the acceptance of movement and phytosanitary certificates issued by the authorities of the Turkish Republic of Northern Cyprus (TRNC), for the products imported from Northern Cyprus and the UN Buffer Zone. As known, in 1974 Turkish armed forces occupied *de facto*

[57] About the relationships between the EU/EC and occupied/disputed territories see G. HARPAZ, E. RUBINSON, *The Interface between Trade, Law and Politics and the Erosion of Normative Power Europe: Comment on Brita,* in 35 *European Law Review,* 2010, p. 551; E. KONTOROVICH, *Economic Dealings with Occupied Territories,* in 53 *Columbia Journal of Transnational Law,* 2015, p. 584.

[58] See J. COYLE, *Rules of Origin as Instruments for Foreign Economic Policy: An Analysis of the Integrated Sourcing Initiative in the US-Singapore Free Trade Agreement*, in 29 *Yale Journal of International Law,* 2004; M. HIRSCH, *Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip,* in 26 *Fordham International Law Journal* 3/2002, p. 572.

[59] ECJ, Case C-432/92, *The Queen v. Minister of Agriculture (Anastasiou I)*, 5 July 1994.

[60] Agreement annexed to Council Regulation (EEC) No 1246/73 of 14 May 1973 (OJ 1973 L 133, p. 1, the 'EEC-Cyprus Agreement').

[61] Relative to the protective measures against the introduction into Member States of organisms harmful to plant or plant products.

the north partition of the Cyprus Island. Following this partition, the authorities of the Republic of Cyprus lost the control on the occupied territory, where afterward had been declared the TRNC, not recognized by the EC, the Member States and the International Community in general. Considering the special situation of Cyprus, the UK and the EC Commission continued accepting the certificates issued by the authorities of the TRNC, with the aim to protect the commercial interests of the whole population of Cyprus. Especially, they acted in the interest of the population living in the TRNC, for who was almost impossible obtaining the necessary certificates from the Cyprus authorities. Moreover, they found that practice in line with the principle of non-discrimination between Cypriot nationals and companies, stated at Article 5 of the Association Agreement concerned.

Conversely, the GC resolved the question basing its decision on the principle of mutual trust – a fundamental principle of European integration – between the competent authorities of the exporting State, affirming that the acceptance of certificates not issued by the Republic of Cyprus would constitute a denial of the object and purpose of the system established in the Association Agreement concerned. Rightly, the GC noted that a system of that kind could not function properly unless the procedures for administrative cooperation are strictly complied with. Therefore, such cooperation is excluded with the authorities of an entity like the one established in the northern part of Cyprus, not recognized by the Community neither by the Member States[62].

Although not mentioned, the GC seems guided by the autonomy principle in the adoption of its decision that, indeed, is based on a fundamental principle of EU law. Afterwards, the GC established the non-relevance of Article 5 EC-Republic of Cyprus Association Agreement in order to deny the admissibility of certificates from the TRNC. The prohibition on discrimination between nationals or companies of Cyprus imposed by Article 5 cannot lead to a departure from the fundamental rules of that Agreement which determines its operation in the manner intended by the contracting Parties. Efforts undertaken to enable the population of Cyprus to benefit from the advantages of the Association Agreement must be pursued within the framework of the Agreement and with all due consideration for the legitimate interests of the other Contracting Party. The GC pointed out that, *"since Article 5 appears in an international Agreement, the EC must take particular account of its partner to the Agreement when interpreting and applying it*". Therefore, it follows from the contractual obligations of the EC to refrain from jeopardizing the achievement of the aims of the Agreement that no means of proof of the origin of products other than that expressly provided for in the 1977 Protocol attached may be *unilaterally adopted* by the Community. The GC concluded establishing that *"any alternative means of proof must be discussed and decided upon by the Community*

[62] ECJ, Case C-432/92, *cit.*, par. 38-40.

and the Republic of Cyprus within the framework of the institutions established pursuant to the Association Agreement, and then applied in a uniform manner by the two Contracting Parties". The GC invoked the Vienna Convention on the Law of Treaties only to support its conclusion about, underlining that the EC cannot – in any event – interfere in the internal affairs of Cyprus, establishing that the problems deriving from the *de facto* partition of the island had to be resolved exclusively by the Republic of Cyprus, the only internationally recognized.

In adopting this decision, the GC excluded that the situation of Cyprus was comparable with that of Namibia and, therefore, it excluded the applicability of the interpretation given by the ICJ in its Advisory Opinion[63] for which a policy of non-recognition should not result in depriving the people of Cyprus of any advantages conferred by the treaty. About, the GC sustained that these advantages have on several occasions been accessible to the whole population of Cyprus. In particular, the Court recalled the financial protocols concluded pursuant to the Agreement, which were administered in such a way that the resources made available by the EC were used for purposes that are equally for the benefit of the population established in the northern part of Cyprus.

The interpretation followed by the GC – based on the principle of cooperation and mutual reliance – has to be shared in this concrete case. Anyway, it is important to underline that the GC neglected the real consequences deriving from its decision on the population living in the Northern Cyprus, in terms of economic damages and social conditions. Conversely, the GC gave particular importance to the relationship between the EC and Cyprus, also aligning itself with the position of the International Community. Differently, in the following decision relating to the situation of Cyprus, the ECJ set aside this decision trying to find a compromise able to secure both the principle of cooperation and the economic interests of the entire population of the Island.

In the decision *Anastasiou II*[64], indeed, the ECJ appeared most inspired by a *practical-trade* approach, with the aim to protect the full application of the EC-Republic of Cyprus Association Agreement and, therefore, the economic interests of the EU. Following the release of the *Anastasiou I* decision, the exporters who, until then, had been hipping citrus fruits from the Northern Cyprus to the UK under cover of phytosanitary certificates issued by the TRKC, concluded an agreement with a Turkish company. Thanks to this agreement, the ships carrying the citrus fruits from TRKC would stop by a Turkish port where Turkish officials would inspected the cargos and issued the certificates, before they continued their route to the UK. Against this practice, Anastasiou and other companies applied for an order restraining

[63] *ICJ, 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.*
[64] ECJ, case C-219/98, *Anastasiou and others (Anastasiou II),* 4 July 2000.

the UK Minister from allowing citrus fruits imported in those circumstances into the EU. The national Court of Appeal refused the order sought and the applicants appealed against that decision to the House of Lords, which decided to ask the ECJ the correct interpretation of the EC-Republic of Cyprus Association Agreement and the directive 77/93/CEE. Essentially, the House of Lords asked the ECJ whether, and if so, under what conditions, the directive permits a Member State to allow into its territory plants originating in a non-member State, accompanied only by a phytosanitary certificate drawn up by the authorities of a non-member consignor country, which is not the country of origin.

The parameter on which the ECJ based its decision was the goal of the directive recalled, namely, the protection of the EC territory from the introduction and spread of organisms harmful to plants. The ECJ then specified that this phytosanitary certificate could be validly issued by the authority of a third State, other than the country of origin, in the case in which the plants are not subject to special requirements that can be satisfied only in their place of origin. Of course, in order to pursue the goal of the directive, the phytosanitary certificates have to be released by an authority of a State recognized by the EC. Therefore, the possibility of issuing valid phytosanitary certificates must be reserved to the non-member countries from which the plants were exported to the Community, after having entered in the territory of those countries and having remained there for such time and under such conditions as to enable the proper checks to be completed.

The ECJ did not mention the protection of economic interests of agricultures and merchants working in the occupied territory of Northern Cyprus, anyway, they took advantage by this decision considering that it was almost impossible to obtain certificates from the authorities of Cyprus. With this solution, the ECJ avoid a block of trade relationship between the EC and the Northern Cyprus causing, above all, a great damage to the local economy. In doing so, the ECJ explicitly denied the use of a *political-sovereignty* approach to resolve the question: it did not take in any consideration the opinion of the Cyprus Republic – its official commercial partner – neither of the International Community, which do not still recognize the TRKC. The Court did not develop any consideration on the labelling of the fruits concerned, limiting its answer on the release of phytosanitary certificates. Interestingly, it answered the House of Lords that *"the Member State concerned [does not have] to take in consideration the reasons for which a phytosanitary certificate has not been issued in the country of origin, when it determines the validity of the certificate with the requirements of the Directive"*. In other words, the ECJ stated that the EC and its Member States do not have to consider the fact that the third country releasing the phytosanitary certificates is also the International actor that occupies and *de facto* controls the territory of Northern Cyprus through the TRKC.

Quite the opposite is the orientation of the ECJ in its decision on *Brita*[65], with which it adopted the strongest *political-sovereignty* approach in relation to the situation of Israel and its settlement in the West Bank, Gaza Strips, East Jerusalem and Golan Heights. The decision is placed in the diplomatic-political framework between EU and Israel relating the extension of the Israeli boards and the process of pacification in the Middle East[66].

Briefly, the first Association Agreement between EC and Israel[67] - dated 1975 - did not contain any reference to the products coming from the Israeli settlements[68]. Afterwards, in 1995, EC and Israel signed a second Association Agreement[69], which does not contain any indication about its territorial scope, but establishes political provisions about the conduct of a political dialogue and their commitment to share values on democracy and human rights. Doing so, the EC introduced a legitimate link between political requirements and economic benefits, with regard to Israel's activity in its settlements. The EC-Israel Association Agreement entered into force in 2000 but, in the meanwhile, an *interim* agreement ensured the continuity of the free trade area between the Parties[70]. From 1975 to 1995, therefore, the origin of goods exported from Israel to the EU was not in question, and the goods originating in the Israeli settlements enjoyed the concessions embodied in the 1975 EC-Israel Agreement. In 1996, the EC concluded with PLO an *Interim* Association Agreement[71], ratified and entered into force in 1997. Unlike the EC-Israel Association Agreements, the EC-PLO Association Agreement explicitly includes the West Bank and the Gaza Strip in its territorial field of application[72]. Although it does not refers to the territories of the Golan Heights and East Jerusalem, the EC – and, afterwards the EU – started a political-diplomatic confront with Israel on the *status* of the goods originating in these territories. After several diplomatic

65 ECJ (GC), case C-386/08, *Brita*, 25 February 2010.

66 About the relationship between EU and Israel see: S. ANIVERY, W. WEIDENFELD (eds), *Integration and Identity: Challenges to Europe and Israel,* Verlag, Bonn, 1999; I. GREILSAMMER, J.H.H. WEILER (eds), *Europe and Israel: Troubled Neighbours*, Walter de Gruyter, 1998; G. HARPAZ, *A Proposed Model for Enhanced EU-Israeli Relations: Prevailing Legal Arrangements and Prospective Juridical Challenges,* Research Paper N. 4-06, International Law Forum of the Hebrew University of Jerusalem Law Faculty, 2006; G. HARPAZ, R. FRID, *The Wider Europe Initiative,* 9 *International Trade Law and Regulation,* 1/2004; G. HARPAZ, G. HEIMANN, *Sixty Years of EU-Israeli Trade Relations: The Expectations-Delivery Gap*, 50 *Journal of World Trade*, 3/2016, p. 447.

67 O.J. 1975 L 136/3.

68 D. KAPELIUK, *A Legal Analysis of the Free Trade Agreement of 1975 between the European Community and the State of Israel*, 27 *Israel Law Review*, 1993, p. 415; A. REICH, *From Diplomacy to Law: The Jurisdiction of International Relations in the Framework of GATT and Israel's Free Trade Agreements,* 22 *Tel Aviv Law Review,* 1/1999, p. 351.

69 O.J. 2000 L 147/1, in force since June 2000.

70 G. HARPAZ, G. HEIMANN, *Sixty Years of EU-Israeli Trade Relations, cit.;* M. HIRSCH, *The 1995 Trade Agreement between the European Communities and Israel: Three Unsolved Issues*, 1/1 *European Foreign Affairs Review,* 1996, p. 87; A. TOVIAS, *Israel and the Barcelona Process: The First Five Years,* in *Israel and Europe: A Complex Relationship,* K. Bohnke, Verlag, 2003.

71 O.J. 1997 L 187/1.

72 E. KLEINMAN, *The Economic Provisions of the Agreement between Israel and the PLO*, Israel Law Review, (1994), p. 347.

efforts, in 2004, Israel accepted to specify on each certificate issued the exact origin of the goods accompanied by it, despite this facilitated the deprivation of benefits from imports originating in the Israeli settlements[73].

In the meantime, the German customs authorities asked the ECJ to interpret the relevant EU law with regard to the entitlement of soft drinks imported by the German company Brita from the Israeli factory Soda-Club Ltd, an approved exporter within the meaning of Article 23 of the EC-Israel Protocol, established in the West Bank.

In its decision on *Brita*[74] case, the ECJ correctly stated that the EC-Israel Association Agreement must be interpreted in accordance with the rules laid down in the 1969 Vienna Convention on the Law of Treaties[75], expression of International customary law. Since the EC has concluded two Association Agreements, one with Israel and one with the OLP, equal in their object and goals, but with two different field of territorial application, the Article 83 of the EC-Israel Agreement, which defines its territorial scope, has to be interpreted in accordance with the principle *pacta tertiis nec nocent nec presunt,* of which at Article 34 of the Vienna Convention. Therefore, since the Article 16(4) of the EC-OLP Association Agreement establishes that this Agreement is applicable to the West Bank and the Gaza Strip, Israel cannot refrain the right of Palestinian authorities from exercising the competence conferred upon them by the provisions of the EC-PLO Agreement. Therefore, the Court concluded affirming that the Article 83 of the EC-Israel Association Agreement must be interpreted as meaning that products originating in the West Bank do not fall within the territorial scope of that agreement and are not qualified for the preferential treatment provided by it. The ECJ rejected also the practical proposal of the referring Court on the opportunity to let the national customs authorities free to choose between two substantively equivalent certificates, leaving open the questions of which of the two agreements apply and of whether proof of origin falls to be issued by the Israeli authorities or by the Palestinian authorities. The proposal was based on the fact that both the Agreements provide for preferential treatments, and the place of origin of the goods is established by evidence other than that envisaged.

In order to justify its decision, the ECJ recalled its previous decision *Anastasiou I*, affirming that the proof of origin issued by the competent authority cannot be considered a mere formality that may be

[73] See E. AOUN, *European Foreign Policy and the Arab-Israeli Dispute: Much Ado About Nothingh?,* 8 *European Foreign Affairs Review* 3/2003, p. 289; G. HARPAZ, *The Dispute Over the Treatment of Products Exported to the European Union form the Golan Heights, East Jerusalem, the West Bank and the Gaza Strip – The Limits of Power and the Limits of the Law*, in 38 *Journal of World Trade Law,* 2004, p. 1049; C. HAUSWALD, *Problems under the EC-Israel Association Agreement: The export of Goods Produced in the West Bank and the Gaza Strip under the EC-Israel Association Agreement,* 14 *European Journal of International Law*, 2003, p. 591.

[74] ECJ, case C-386/08, *Brita*, *cit.*

[75] Especially art. 31, 34.

overlooked as long as the place of origin is established by means of other evidence. Therefore, the validity of the certificates issued by authorities other than those designed by name in the relevant association agreement might not be accepted. In my opinion, the reference to *Anastasiou I* was not appropriate in the contest of the *Brita* case since the circumstances of the two cases were not comparable. In the first one, indeed, the principle of mutual confidence was rightly in question, since the occupying power of Northern Cyprus, constituted in the TRNC, was not recognized by the EC and, therefore, it had not any agreement with this last. Differently, the EC had already concluded an Association Agreement with Israel, implemented for long time on the Israeli settlements by Israel, therefore the mutual trust did not reveal in that case.

The *Brita* decision was in line with the policy of the European Institutions and the opinion of large part of the International Community. The ECJ referred extensively to the International law – but not to the relevant UN resolutions – and adopted a quite strong position on the topic. Interestingly, the ECJ extended the application of the 1969 Vienna Convention to the EC-PLO Association Agreement and, therefore, established the full application of the principle *pacta tertiis* to the PLO, even if this last is not a *state* in a formal-technical sense. The Court affirmed that the acceptation of Israeli certificates for products coming from the occupied territories could constitute a violation of the territorial control of another subject of International law, namely, the PLO; therefore, it excluded the products obtained in territories placed under Israeli administration after 1967 by the benefits of the preferential treatment provided for in the EC-Israel agreement.

The ECJ relied its decision assuming a clear political position about the situation between Israel and PLO, but avoiding any consideration on the situation of the population living in the Israeli settlements, neither on the practical economic and social consequences deriving from it. After its decision, indeed, Israeli and Palestinian businesses, likewise the populations living in these areas, are not entitled anymore to the benefits of both the Association Agreements, since a substantial part of the West Bank is not covered by any of them[76]. Regrettably, the logic of *Brita* has been extended also to goods originating in East Jerusalem and Golan heights, which are not covered by the EU-PLO Agreement, thus being also deprived of any option of benefiting from any trade concessions while exported to the EU. This position could also have undermined a wishful cooperation between Israeli and Palestinian industries and workers[77]. Such

[76] Being uncovered by the Israel-EU Agreement, according to the Court; and not being the Palestinian Authority able to exercise its authorities in these territories, which are under Israeli government.

[77] The logic of *Brita* decision has been adopted by the Commission in its *Guidelines on the Eligibility of Israeli Entities in the territories Occupied by Israel since June 1967 for Grants, Prizes and Financial Instruments Funded by the EU from 2014 Onwards*, OJ C 205/5 of Jul. 19 2013. See N. MUNIN, *EU Guidelines Regarding Activities by Israel in the Occupied Territories: A Diplomatic Achievement or a Pyrrhic Victory?,* UACES 44th Annual Conference, 2014.

cooperation, indeed, could have encouraged normalization of economic relations and maybe, in future, to contribute to the enhancement of the peace process between the two peoples involved[78].

Finally, the quite recent case law on the EU-Morocco Liberalization Agreement appears particularly relevant for the purpose of this study. In a nutshell, the territory of Western Sahara is listed among the non-self-governing territories for the purposes of Article 73 UN Charter[79] and, accordingly with International law, it is not under the sovereignty of Morocco, although it controls most of its territory. Conversely, the Front Polisario[80] controls a smaller, very sparsely populated area in the east of the territory. A wall of sand constructed and guarded by the Moroccan army separates the two parts of the territory. A large number of refugees from Western Sahara lives in camps administered by Front Polisario, situated in Algerian territory[81].

As already seen, the GC has been called by Front Polisario to establish if the application of the EU-Morocco Liberalisation Agreements in form of exchange of letters, concluded in the framework of the Association Agreement[82], is lawfully applicable on the territory of Western Sahara under the EU law. The Front Polisario brought an action before the GC seeking the annulment of the EU Council decision adopting the EU-Morocco Liberalization Agreement on agricultural, processed agricultural and fisheries products, contesting its legality under several arguments. Essentially, Front Polisario contested the right of Morocco to export in the EU products from the Western Sahara, qualifying them as Moroccans.

The GC did not consider that Morocco is an occupying power without a lawful mandate capable of justifying its presence on the territory of the Western Sahara. Neither the fact that the UE and its Member

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78 About Brita decision and the relations between EU and Israel see: N. MUNIN, *The Evolution of Dispute Settlement Provisions in Israel's Preferential Trade Agreements: Is There a Global Lesson?*, in *The Journal of World Trade,* 2/2010; ID, *Can Customs Rules Solve Difficulties Created by Public International Law?: Thoughts on the ECJ's Judgment in the Brita Case (C-386/08)*, in *Global Trade and Customs Journal*, 2011, p. 193; G. HARPAZ, E. RUBINSON, *The Interface Between Trade, Law and Politics and the Erosion of Normative Power Europe: Comment on Brita,* 35 *European Law Review*, 2010, p. 551; L. PUCCIO, *Understanding EU Practice in Bilateral Free-Trade Agreements: Brita and Preferential Rules of Origin in International Law,* in 36 *European Law Review.,* 2011, p. 124; P.J. CARDWELL, *Adjudicating on the Origin of Products from Israel and the West Bank: Brita GmbH v. Hauptzollamt Hamburg-Hafen (C-398/06),* 17 *EPL*, 2011.

79 UN Doc A/5514 (n 4) Annex III: List of Non-Self-Governing Territories under Chapter XI of the Charter at 31 December 1962 classified by geographical region; Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV), 14 December 1960.

80 It is the national liberation movement created in 1973, which, in accordance to its constituting document, represents the fruit of the long resistance of the Sahrawi people against the foreign occupations.

81 Cfr. ECJ, *Polisario*, cit., par. 16. On Western Sahara see, in general: M. BALBONI, G. LASCHI, *The European Union Approach Towards Western Sahara,* Lang, 2017; A. CALIGIUri, *La situazione del Sahara occidentale e la sua incidenza sull'applicazione degli accordi internazionali conclusi dall'UE con il Marocco*, in *Diritti Umani e Diritto Internazionale,* 2/2016, p. 490; T.M. FRANCK, *The Stealing of the Sahara,* 70 *American Journal of International Law,* 1976, p. 694. E. JENSEN, *Western Sahara: Anatomy of a Stalemate*, Lynne Rienner Publishers, 2005.

82 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 [2000] OJ L70/2 (EU-Morocco Association Agreement).

States, likewise the UN, do not recognize any kind of Moroccan sovereignty over the Western Sahara. On the contrary, the GC affirmed, "*the conclusion of an agreement between the EU and a non-member State which may be applied on a dispute territory is not, in all cases, contrary to EU law or international law with which the European Union must comply*[83]".

The GC seemed accept the Morocco *de facto* control on the area and, therefore, the applicability of the Agreement on the territory of the Western Sahara, although it underlined that the approval by the contested decision of the Liberalization Agreement concerned does not support the sovereignty of Morocco over Western Sahara. The mere fact that the EU allows the application of the agreement by the Kingdom of Morocco to agricultural and fishery products exported to the EU from the part of the territory of Western Sahara, which it controls, or to products which are imported into that territory, does not amount to a recognition of Moroccan sovereignty over that territory. The GC, anyway, underlined that the contested agreement has the positive objective to facilitate the exportation of products originating from the Western Sahara to the EU. About the overall situation, the GC stated, *"[the EU] does not wish to take sides in the dispute between the applicant and the Kingdom of Morocco, while supporting the efforts of the UN towards a just and lasting resolution of that dispute by negotiation*[84]".

The decision *Polisiario I* appears questionable for several reasons[85]. Particularly, although the GC never referred to the principle of EU law autonomy, the decision differs significantly from the customary International law and the UN law. The GC, indeed, did not take in due consideration the relevant acts of the UN Organs about the situation of Western Sahara, accepting the occupation of Morocco and excluding the right of Front Polisario to be consulted – by virtue of its International *status* – before the conclusion of the Liberalization Agreement between the EU and Morocco[86]. It is certainly true – as the GC stated – that the right to be heard cannot be transposed in the context of a legislative process leading to the adoption of general EU acts involving choices of economic policy and applicable to all operators concerned, even if the person is directly and individually concerned by those acts. In addition, the GC was right stating that the situation of the Front Polisario is not comparable with that of persons and

[83] ECJ, *Polisario, cit.,* par. 220.
[84] ECJ, *Polisario, cit.,* par. 154-157.
[85] S. HUMMELBRUNNER, A.C. PRICKARTZ, *It's not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the GC of the European Union*, in *Utrecht Journal of International and European Law*, 32(83), 2016, p. 19; P. MORI, *La sentenza T-512/12, Fronte Polisario* c. *Consiglio: un'incerta qualificazione giuridica del rappresentante del popolo Sahrawi,* in *Osservatorio Europeo, DUE*, May 2016; G. VIDIGAL, *Trade Agreements, EU Law, and Occupied Territories (2): The GC Judgment in Frente Polisario v Council and the Protection of Fundamental Rights Abroad*, in *EJIL: Talk!*, 11 December 2015, available at <http://www.ejiltalk.org/13901-2/>.
[86] ECJ, *Polisario, cit.,* par. 138.

entities addressed by economic and financial restrictive measures. Therefore, the relevant case law of the ECJ does not apply at the present case.

Anyway, despite Front Polisario had not provided for the origin and scope of the duty of consultation originating from the International law, the GC should have reached a different conclusion, admitting the right of the Front Polisario to be consulted by the Council and, *viceversa,* the obligation of this last to consult Front Polisario. This conclusion, indeed, would be consistent with the recognition of the role of Front Polisario in the determination of the definitive *status* of the Western Sahara, as established by the UN and recognized by the GC itself in the same decision, while admitting the right to standing of Front Polisario[87]. Conversely, the GC justified its deny on the basis of the fact that the contested decision was adopted through a special legislative procedure to approve the conclusion of an agreement of general scope and application, therefore, the Council was not obliged to consult the Front Polisario before its adoption[88].

In the EU law perspective, the GC rightly established that the EU values do not prohibit the conclusion of an agreement with a third State applicable in a disputed or occupied territory, neither the EU might be considered responsible for the actions committed by that country, whether or not they correspond to infringements of fundamental rights. However, as already seen before, the GC deeply and rightly underlined the EU obligations in terms of human rights coming directly from the EU law. Additionally, the GC rightly recalled the principle of permanent sovereignty of the population on natural resources, while seemed to neglect the other relevant principles of International law, namely, the principle of self-determination – widely recognized as a peremptory norm of International law – and the obligation of non-recognition and not to render aid and assistance in the commission of an unlawful act[89]. The EU is bound to the International law by its primary law and, of course, because it is part of the International Community. Despite that, the GC finally annulled the contested decision as far as it approves the application of the agreement to the Western Sahara territory, without guarantee the respect of fundamental rights of Saharawi people, as provided for by the Charter.

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87 Cfr. ECJ, *Polisario, cit.*, par. 110-114.

88 Cfr. ECJ, *Polisario, cit.,* par. 137.

89 Accordingly with art. 55 of The 1907 Hague Regulations. E. BENVENISTI, *The International Law of Occupation,* OUP, Oxford, 2012; A. CASSESE, *Powers and Duties of an Occupant in relation to Land and Natural Resources,* in A. CASSESE, P. GAETA, S. ZAPPALÀ (eds), *The Human Dimension of International Law: Selected Papers of Antonio Cassese,* OUP, Oxford, 2008; D. DAM, DE JONG, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations,* CUP, Cambridge, 2015. Critically, M. DAWIDOWICZ, *Trading Fish or Human Rights in Western Sahara? Self-Determination, Non-Recognition and the EC-Morocco Fisheries Agreement,* in D. FRENCH (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law,* CUP, Cambridge, 2013, p. 250; S. KOURY, *The European Community and Member States' Duty of Non-Recognition under the EC-Morocco Association Agreement: State Responsibility and Customary International Law,* in K. ARTS, P.P. LEITE (eds), *International Law and the Question of Western Sahara,* International Platform of Jurists for East Timor, Leiden, 2009, p. 165.

Questionably, the decision *Polisario I* has been set aside by the ECJ that found several errors of law, in line with the Opinion of the General Advocate[90]. The ECJ developed its decision focusing on the field of application of the EU-Morocco Liberalization Agreement, making a deep use of the relevant International law, while leaved aside the relevant EU law. Essentially, the ECJ stated that the GC erred in law in holding that the EU and the Kingdom of Morocco should be regarded as having tacitly agreed to interpret the words "territory of the Kingdom of Morocco", of which at Article 94 of the EU-Morocco Association Agreement, as meaning that they included the territory of Western Sahara. The ECJ contested the validity of the legal arguments brought by the GC through the rules of good faith of which at Article 31(1 and 3c) of the 1969 Vienna Convention, pursuant to which the interpretation of a treaty must be carried out by taking account of any relevant rules of international law applicable in the relations between the parties. Therefore, the ECJ noted that the inclusion of the territory of the Western Sahara within the scope of the EU-Morocco Association Agreement would be contrary to the principle of international law of the relative effect of treaties. As defined by Article 34 of the Vienna Convention, treaties do not impose any obligations, or confer any rights, on third States (or Parties) without their consent. Even if the EU had not concluded any agreement with Front Polisario relating to the products originating in Western Sahara[91], the international principle recalled had to be taken into account in the context of the interpretation of the EU-Morocco Association Agreement since its application to that territory would affect a "third part", namely the people of the Western Sahara.

To reach this conclusion, the ECJ extensively recalls the relevant UN documents about the Western Sahara condition. Particularly, it refers to the Advisory Opinion[92] of the International ECJ stating, *"The population of that territory enjoyed the right to self-determination under general international Law"*, together with the AG Resolution 34/37 on the question of Western Sahara, which recommended that the Front Polisario has to be considered *"the representative of the people of Western Sahara. [Therefore,] it should participate fully in any search for a just, lasting and definitive political solution of the question of Western Sahara"*.

Therefore, as the application of the Association Agreement between EU and Morocco may affect the people of the Western Sahara, Front Polisario – in quality of its representative – must express its consent about the extension of that agreement to the territory of the Western Sahara, even if the application would be to its benefit. Since the Front Polisario has not been consulted about the application of the Association Agreement on the territory of the Western Sahara, this last has to be excluded and contrary to the principle of the relative effect of treaties.

[90] Advocate General Wathelet, Opinion delivered on 13 September 2016, Case C-104/16 P.
[91] As, on the contrary, it did with the OLP.
[92] ICJ, *Western Sahara*, Advisory Opinion, Reps. 1975, p. 12

The other reasons for which the Liberalisation Agreement may be applied on the contested territory have to be excluded as well. Importantly, the ECJ excludes that EU and Morocco had to be regarded as having tacitly agreed to interpret the Article 94 of the Association Agreement, considering the position of Morocco, for which the Western Sahara is part of its territory. Consistently with customary International law, the fact that the Council and the Commission were aware of that position at the time of the conclusion of the Association Agreement, together with the absence of any clause excluding explicitly the Western Sahara from the territorial scope of that agreement cannot mean that they tacitly agreed with Morocco about it. In order to establish the existence of such will, the GC should have verified if that application reflected the existence of an agreement between the parties to amend the interpretation of Article 94 of the Association Agreement.

Conversely, in compliance with the article 31(3)(c) of the 1969 Vienna Convention – for which any relevant rules of international law applicable in the relations between the parties has to be considered in the interpretation of a treaty – the GC was obliged to take into account the customary principle of self-determination. The principle is an *erga omnes* right applicable to all non-self-governing territories and to all peoples who have not yet achieved the independence. Particularly, since the Western Sahara had been included on the list of non-self-governing territories within the meaning of Article 73 of the UN Charter, the principle of auto-determination, excludes that the words 'territory of the Kingdom of Morocco' set out in Article 94 of the Association Agreement could be interpreted in a way for which Western Sahara is included within the territorial scope of that agreement. In a manner significantly different from its decision on *Anastasiu II* about Northern Cyprus, the ECJ excludes explicitly any kind of tolerance toward the conduct of Morocco and denies that the application of the Agreement on Western Sahara by Morocco, well-known and accepted by the Institution of the EU, could mean a tacitly agreement between them.

Finally, establishing that the Liberalization Agreement does not apply to the territory of Western Sahara, the ECJ annuls the previous decision of the GC. Deciding on the merit, it affirms that since the Western Sahara is not included in the field of application of the Liberalization Agreement, the Front Polisario cannot be regarded as directly and individually interested by that and, therefore, it does not have the right to standing before the EU Court to seek the annulment of the act.

In this decision, the ECJ gives an example of rigorous application of the 1969 Vienna Convention on the Law of Treaties, proving its commitment in the development of the international law in a quite traditional way. In doing so, the ECJ leaves completely aside the concept of EU law autonomy and affirms that the territorial scope of the international agreements of the European Treaties cannot be interpreted without referring to the general International law. Importantly, the ECJ refuses to accept the Council opinion,

instead endorsed by the GC about the application of the Agreements concerned to the Western Sahara without the EU formal recognition of the Moroccan sovereignty on it. The ECJ establishes that in order to extend their application to the Western Sahara is necessary an explicit treaty provision and the involvement of the Front Polisario, as representative of the Saharawi people.

Of course, the *Polisario II* decision has to be welcomed under this point of view but, at a closer look, it appears not so pleasant in the human rights perspective. The ECJ misses the opportunity to give an important contribution in the development of the relationship between International trade law and human rights law; moreover, it loses the chance to point out clearly the human rights obligations of the EU Institutions, contributing in the development of a methodology for their implementation in the field of trade policy. Specifically, it lost the occasion to straighten the role of the EU Charter on the CCP and in general on the External Relations of the EU. The proposal presented by the GC in the previous judgment about the introduction of a normative framework on EU human rights obligations based on the EU Charter in the conclusion of trade agreements deserved a better consideration. At procedural level, the ECJ could have given a positive impulse in the development of an EU legal duty to adopt a fundamental rights assessment before the conclusion of a trade agreement.

Finally, it must be pointed out that the decision of the ECJ avoids facing the fact that – since the last decade – the EU Institutions are aware about the application of the Agreements between EU and Morocco on the Western Sahara territory by this last. While acknowledging Front Polisario as the representative of the Saharawi People at international level, the ECJ does not recognize it the right to standing before the EU Courts, so limiting its effective power to defend the rights of the Saharawi People in the EU legal system. In other words, if the application of the EU-Morocco Association and Liberalization Agreements will continue on the territory of Western Sahara by Morocco, without reactions by the EU, Front Polisario will face serious difficulties to bring the matter before the EU Courts.

In conclusion, the analysis of the EUCJ case law on the application of trade agreements on disputed and occupied territories shows that it is affected by various factors involved. Particularly, economic and financial interests, together with political-diplomatic questions, often have influenced the decision adopted by the ECJ. Unfortunately, in doing so, the ECJ did not developed – at least, until now – a uniform and coherent judicial paradigm to adopt in relation to the application of the EU trade agreements on disputed and occupied territories. In addition, its commitment with the International law appears quite swinging, likewise the role of the human rights obligations, both at International and European level. About human rights obligations, anyway, it must be observed a growing consciousness, as demonstrated in the last decisions concerning the Western Sahara. The decision on *Polisario II*, indeed, had the merit to give considerable importance to the human rights obligations of the EU coming from the customary

International law. Conversely, it completely avoids the topic of the human rights obligations deriving from the EU Law. That said, it must be underlined that the ECJ did not stated that the GC – in *Polisario I* – was incurred in an error of law while affirming the duty of the EU Institutions to secure the respect of the Charter during the conclusion and the implementation of the EU trade agreements. The EU Institutions, therefore, should maintain and deepen the paradigm outlined by the GC in *Polisario I*. This last would enhance the role of the Charter in the EU legal order, particularly, in the external dimension of the CCP. This approach would improve the effectiveness of human rights protection in the EU law, consistently with its external action on human rights and, above all, with the standard requested to third countries in order to establish commercial relations with itself.

5. Conclusion, a proposal for the development of a coherent approach "human rights" oriented in the CCP towards disputed and occupied territories

The EU declares that the aim of its external trade policy is "*to ensure that economic growth goes hand in hand with social justice, respect for HR, high labour and environmental standards, and health and safety protection*".

Analysing the relevant EU law appears that this declared goal is not only a political "slogan", but has quite precise legal bases in the founding Treaties at Article 2, 5(3) and 21 of TEU. In the field of the CCP, through the typical instrument of the trade agreements, the EU has not only an opportunity, but also a duty to pursue these goals. As seen, the content of any international agreement concluded by the EU must be compatible with the primary law, included the Charter. In order to guarantee this result, during the negotiation with the contracting Part, the EU Institutions have to use the Charter as a normative guideline, also conducting appropriate impact assessments in order to establish how the future agreements will affect the human rights of the population involved. As rightly pointed out by the GC in *Polisario*, this duty is even more important in the case in which a trade agreement could be applied on a disputed or occupied territory.

If is not questionable the existence of a human rights obligation in the content in any trade agreement, not clear is still the scope of this legal duty. Indeed, although the EU cannot be responsible for the violations of the human rights in the application of an agreement by a third State, it has the duty to do its best to guarantee the respect of the human rights, consistently with its founding values. The EU judicial system offers limited judicial remedies to natural and legal persons in case of infringements of fundamental rights and liberties deriving from the implementation of the agreement. Anyway, it seems possible to move an action for extra-contractual liability against the EU in case of damages suffered by the population. In the same vein, the individuals could denounce the situation to the EU Ombudsman, searching for a non-judicial solution.

In this framework, the ECJ – being the custody of the correct interpretation and application of the EU law – could contribute significantly in the development of an interpretative paradigm "human rights" oriented through its case law. Particularly, it would be advisable that the ECJ, maintaining the approach adopted in the decision *Polisario I,* when called upon to interpret a trade agreement applicable to disputed or occupied territories, uniformly adopts an interpretative paradigm based on the respect of the human rights of the population living in the disputed or occupied territory involved. The suggestion is to leave aside the diplomatic-political questions not strictly related with the implementation of the agreement.

Considering the internal human rights obligations, the ECJ could develop, in the framework of the *practical-trade* approach, an interpretative paradigm based on the human rights respect and the economic wellbeing of the population living in disputed and occupied territories that, by the way, seems to be in line with the obligations prescribed by the customary International law. The introduction of these parameters could modify the approach of the ECJ also in cases related to the rule of origin. For example, In the case in which it is contested the legitimate authority entitled to issue the movement certificates of goods produced in a disputed territory, the ECJ could use, as evaluation parameter, the achievement of the economic wellbeing of the population, together with the respect of the human rights, and the principle of permanent sovereignty on the natural resources.

This approach – that certainly need to be further developed – could give a relevant contribute in the evolution of an international trade law "human rights-oriented". It could be seen as part of an evolutionary tendency of the International legal order, which is moving through a paradigm that considers increasingly principles and values based on, and connected with, the society[93]. In this scenario, the role of the States, both in the International Community and in relation with its people, is going to change and, with it, a change in the consideration and interpretation of the basic principles of International law. In this evolutionary interpretation, indeed, the concepts of territory and people seem lose their traditional connotations, in favour of individual prerogatives[94]. Following this approach, the International Community could become more "human rights" and "society" oriented. The situation of disputed and occupied territories – where the sovereignty is not anymore or not yet clearly established – is a field

[93] N. KRISCH, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law,* OUP, Oxford, 2010; A. PETERS, *Are we Moving towards Constitutionalization of the World Community?,* in A. CASSESE (ed), *Realizing Utopia*, OUP, Oxford, 2008, p. 119; ID, *Humanity as the A and Ω of Sovereignty,* 20 EJIL, 2008, p. 513; ID, *The Function and Potential of Fundamental International Norms and Structures,* 19 Leiden JIL, 2006, p. 579.

[94] C. FOCARELLI, *La persona umana nel diritto internazionale,* Il Mulino, Bologna, 2013; ID, *International Law as Social Construct: The Struggle for Global Justice,* OUP, Oxford, 2012.

particularly useful in order to show how the exercise of a different role by States and International Organizations could contribute in the realization of an International legal order "society-oriented"[95].

[95] S. ZAPPALÀ, *Can Legality Trump Effectiveness in Today's International Law?,* in A. Cassese (ed), *Realizing Utopia,* OUP, Oxford, 2008, p. 105.