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Polisario Front Before the Court of Justice of the European Union

A Study of Judicial Activism in the EU

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Abstract

Since the CJEU's creation, it has been significant to solidify and review European Law. However, rather than merely being the dispute arbiter of the European Union, it is also seen to be a driver for political change and integration. The involvement of the CJEU in political matters has often been associated with judicial activism. An area especially prone to this phenomenon has been fundamental rights. The CJEU's involvement over the years has been pivotal in establishing the European fundamental rights framework. The judicial activism in a relatively uncharted area in this field, external relations, was analyzed through a qualitative case study of the CJEU case *Polisario Front*, concerning the application of a EU trade agreement to the non-self-governing territory of Western Sahara. This thesis concluded that the judgments in this case contributed to the expansion of influence of fundamental rights in European external relations through judicial activism by the CJEU.

Key words: Judicial Activism, Judicialization, Western Sahara, Fundamental Rights, Court of Justice of the European Union
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1 Introduction

This thesis starts with a phenomenon that is all too common these days: increasing awareness and social responsibility of European consumers. It is important to know how our products are made, but it is also essential to know where our products may come from. Some people will only buy clothes made from sustainable materials, and others want insurance that their new shirt is not made by children on the other side of the world. Likewise, there are some that want to know if their products originate from an occupied territory.

The territory in this case is Western Sahara, South of Morocco, who includes the territory as part of its own country. Morocco has occupied Western Sahara since 1975. Polisario Front[1], the liberation movement of Western Sahara, had fought to claim its independence but failed to do so. In 1991, a truce was negotiated with the promise on a referendum on the right to self-determination of Western Saharan inhabitants, the Sahrawi. This has not yet happened, and Morocco sill occupies the territory and claimed full administrative control over it.[2]

The problem lies in the fact that the European EU-Morocco Free Trade Agreement, or the Liberalization Agreement, aimed at liberalizing the European imports from Morocco, is also applied to Western Sahara. What this means is that cherry tomatoes from Western Sahara can be sold at the European market labeled as originating from Morocco. Moroccan companies with a majority of Moroccan employees farming tomatoes and other vegetables in Western Sahara are thus able to profit from the agriculture in Western Sahara.[3] These companies get their permits from the Moroccan king, and benefit Morocco rather than the Sahrawi people.[4] Not excluding Western Sahara from this agreement, thus, according to some, indirectly supports the occupation of Western Sahara by permitting the sale of Western Saharan grown tomatoes in European supermarkets, labeling them as if they originate from Moroccan territory.[5]

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[1] Frente Popular de Liberación de Saguía el Hamra y Río de Oro, or Popular Front for the Liberation of Saguia el-Hamra and Río de Oro.

[2] Black, I. (2015, March 14) Western Sahara's ‘conflict tomatoes’ highlight a forgotten occupation. [online] *The Guardian*. Retrieved at: https://www.theguardian.com/world/2015/mar/04/western-sahara-conflict-tomatoes-occupation-morocco-labelling-tax

[3] Western Sahara Resource Watch (2012B). Conflict tomatoes. [online] *Western Sahara Resource Watch.* Available at: http://www.wsrw.org/files/dated/2012-02-13/conflict_tomatoes_14.02.2012.pdf

[4] Brandsma, J. (2012). 'Label 'Marokko' is misleidend'. *Trouw*. [online] Available at: https://www.trouw.nl/home/-label-marokko-is-misleidend-~a05ce6dc/

[5] Western Sahara Resource Watch, (2012B).

Of course, the Liberalization Agreement extends beyond the import of tomatoes to agricultural and fisheries products, two of the main resources of Western Sahara. This indirect conveyance of support for the occupation of Western Sahara through the Liberalization Agreement as well as what this means for the exploitation of the resources of Western Sahara without benefiting the Sahrawi people were among the main reasons of Polisario Front to initiate an action for annulment of the Council Decision on adopting the Liberalization Agreement. They based their claim, partially, on fundamental rights and the right to self-determination specifically.[6]

By bringing their fight for liberation to the Court of Justice of the European Union (CJEU), Polisario Front has made their political battle a European legal conflict also. Such judicialization of a political conflict is not a new phenomenon, and neither is the ability or willingness of a Court to make a politically charged judgment, or to engage in judicial activism. This thesis aims to shed light on the illustrious phenomena of judicialization and judicial activism using the judgments of the CJEU in the *Polisario Front* case.

Although in the past fundamental rights was an area exceptionally prone to the concept of both judicialization as well as judicial activism, in recent years the CJEU seem to have been more conservative in its judgments.[7] Yet, the importance of fundamental rights within the European legal and legislative framework has grown immensely since the late 1990's, although it has not become less sensitive.[8] There are still many gaps and ambiguities in European fundamental rights law, especially with regards to its extraterritorial application and the obligations it imposes on EU institutions in safeguarding and respecting fundamental rights in European external relations.[9] What has been the impact of judicialization and judicial activism in this field so far? Are they still occurring in this field or are they on its return, so to speak? The primary aim of this thesis is to shed light on these questions by means of the *Polisario Front* case as an illustration to the possible occurrence of judicialization and judicial activism and the impact that they may have on the development of fundamental rights law in the field of external relations. The main research question of this thesis is thus as follows:

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[6] Hummelbrunner, S. and Prickartz, A. (2016). It's not the fish that stinks! EU trade relations with Morocco under the scrutiny of the General Court of the European Union. *Utrecht Journal of International and European Law*. 32(83), 19–40. DOI: 10.5334/ujiel.322

[7] Schima, B. (2015). EU fundamental rights and Member State action after Lisbon: putting the ECJ's case law in its context. *Fordham International Law Journal,* 38(4), 1098-1133. DOI: 10.2861/378609; Chalmers, D. & Trotter, S. (2016). Fundamental rights and legal wrongs: the two sides of the same EU coin. *European Law Journal,* 22 (1), 9-39. ISSN 1351-5993.

[8] King, T. (2011). European Union as a Human Rights Actor. In: M. Oapos, Flaherty, Z. Kędzia, A. Müller and g. Ulrich, ed., Human Rights Diplomacy: Contemporary Perspectives. Leiden: Brill Nijhoff.

[9] Bartels, L. (February 1, 2014). A Model Human Rights Clause for the EU's International Trade Agreements. *German Institute for Human Rights and Misereor*. Available at SSRN: https://ssrn.com/abstract=2405852

> Was the CJEU taking an activist stance in the two *Polisario Front* rulings and if so what was their impact on fundamental rights law in European external relations?

To answer this question and fulfill the aim of this thesis, the thesis will proceed along the following steps. Firstly, the theory will be established around the two phenomena of judicialization and judicial activism. Furthermore, the role of the Court within the EU will elaborated upon and analyzed from a theoretical perspective. Secondly, the methodology will be presented and explained. Thirdly, the concept of fundamental rights in European legislation will be looked at from a theoretical perspective. Fourthly, the relevant previous case law of the CJEU with regards to this topic will be examined carefully. Fifthly, an overview of the specific case of *Polisario Front* will be given and placed into the context of the historical background to the conflict in Western Sahara. Finally, it will be analyzed how two judgments in the *Polisario Front* case measure up to the concepts of judicialization and judicial activism as explained in the theoretical framework. It will also discuss the role of the judgments in the fundamental rights framework of the EU, and the impact they have on this framework.

2 Theoretical Framework

The aim of this thesis is to analyze whether or not the two *Polisario Front* rulings were cases of CJEU judicial activism and explore the impacts of these judgments on EU legislation and actions. This chapter will seek to explain the main theories and concepts that are necessary to understand the CJEU's role and position in these two judgments and how they relate to the concept of judicial activism. It begins with an outline of the role of the Court within the European legislative framework and its structure. Secondly, theoretical perspectives on the influence of the Court will be discussed. Finally, the concepts of judicial activism and judicialization will be defined and analyzed.

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2.1 The Role of the Court

Whilst the CJEU is not the official guardian of the treaties – this role is fulfilled by the European Commission (Commission) – the CJEU does play a custodial role in the interpretation and application of EU law as a whole. The official website of the EU describes the CJEU's role as ensuring that "EU law is interpreted and applied the same in every EU country [and that] countries and EU institutions abide by EU law"[10]. This statement, concise as it is, does not illuminate the full extent of the different roles the Court embodies and the objectives that it serves.

Firstly, the CJEU clarifies and fills gaps and ambiguities in EU law and the treaties through dispute resolution, which mainly manifests itself in the Court through preliminary rulings. These concern questions relating to interpretation of Union law or its validity and are brought before the CJEU by national courts. Similarly, this procedure is also used to test the compatibility of national law with EU law. These preliminary rulings have spawned many legal doctrines throughout the years specific to the European Union, such as the ERTA[11] doctrine, in which

[10] European Union (n.d.). *Court of Justice of the European Union (CJEU) - European Union - European Commission*. [online] European Union - European Commission. Available at: https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en [Accessed 1 Aug. 2017].

[11] ERTA: European Road Transport Agreement.

the CJEU established the competence of the Commission to enter into international commitments in cases where such commitments would lead to the fulfillment of the objectives, for the attainment of which European law provided powers to the institution.[12]

CJEU case law is an original legal concept in the sense that it, like common law, can be invoked to strengthen the legal arguments in new cases, but also in the sense that it can indicate to the European institutions particular legal gaps which can consequently be filled with new legislation. The ERTA doctrine for instance has as a practical consequence that even when the Community does not have the exclusive competence on a particular field, it may still easily include this particular field in external negotiations if this particular field has already seen widespread legislation by the Community in the Union.[13]

Furthermore, principles which evolved from European case law or particular outcomes of cases can also be invoked before national courts, ensuring a common application of EU case law which all courts in the EU must adhere to. In fact, the important legal doctrines of the supremacy of EU law and direct effect, allowing individuals to call upon EU law in national Courts to challenge national legislation, are not based on the Treaties, but on the established case law by the CJEU itself, the *Van Gend en Loos* case[14], establishing direct effect, and the *Costa v ENEL* case[15], establishing the supremacy of Union law.[16]

Secondly, since the Treaty of Rome, the CJEU has also played a role in the enforcement process of EU legislation, judging in cases of non-compliance.[17] When national governments fail to comply with EU law, the Commission or another Member State can initiate an infringement procedure[18]. Should a Member State be found to be at fault by the CJEU, said member state must correct its mistake or negligence at once. Should a second case be initiated on the same matter, the Member State might have to pay a fine.

Thirdly, the CJEU works to ensure that EU institutions like the Commission and the Council abide by EU law or that the acts they produce are in line with existing EU legislation. In that sense, it answers the perennial question

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[12] Case C-70/22 *Commission of the European Communities v Council of the European Communities(European Agreement on Road Transport or ERTA)* [1971] ECR 263. ; Mathijsen, P. and Dyrberg, P. (2013). Mathijsen's Guide to European Union Law. London: Sweet & Maxwell. ; Baquero Cruz, J. (2006) The Changing Constitutional Role of the European Court of Justice. *International Journal of Legal Information* 34(2). Available at: http://scholarship.law.cornell.edu/ijli/vol34/iss2/7

[13] Mathijsen and Dyrberg, 2013.

[14] Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

[15] Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585.

[16] Alter, K. (1998). Who Are the "Masters of the Treaty"? European Governments and the European Court of Justice. *International Organization*, 52(01), pp.121-147.

[17] Ibid.

[18]Please note that the infringement procedure is generally preceded by an informal stage between the concerned parties.

of Juvenal: *quis custodiet ipsos custodies?*[19] Member States, the Council of the EU, the Commission, the Parliament (the preferential actors), also the ECB, the Committee of Regions[20][21] and private individuals, may ask the CJEU to annul an EU act that might violate EU treaties or fundamental rights through actions for annulment. The actors mentioned above can also launch cases against the EU institutions to ensure that Treaty obligations are met. A famous example of the latter is the Strasbourg judgment in which France, supported by Luxembourg, successfully brought an action against the European Parliament for failing to meet its Treaty obligations[22] for having twelve meetings per annum in Strasbourg rather than in Brussels.[23]

The Court's jurisdiction over the European institutions also extends to failure to act and actions for damages. Complaints can be made by the other European institutions, member state governments, companies, individuals and other legal persons, to ensure that certain action is taken to attend to arising circumstances. For example, in *C-265/ 95 Commission v France*, the Court ruled that France was responsible for damages for having failed to take all necessary and proportionate measures in order to prevent the free movement of fruit and vegetables from being obstructed by actions by private individuals.[24] In principle, damages can be claimed when the interests of any individual or company have been harmed as a consequence of the action, or inaction, of the EU or its staff but also that of the Member States.

2.2 The Structure of the CJEU

The structure of the CJEU expanded over the years, and it is now composed of two courts: the General Court ('GC'), existing of 47 judges, and the Court of Justice ('CJ'), with 1 judge from each Member States and 11 advocate generals. The GC rules mainly on actions for annulment initiated by individuals, companies and occasionally the governments of Member States. They mainly rule on cases within the fields of State aid, competition law, trade, trade marks and agriculture. The CJ generally rules on requests for preliminary rulings and certain actions for annulment. It also deals with appeals to decisions by the GC.

The CJ can sit in several compositions while hearing a case. The size of the chamber depends on the matter at hand. In most proceedings, the Court may sit in Chambers of three or five judges. A Grand Chamber, of fifteen judges, will

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[19] Who watches the watchmen?
[20] Art 263 Treaty on the Functioning of the European Union [2007] OJ C 326.
[21] Ibid.
[22] Under articles 216 EEC, 77 ECSC and 189 EAEC.
[23] Joined Cases C-237/11 and C-238/11 *French Republic v Commission* [2011] Digital Reports.
[24] Case C-265/95 *Commission v French Republic* [1997] ECR I-6959.

gather when a Member State or Institution, which is a part of the proceedings, requests this. It may also sit in a Grand Chamber in important or complex cases, for example often for cases concerning external agreements. The treaties require the Court to sit in plenary, full court, in exceptionally important cases and specific cases, which are laid out by the treaties, for example when a member of the Commission has allegedly failed to fulfill his or her obligations.

2.3 European Integration and the CJEU

Above, it is already illustrated that the CJEU is not an average Court in terms of its jurisdiction and the consequences for many aspects of law in the European Union that derive from its steady output of case law. Some may even argue that that the CJEU rivals the most powerful national supreme courts in its judicial power and authority. But is the CJEU actually able to drive European integration through its interpretation of rules and norms? Has it driven integration in the past?

With these questions in mind, this section will briefly discuss several theoretical perspectives that may be used to explain the role of the CJEU in European integration. Firstly, the theory of intergovernmentalism argues that the Member States are the drivers of European integration, and that Member states took all the steps deepening this integration, solely driven by their own-self interest. The EU is thus defined by the Members who created it, setting the limits to curb its authority.[25] The CJEU from this perspective does not have the autonomy to make decisions beyond the set limits of Member States, its influence on integration being no more than what the Member States allowed. Accordingly, in its judicial interpretation the Court is said to be careful in avoiding decisions that do not correspond to preferences of the Member States, especially the powerful ones.[26] It is doubtful whether this is the case, as CJEU jurisprudence has often ruled against Member States.[27] Neo-functionalism, too, disagreed. They argued that the EU institutions themselves are the drivers of European integration. The Member States agreed to transfer parts of their sovereignty to the EU to reap the benefits of a joint policy, thereby accepting the authority of the supranational entity, including the jurisdiction of a supranational court.[28] It also argued that in order for integration in one field to be successful, it needed to expand to relating

[25] Alter, 1998.
[26] Burley, A. and Mattli, W. (1993). Europe Before the Court: A Political Theory of Legal Integration. *International Organization*, 47(01).
[27] E.g. Joined Cases C-20/15 & C-21/15 P *Commission v World Duty Free Group and Banco Santander* [2017] OJ C 53.
[28] Sweet, A.S. (2012). Neofunctionalism and Supranational Governance (unabridged version). *Faculty Scholarship Series.* Paper 4628. http://digitalcommons.law.yale.edu/fss_papers/4628

policy areas, thus creating a spillover effect.[29][30] A similar spillover effect will arise from the actions of the supranational institutions like the CJEU, deepening integration in already integrated areas and expanding it to other fields too.[31] Rather than being impartial supranational institutions that simply implement and administer the agreements of the Member States, these institutions like the CJEU are seen as active political actors attempting to cultivate further integration through either formal or informal means.[32]

The position of the Court as its own actor rather than an obedient servant from the Member States has become the consensus among political scientists,[33] whereas the debate among legal scholars sees the ECJ faithfully interpreting the treaties, simply filling existing gaps in legislation.[34] However, these theories, viewing the Member States as uniform actors, were deemed to simplistic. The current focus of the debate on the role of the CJEU is the question of its legitimacy. The CJEU can be deemed to be as powerful as the most powerful national supreme courts, but it lacks a similar basis in legitimacy.[35] It is questionable whether the CJEU has enough insight into the public discourse to make decisions on matters of gender equality in the German army, or LGBTQ rights in Ireland.[36] According to De Waele and Van der Vleuten, the CJEU "assumed the role of a federal constitutional court, although the EU lacks a constitution and is neither a federation nor likely to become one on short notice".[37] An indicator of the independence of the CJEU in relation to the Member States is the difficult procedure to reverse its rulings. As it requires unanimity among the Member States, one disconcerted voice can block a majority, and as there are 28 Member States the chances of landing in a joint-decision trap regarding the reversal of a Court ruling are more a certainty than a possibility.[38] In other words, in order to reverse a misguided or misinterpreted ruling, a unanimity

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[29] Examples include the emergence of Euratom and the European Economic Community after the establishment of the European Coal and Steel Community.

[30] Sandholtz W. and Sweet, A.S. (2012). Neo-Functionalism and Supranational Governance. In: Jones, E., Menon A., and Weatherill, S., Eds. Oxford: Oxford University Press.

[31] Ibid.; Burley and Mattli, 1993.

[32] Sweet, A.S. (2010). The European Court of Justice and the Judicialization of EU Governance. *Faculty Scholarship Series*. Paper 70. Retrieved at: http://digitalcommons.law.yale.edu/fss_papers/70; Sandholtz and Sweet, 2012; Burley and Mattli, 1993.

[33] E.g. Burley and Mattli, 1993; Sandholtz and Stone Sweet, 2012; De Waele, H. and van der Vleuten, A. (2011). "Judicial Activism in European Court of Justice-The Case of Lesbian, Gay, Bisexual and Trans gender Rights." *Michigan State Journal of International Law* 19(3), 639–666.

[34] De Waele and Van der Vleuten, 2011.

[35] de Vries, S.A. (2013). Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice. *Utrecht Law Review*, 9 (1), 169-192.

[36] Von Bogdandy, A. (2000). The European Union as a human rights organization? Human Rights and the Core of the EU. *Common Market Law Review,* 37(6), 1307–1338.

[37] 2011, 664.

[38] Faulkner G. (2011) The EU's Decision Traps: Comparing Policies. Oxford: Oxford University Press. ; Kelemen, D. (2017). The Court of Justice of the European Union in the Twenty-First Century. Duke Journal of Constitutional Law & Public Policy, 79(2).

among Member States is required. Therefore, the threat of an override of a Court ruling is not credible. Such an override would need much political bargaining between Member States, which would be costly and time-consuming.[39] This ability of the Court is one of the factors that provide a conducive environment for further judicial empowerment and a condition for judicialization.[40]

2.4 Judicial Activism

The term judicialization is often used interchangeably with judicial activism, and although they overlap, the terms refer to different concepts. Whereas the former refers to the increased reliance on courts' decisions on politically meaningful and controversial matters, judicial activism refers to decision-making by judges that inappropriately opposes the policy made by the elected branches.[41]

Judicial activism is a term that is loaded with normative connotations, be it positive or negative. Like beauty, judicial activism is in the eye of its beholder.[42] Although the phenomenon had been criticized for a long time, it was first named by Schlesinger, who divided the US Supreme Court justices into those who were "champions of judicial restraint" and those who were activist.[43] Regarding the CJEU, judicial activism is connected to its role in pushing integration.

The term invites its user to make a normative judgment on the activist stance of the CJEU. Is it abusing its authority to push European integration, expanding its jurisdiction or altering legislation, or is it commendable when it uses its power for its own conception of the social good? The line is very thin and the normative verdict could go either way.[44] In Europe, compliance with the CJEU's decisions and their enforcement is signified by the difficulty of reversing its decisions by other political actors. Moreover, Court has expanded its own zone of discretion, and thus deepened European integration, through landmark rulings

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[39] Sweet, A. S and Brunell, T. L. (2013). Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the ECHR, the EU, and the WTO. *Faculty Scholarship Series*, 4625. Retrieved at: http://digitalcommons.law.yale.edu/fss_papers/4625
[40] Kelemen, 2016; Sweet, A.S. (2010). The European Court of Justice and the Judicialization of EU Governance. *Faculty Scholarship Series*. Paper 70. Retrieved at: http://digitalcommons.law.yale.edu/fss_papers/70
[41] Lindquist, S., and Cross, F. (2009). Identifying Judicial Activism. In Measuring Judicial Activism. : Oxford University Press.; Grimmel, A. (2012). Judicial Interpretation or Judicial Activism? The Legacy of Rationalism in the Studies of the European Court of Justice. *European Law Journal*, 18(4), 518-535. doi:10.1111/j.1468-0386.2012.00615.x
[42] Lindquist and Cross, 2009
[43] Schlesinger, A. M. (1947, January). The Supreme Court: 1947. *Fortune.*
[44] For example, the ruling by the US Supreme Court in the Brown v the Board of Education case, removing judicial support for the segregation in education, is widely regarded to be activist, whilst simultaneously being viewed as an iconic verdict for the social good.

such as *Van Gend en Loos*[45], establishing legal doctrines that define the relationship between national and European law.[46]

Was the Court running wild? The transformation of the CJEU into a law-making entity began in the 1960s with the consolidation in case law of the "constitutional" legal doctrines of supremacy[47] and direct effect.[48] Despite the alleged revolutionary character of these rulings, the doctrines they established were not novel.[49] While the Treaties did not outline these specific doctrines, it did not rule them out either. Occasionally, the Treaties referred to them as well.[50] E.g., Article 189 EEC mentioned that regulations shall be "directly applicable in each Member State."[51] Article 177 EEC established the preliminary reference procedure, which in Cruz' reading presupposes direct effect as well as references to the doctrine of supremacy.[52] The novelty of the Court's rulings laid in its consequences. Although international law usually takes precedence over national law, most countries do not actually accord supremacy to it.[53] Due to the *Costa v ENEL* ruling[54], European law has become different in that respect, as it is given supremacy in all Member States. Similarly, the *Van Gend en Loos*[55] verdict established direct effect of Union law, which is also not a new doctrine in both national and international law.[56] Nevertheless, the doctrine sidelined national courts and national legislation, decommissioning applicable sections in the constitutions of several member states.[57]

The phenomenon of judicial activism was believed to be necessary to push integration forward and was expected to subside after the signing of the Single European Act. More recent judgments indicate that this may not be the case. For example, *ECOWAS* case[58] of 2008 expanded the Court's jurisdiction to include the formerly untouchable CFSP and thereby fulfills the activist bill in expanding the areas under judicial review through new rules and instruments of the Court's own devising.

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[45] Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.
[46] Sweet, 2010.
[47] Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.
[48] Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585.
[49] De Waele and Van Der Vleuten, 2011; Baquero Cruz, 2006.
[50] Baquero Cruz, 2006.
[51] Article 189 Treaty Establishing the European Community [1957]
[52] Article 177 Treaty Establishing the European Community [1957]; Cruz, 2006
[53] De Waele and Van Der Vleuten, 2011.
[54] Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585.
[55] Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.
[56] Velluti, S. (2016). The Promotion and Integration of Human Rights in EU External Trade Relations. Utrecht Journal of International and European Law, 32(83), 41-68.; Cruz, 2006.
[57] De Waele and Van Der Vleuten, 2011.
[58] Case C-91/05 Commission v. Council ("ECOWAS" or "Small Arms and Light Weapons") [2008] ECR I-3651.

2.5 Judicialization

The term "judicialization" has become standard when describing the activities and the role of the CJEU. Providing a definition is complicated. Sweet defines the judicialization of politics as the influence of judicial law-making by the Court on other actors of governance. He sees the theory as meant to explain how judicial authority is established and constructed.[59] Hirschl defines it as the ever "accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions and political controversies."[60] Courts are asked more often to resolve policy issues, for example fundamental rights, immigration or environmental protection. Controversial political issues are being reframed as being constitutional topics that Courts ought to clarify or interpret.[61] Through the increased reliance upon courts to settle major policy issues, courts may become drivers of political and social change.[62] This thesis uses judicialization as the compliance of political actors with politically meaningful outcomes of dispute resolution by the Court that were the result of the Court's independent input.[63]

Sweet recognizes three conditions conducive to the phenomenon of judicialization. Firstly, cases need to be filed to the Court; when other actors, be it political or private, do not submit cases for the Court to review, the Court can simply not contribute through giving rulings. Secondly, the cases must result in defensible case law, in which the Court gives argumentation for their decisions. Finally, other political actors must accept the outcome of the Court's dispute resolution, and refer to it in future political decision-making.[64] Judicial independence is necessary in order to effectively wield the judicial power. Courts ought not be limited by other political actors, rather, its case law needs to be accepted to legitimize its authority and to ensure compliance with its decisions.[65] Courts also ought to have the discretionary power to decide on politically meaningful matters.[66] Regarding the conditions for judicialization in the EU, Kelemen believes that the limited administrative capacity of the EU encourages

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[59] Sweet, A. S. (1999). Judicialization and the Construction of Governance. *Comparative Political Studies* 31, 147-184.

[60] Hirschl, R. (2006). The New Constitutionalism and the Judicialization of Pure Politics Worldwide. SSRN, 75(2), 721-754.

[61] Ibid.

[62] Martinesen, D.S. (2015). An ever more powerful court? The Political Constraints of Legal Integration in the European Union. Oxford: Oxford University Press.

[63] Ginsburg, T. (2008). The judicialization of administrative governance Causes, consequences and limits. In: A. H.Y. Chen and T. Ginsburg, ed., The Judicialization of Administrative Governance: Causes, Consequences and Limits. Chicago: Routledge.

[64] Sweet, 2010.

[65] Ginsberg, 2008.

[66] Ginsberg, 2008; Sweet, 2010.

legislators to substitute strong, centralized bureaucracy by judicialization.[67] Furthermore, through principles like supremacy and direct effect, national courts are encouraged to refer cases to the CJEU for review or clarification.

Arguably, it is the expansion of judicial authority through activist decisions by the CJEU that allowed the phenomenon of judicialization to thrive in the European Union, as it gave the CJEU the capabilities to make significant rulings on politically sensitive matters. For the purpose of this thesis, both judicialization as well as judicial activism are important phenomena. While the former helps understanding the judicial authority of the CJEU on the matter of fundamental rights, the latter provides the framework necessary to conclude whether or not the judgments of the CJE in the *Polisario front* case are excessive, and shed a light on the normative dimension of the answer to that question.

[67] Kelemen, 2011.

3 Methodology

This thesis consists of a case study to illustrate and identify judicial activism by the CJEU. It focuses on the contribution of the Court to the protection of fundamental rights in external agreements analyzing specifically the two rulings in *Polisario Front*. Through a thorough analysis of this case along the benchmarks of judicial activism, this thesis aims to shed more light upon the dominating questions with regards to political judgments by the CJEU. Has the CJEU taken an activist stance or has it been faithfully interpreting standing legislation? Is the CJEU itself expanding its jurisdiction and what is the contribution of judicialization to this expansion? What have been the CJEU's contributions to the specific field of fundamental rights in external agreements? Do these contributions go beyond what other political actors, e.g. the Commission, Member States, Parliament, had imagined? Did the CJEU expand its own role in this regard? And what are, or could be, the consequences of this?

By using a mixed method approach, in which the political analysis is accompanied by a review of relevant legislation and case law, this thesis provides an interdisciplinary insight into the concept of judicial activism. While most analyses either take a legal or a political approach on the matter, this thesis aims to combine these approaches to get a more complete picture of judicial activism. By taking this interdisciplinary approach to the case study, this thesis hopes to contribute to the continuous debate on judicial activism and the applicability of this concept to the CJEU.

The research question will be as follows:

> Was the CJEU taking an activist stance in the two *Polisario Front* rulings and if so what was their impact on fundamental rights law in European external relations?

The contribution this thesis will make to the literature will be twofold.[68] Firstly, it will aim to illuminate the phenomenon of judicial activism and judicialization, both of which having been the subject of or central to many studies, without providing much clarity as to their meaning and impact. Secondly, it will apply these phenomena to the specific field of fundamental rights in European external

[68] King, G., Keohane, R.O. and Verba, S. (1994). Designing Social Inquiry. Princeton: Princeton University Press. P. 16-17.

trade agreements, which has largely been overlooked in the study of judicial activism in the EU.

3.1 Case Selection

When referring judicial activism, it is not unlikely to hear fundamental rights uttered in the same breath, especially when it concerns the CJEU. There is hardly any doubt among scholars that this is one of the policy areas where the CJEU has been especially active, in particular during the early years, when it laid the groundwork for the current EU fundamental rights framework and establishing them as general principles of EU law, even though they were not mentioned in other sources of EU primary law. In that regard, fundamental rights might not seem as the most innovative field to research the engagement of the CJEU in judicial activism. However, in recent years, the CJEU has been much more withdrawn in its rulings regarding fundamental rights, avoiding further expansion of its fundamental rights jurisdiction[69] and hesitant with the use of fundamental rights in its legislative review.

A previous indicator of judicial activism has been the expansion of the CJEU's jurisdiction through its own rulings. The scope of jurisdiction of the CJEU with regards to fundamental rights is still unclear, as the Charter of Fundamental Rights of the European Union (CFREU) does not include a clause on the limits of its applicability. This raises interesting questions as to the application to certain policy areas. External trade is an exclusive competence of the EU, meaning that the Commission can enter into international agreements with third countries on behalf of its member states. The policy area of external trade agreements also falls under the jurisdictional scope of the CJEU, but it is as of yet unclear to what extend the CFREU also governs this field. How far does the influence of the CFREU reach into international agreements? Could the institutions be held accountable by the CJEU for violations of the CFREU happening through or because of European external agreements? Can external agreements be annulled by the CJEU over fundamental rights violations? To what extent, if at all, could individuals from non-European territories claim protection under the CFREU for the violation of their fundamental rights?

One case stands out as being particularly interesting in this regard. The *Polisario Front* case was concluded near the end of 2016 by a judgment of the CJ. Although this thesis will go more in depth as to the relevance of this case, for the

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[69] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECR.; Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351.

methodology section two aspects of the verdict and proceedings stand out in this case. Firstly, it is the conclusion of the judgment that awarded the fundamental right to self-determination to the territory of Western Sahara, without building upon EU legislative sources such as the CFREU, instead basing its decision on international law. Secondly, the *Polisario Front* case has in fact had two judgments. Before the CJ handled the appeal, the initial judgment was given by the GC. In itself this is not very remarkable, and while the two judgments yielded the same result, the GC did build its verdict on European law, including the CFREU. This thesis will show that the two judgments present the two different perspectives on judicial activism and judicialization.

Given the novelty of the final judgment, scholarly research into the impact of these judgments and what they illustrate in terms of judicial activism has been limited. Nevertheless, the Court's actions in this field could have big consequences and be exemplary for the Court's future course.[70] Therefore, a careful and detailed exploration of the topic will yield interesting findings that can be used for the future study of judicial activism. This thesis has chosen a single case study to be able to use qualitative methods to focus on carefully examining the CJEU's reasoning and the accompanying context.

3.2 Measuring Judicial Activism and Judicialization

Measuring the concepts of judicial activism and judicialization is challenging. Some studies attempt to measure judicial activism based on the personal beliefs of the judges in comparison to the progressiveness of their rulings and how they measure up to actual law. But, as Grimmel says, to presume judicial activism merely on the basis of beliefs we think the judges might have had is a non-scientific approach.[71] To measure judicial activism, scholars typically combine one or more of the following measures. Firstly, whether or not the standing legislation was struck down by the Court's decision.[72] Secondly, whether or not actions by the executive branch were reversed. Thirdly, whether or not prior precedents were overruled. Fourthly, whether or not the jurisdiction of the Court was expanded through its ruling.[73] One of the pitfalls is that these approaches, even combined, do not contextualize the standing legislation and actions, and do not adequately take into account the legal argumentation used by the Court upon striking down legislation, reversing actions and overruling precedents.

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[70] The CJEU is however in principle not legally bound by its previous case-law.
[71] Grimmel, 2012; Yung, C.R. (2011). Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts. *Northwestern University Law Review* 105(1).
[72] Lindquist and Cross, 2009.
[73] Yung, 2011.; Lindquist and Cross, 2009.

To overcome this gap in the approach to judicial activism, this thesis does not only use a combination of the four methods already mentioned, but also takes into account an analysis of the legal reasoning used by the CJEU to explain its decisions. It uses the argument made by Grimmel, who, like Arnull, believes that far-reaching judicial activism can only be tested by an elaborate analysis of the legal arguments given by the CJEU to support its decisions. If there are compelling explanations for decisions in the law, it is the law that ought to be criticized and not the decision of the judges. Unless the law provides no substantial basis for the ruling, one should not presume that the CJEU is pushing beyond its boundaries (this is also termed context rationality).[74] In order for an action to be perceived as justifiable within European law, a decision has to meet three basic conditions. The ruling must not overstep the measures that draw the line between law and politics; the ruling needs to conform to the accepted standard of a common understanding of European law; and the verdict must be acceptable as a common legal practice, and fit in the context of past judicial decisions and developments.[75] Furthermore, as Ferejohn says, when judicial activism occurs it will be responsive to the political context.[76]

The differences in the judicial reasoning of the CJ and the GC in itself already imply the importance of the basis on which the ruling was built. While the four benchmarks for measuring judicial activism provide a picture of the extent to which the conclusions of the ruling were activist, it needs a political context as well as a careful analysis of the legal reasoning to provide a complete picture of judicial activism.

3.3 Steps of Analysis

Combining the common methods of measuring judicial activism with the approach of context rationality, this thesis analyzes the role of the CJEU in the protection of fundamental rights in external agreements, with a specific focus on the two judgments in the *Polisario Front* case. Applying these methods for this purpose results in the following steps that will need to be taken in order to give a coherent conclusion on the question.

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[74] Grimmel, 2012; Arnull, A. 2006. The European Union and its Court of Justice. Oxford, New York: Oxford Univ. Press.

[75] Grimmel, 2012.

[76] Ferejohn, J. (2002). Judicializing Politics, Politicizing Law. *Law and Contemporary Problems*, 65(3).

3.3.1 Step 1: Overview of the Existing Legislation

Firstly, an extensive overview of the relevant European legislation is given with regards to fundamental rights protection and external agreements. The chapter will explore the role of fundamental rights within the EU and external policy in particular. What do the Treaties say on the protection of fundamental rights? What is the role of the CFREU? What does other relevant legislation on fundamental rights say? What are the limitations of fundamental rights law in the EU?

3.3.2 Step 2: Analysis of Case Law

Step 2 focuses on the other source of European primary law, namely the case law on fundamental rights by the CJEU. This chapter compiles the relevant cases and will provide a full picture of the previous relevant rulings and precedents the CJEU has set with regards to fundamental rights and external agreements. It focuses mainly on the scope of the jurisdiction of the CJEU with regards to these two topics. What are the limits of the CJEU's jurisdiction with regards to fundamental rights? What has the case law on these limits said? What about the CJEU's involvement with external agreements? Finally, it also discusses the CJEU's case law on the requirements of litigants being able to bring their cases in front of the CJEU. What are these requirements and what are the limitations? How did the CJEU expand or limit these requirements through its past case law?

3.3.3 Step 3: The *Polisario Front* Case – the Context, the Parties and the Ruling

This chapter starts by placing the *Polisario Front* case in the context of the case law as mentioned in the previous chapter. Then, it provides a complete picture of the case. What are the circumstances in which the case arose? Who brought it the matter in front of the CJEU? Who are the other parties involved and what are their interests in the case? How did the case proceed? What were the rulings by the GC and the CJ and what did they mean for the parties involved?

3.3.4 Step 4: The Analysis – Judicial Activism?

A further analysis of the judgments by the GC and the CJ is conducted in terms with the benchmarks of judicial activism as discussed above. It not only aims to simply answer the questions with a "yes" or a "no" answer, but in line with the

approach of context rationality it also looks at the judicial reasoning for the decisions made by the CJEU.[77] What did the judgments do in relation to current standing legislation, did they strike down policies that might have indirectly been up for legislative review, and what would have been the reasoning behind it? Did the judgments reverse executive action and why? Where do the judgments stand in terms of previous precedents set through case law? Did they overthrow them or did they align with them, if so, why? And finally, what do the judgments mean in terms of the expansion of the CJEU's jurisdiction? What was the reasoning behind these decisions? Where do these judgments stand in the trend of judicialization?

3.4 Generalization and Limitations

The disadvantage of a case study is the limitations its places upon the opportunity of the generalization of its results. Because it is a small sample, consisting of just two rulings in one case, the thesis provides an in depth analysis of this single case, but it is difficult to draw broad conclusions based upon the small *n* sample. Making statements on judicial activism of the CJEU over the entire policy spectrum is difficult based on this thesis. However, since this concerns case law, which is a source of primary law, it means that the judgment remains in place until it is overruled. This means that the influence of the judgment is lasting beyond this case, and that this ruling has in fact become a part of the European legislative framework used to base new decisions on.

Thus, while drawing conclusions for all rulings by the CJEU is impossible, the conclusions of this thesis will bear relevance for the future decisions by the CJEU in the area of fundamental rights in external agreements, and will become a guideline for future case law. Within the specific policy field of fundamental rights, then, and the CJEU's jurisdiction within this field, the conclusions of this thesis might apply.

[77] Arnull, 2006; Grimmel, 2012.

4 Fundamental Rights in EU External Relations

It is a carefully constructed narrative that fundamental rights are integral to the European Union. Some would indeed argue that they are inherent to the very core of Union law and all its policies. At the start of the European project, however, fundamental rights were not as integrated to the European structure as the current emphasis on them might suggest. It was not until the Maastricht Treaty was signed in 1992 that European law formally included fundamental rights into its framework. Before the Maastricht Treaty, the CJEU laid the basis for the role of fundamental rights in the EU, which is expanded upon in the next chapter.

This chapter outlines the evolution of legislation on fundamental rights in the European Union, both in its Treaties and secondary legislation. Secondly, the chapter discusses the role of fundamental rights in European trade and external agreements, focusing on both the legislation underpinning this role as well as the underlying motives and objectives.

4.1 Fundamental Rights in European Legislation

Although the preamble of the Single European Act from 1987 mentioned fundamental rights, it was the Maastricht Treaty (1992) that converted respect for fundamental rights into a treaty obligation.[78] In Article F.2, it states that the EU shall respect fundamental rights as guaranteed by the ECHR and establishes them as general principles of Community law.[79] Furthermore, it named the development and consolidation of fundamental freedoms and human rights as an objective for the Common Foreign and Security Policy (CFSP).[80]

An important milestone for the inclusion of fundamental rights was reached in 2000, upon the proclamation of the CFREU. It responded to the apparent need to make fundamental rights and their importance more visible to

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[78] Defeis, E. (2017). Human Rights, the European Union, and the Treaty Route: From Maastricht to Lisbon. *Fordham International Law Journal*, 35(5).; de Búrca, G. (2011). The road not taken: the european union as a global human rights actor. *The American Journal of International Law*, 105(4).
[79] Article F.2 The Treaty of Maastricht on European Union [1992].
[80] Article J1.2 The Treaty of Maastricht on European Union [1992].

European citizens.[81] Furthermore, it needed to reflect the expansion of the EU into policy areas where, unlike the original competences, the protection of fundamental rights is an essential criterium. Moreover, fundamental rights had grown to become a point of attention of the international community in general, and the EU needed to follow suit.[82] All new European legislative proposals are vetted for compliance with fundamental rights, can be interpreted in the light of the CFREU and, as discussed above, can be revoked by the CJEU for infringing fundamental rights.[83] Therefore, the growing importance of fundamental rights in the EU and the interpretation by the CJEU has centralizing tendencies, and may indirectly increase the reach of EU law.[84] The Lisbon Treaty (2009) gave the CFREU legal meaning via one simple article that stated that the CFREU was binding.[85] However, it only provides a baseline for fundamental rights protection, and Member States are allowed to instate higher standards of protection, a matter that has been specifically important for the German Constitutional Court.[86] The Lisbon Treaty also amended Article 6(2) TEU[87] in such a way that it placed the obligation upon the EU to accede to the European Convention of Human Rights, a document dating from 1953 and a large inspiration on the CFREU. A draft agreement was negotiated in 2011, but the CJEU ruled in 2014 that the draft agreement was not conform EU law.[88] The negotiations for the EU's accession are thus still underway, and face tremendous difficulties in combining the two legal frameworks while preserving the autonomy of EU law.

Despite the developments regarding the integration of fundamental rights into the European framework,[89] such as the inclusion of the CFREU in the Lisbon Treaty, the long awaited but still pending accession to the European Convention of Human Rights (ECHR)[90], and the adoption of a New Strategic Framework on Human Rights and Democracy[91], the EU is still criticized because of the

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[81] Defeis, 2017.
[82] Ibid.
[83] De Vries, 2013.
[84] Lenaerts K (1991) fundamental rights to be included in a community catalogue. *European Law Review* 16, 367–390.
[85] De Vries, 2013.
[86] See: Solange I and Solange II and the next chapter.
[87] Article 6 Treaty on the European Union [2007] OJ C 326
[88] Opinion 2/13 *Opinion pursuant to Article 218(11) TFEU* [2014] ECR.; See Butler, G. (2015). A Political Decision Disguised as Legal Argument? Opinion 2/13 and European Union Accession to the European Convention on Human Rights. *Utrecht Journal of International and European Law*, 31(81), 104–111.
[89] See: Ferraro, F. and Carmona, J. (2015). *Fundamental Rights in the European Union: The role of the Charter after the Lisbon Treaty*. Members' Research Service. [online] European Parliamentary Research Service. Available at: http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/554168/EPRS_IDA(2015)554168_EN.pdf
[90] The accession was blocked by the CJEU in 2014 in Opinion 2/13.
[91] EU strategic framework and Action Plan on Human Rights and democracy, Council of the European Union, Doc 11855/12, 25 June 2012.

shortcomings of its fundamental rights policy.[92] The CFREU is not all-encompassing, and leaves gaps in its application, that might be resolved by interpretation of the CJEU. One of these gaps is the jurisdiction and territorial scope of the CFREU. While the ECHR has a clause limiting the scope of its application, the CFREU does not include a similar one.[93] Too often, the EU is seen to be too lenient towards undemocratic regimes, the coherence between the internal and external dimensions can be found lacking and the coordination between Member States' reactions to human rights failings in third countries is inadequate.[94] Despite the patchwork of its legal competences regarding fundamental rights, the EU has developed into global leader with regards to fundamental rights, its protection, and its promotion.[95]

4.2 Fundamental Rights in External Relations

As further European integration solidified fundamental rights as concrete policy goals, the EU formed the objective to become and be perceived as a global norm setter and peace builder. Fundamental rights became a foreign policy objective, and the EU aimed to be a role model to other countries.[96] In fact, Article 21(1) TEU names fundamental rights as the guiding principles to its actions on the international scene.[97] But the altruistic leadership role of the EU can also be explained from the European belief that their security is best protected in a stable global sphere, and that fundamental rights and its promotion have been and will be indispensable in achieving and maintaining this stability and peace.

Since 2012, European external relations concerning fundamental rights have been guided by the "EU Strategic Framework and Action Plan on Human Rights and Democracy." This framework sets out the values, principles and objectives that will guide its external action in this regard. The centrality of fundamental rights within the EU's foreign policy has been confirmed by the new action plan adopted in 2015.[98] The Commission also produces EU guidelines on key fundamental rights matters, ranging from LGBTI rights to the death penalty.[99]

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[92] Leconte, C. & Muir, E. (2014). Introduction of Special issue: understanding resistance to the EU fundamental rights policy. Human Rights Review, 15(1), 1-12. DOI: 10.1007/s12142-013-0301-3
[93] Velluti, 2016.
[94] Leconte and Muir, 2014.
[95] Ibid.
[96] Ferreira-Pereira, L. (2012). Human Rights, Peace and Democracy: Is "Model Power Europe" a Contradiction in Terms? In: F. Bindi, ed., The Foreign Policy of the European Union: Assessing Europe's Role in the World.Washington: Brookings Institution Press, 290-302. ; de Búrca, 2011.
[97] Article 21 Treaty on the European Union [2007] OJ C 326
[98] Keeping Human Rights at the Heart of the EU Agenda 2015-2019
[99] The Guidelines: [ADD]

Although these guidelines are not legally binding, they have a steering function in foreign policy.[100]

However, while the triumph of fundamental rights seemed to be at hands in the beginning of the post-Cold War era, it is less assured now. The legitimacy of fundamental rights within the Western model has been criticized by economically thriving countries, mostly Asian, who reject the Western ideas on fundamental rights, and because the global financial crisis was widely regarded as the result of the Western societal model.[101] Furthermore, the credibility of the discourse on fundamental rights is undermined by the violations of fundamental rights by Western countries, amongst others under the guise of counter-terrorism measures. Moreover, it is not easy to promote fundamental rights externally. When it concerns areas such as women's rights, the EU is often accused of imposing its own values onto third countries, and when it concerns civil and political rights, the EU, at best, is perceived by the government of the respective country as meddling in its affairs, undermining their position.[102] Fundamental rights are a rigid concept, and because of this it is difficult to negotiate about their rightful application. The carrying out of the values of fundamental rights is further impeded by the fact that the policy needs to be consented to by 28 Member States. The differences in their interests ensure that the policy going forward often consists of just the lowest common denominator.[103]

Nevertheless, both the European Parliament as well as European civil society keep pressing for the integration of fundamental rights in existing policies and adopting new, progressive legislation. The Parliament has adopted fundamental rights into their core tasks, and divides a lot of attention to it via, inter alia, the Sub-committee on Human Rights, submitting questions on fundamental rights policies to the Commission and awarding the annual Sakharov Prize for the freedom of thought.[104] Moreover, Parliament will not approve of an external agreement which does not include adequate safeguards for fundamental rights, hereby not only making a clear stance but also facilitating the Commission's negotiating position with third countries, clarifying that without such a fundamental rights clause there is no agreement.[105] In fact, these fundamental rights clauses in external agreements have proven to be highly effective in securing the EU's objective of both protecting and promoting fundamental rights as well as being perceived as a global fundamental rights leader.[106]

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[100] Wouters, J. and Hermez, M. (2016). EU Guidelines on Human Rights as a Foreign Policy Instrument: an Assessment. *CLEER Papers 2016/4, The Hague, Centre for the Law of EU External Relations*, 170, 63-81.
[101] King, 2011
[102] Ibid.
[103] Ibid.
[104] King, 2011.
[105] King, 2011; King, T. (1999). Human Rights in European Foreign Policy: Success or Failure for the Post-Modern Diplomacy? *EJIL* 10(2), 313-337.
[106] Schmieg, E. (2014). *Human rights and sustainability in free trade agreements: can the Cariforum-EU Economic Partnership Agreement serve as a model?*. SWP Comments. Berlin:

4.3 External Agreements as Fundamental Rights Mechanisms

The large majority of European external agreements are external trade agreements, and it is these external trade agreements that this section will be focused on. External trade agreements are essential to the EU's foreign and economic policy. Through these agreements, the EU can grant (limited) coveted access to its internal market.[107] On top of furthering the economic objectives of the European Union, these external agreements can also be used to spearhead other foreign policy goals of the EU, such as environmental protection, security, and fundamental rights. Arguably, the EU's economic power and the instruments that come with it, for example economic sanctions, development policies and the brokering of these external agreements, is the most powerful foreign policy tool the EU possesses.[108] They provide the EU with the necessary capability for strategic action in the domain of foreign policy.[109]

Still, the patchwork that is the legal standing of fundamental rights in the EU framework also shimmers through in the European external economic and developmental policy fields.[110] The application and implementation of fundamental rights measures and policies are preferential and not uniform. For example, the Generalized System of Preferences (GSP), providing support to development countries, has a mechanism that allows support to be withdrawn when the country in question violates fundamental rights In reality, however, this has happened only a few times, in Myanmar and Belarus for example, and while similar allegations were made to Uzbekistan and Turkmenistan, their GSP status was not withdrawn. The EU is thus selective in the cases where they use their power to withdraw privileges on the internal market, even though there have been clear violations of fundamental rights.[111]

The inclusion of fundamental rights clauses in all external agreements of the EU with third countries, including, amongst others, trade, association, and Liberalization Agreements, are an important component of the objective to protect and promote fundamental rights worldwide. The relevance of these clauses was

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[107] Velluti, 2016; King, 2011; Schmieg, 2014.
[108] Conant, L. (2014). Compelling Criteria? Human Rights in the European Union. *Journal of European Public Policy,* 21(5) pp. 713-729. 10.1080/13501763.2014.897742
[109] King, 2011.
[110] Schmieg, 2014.
[111] Velluti, 2016

emphasized in a Communication[112] by the Commission, in which it emphasized that trade policy and the external agreements formed a core constituent to the Europe 2020 strategy.[113] Through it, the EU will encourage third countries "to promote the respect of human rights, labor standards, the environment and good governance."[114] Furthermore, it is now widely accepted that companies and businesses can profoundly affect a wide range of fundamental rights through ethical trade, respect for fundamental rights and responsible supply chain management. [115] If not carefully implemented, however, external trade and liberalization agreements can also cause fundamental rights violations and other human security threats. The fundamental rights clauses then serve to prevent the violation of fundamental rights through the agreement.[116] The clauses consist of two parts. Firstly, it proclaims fundamental rights to be at the basis of the respective agreement with the third country. Secondly, it includes an "appropriate measures" clause, allowing either party to adopt "appropriate measures", should the other party fail to uphold the essential elements of the agreement. The essential elements consist, among others, of fundamental rights.[117]

But the despite the objectives of these clauses, they are often met by criticism. They are deemed a violation of national sovereignty by third countries, who do not welcome or wish for such intrusion on their national sphere.[118] Moreover, critics call the credibility of these clauses into question, because the application of these "appropriate measures" clauses seem uneven and selective at best.[119] For example, while the association agreements with the Ukraine, Georgia and Moldavia include appropriate measures clauses, the EU only uses them as a last resort for exceptional circumstances. Will suspension therefore actually be on the table if fundamental rights are found to have been violated?[120]

Hence, the question arises on the true motivations of the EU to include these clauses and to trigger them; are they genuinely being humanitarian and pursuant of adequate protection and promotion of fundamental rights? Or is

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[112] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee Com/2012/022 final on Trade, growth and development: Tailoring trade and investment policy for those countries most in need [2012].
[113] Europe 2020 Com/2010/2020 A strategy for smart, sustainable and inclusive growth [2010].
[114] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee Com/2012/022 final on Trade, growth and development: Tailoring trade and investment policy for those countries most in need [2012].
[115] Wouters, J., and Hachez, N. (2009). When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights Be Ensured? *Human Rights & International Legal Discourse,* 301-316. ; Schmieg, 2014.
[116] Schmieg, 2014.
[117] Bartels, 2014.
[118] King, 2011; Velluti, 2016; Dolle, T. (2015). Human Rights Clauses in EU Trade Agreements: The New European Strategy in Free Trade Agreement Negotiations Focuses on Human Rights—Advantages and Disadvantages. In: N. Weiß and J. Thouvenin, ed., The Influence of Human Rights on International Law.. New York City: Springer International Publishing, pp.213-228.
[119] Velluti, 2016; Schmieg, 2014.
[120] Velluti, 2016.

reality more cynical, and are the EU's motivations more economic or even political in nature?[121] The number of cases where the EU took appropriate measures is small, whilst the list of cases where the EU could have triggered is long. The EU has only relied on the clause to put in place sanctions in respect of the Cotonou Agreement, which includes just African, Caribbean and Pacific countries. While Parliament calls for more clear criteria to assess whether or not the obligations under the clause are met, the Commission believes that the clause mainly serves to show the shared commitment to human rights, and to use it to impose sanctions should only be done in the most extreme cases, for example after a coup d'état.[122]

4.4 Legal Standing of External Agreements

The EU is a legal actor who concludes external agreements on behalf of its 28 Member States. Therefore, these external agreements fall within the jurisdiction of the CJEU. The question that arises, then, is whether or not the Treaty articles and other legislation with regards to fundamental rights have an extraterritorial scope? Can they be applied to European policies with extraterritorial effect? Articles 3(5) and 21 TEU[123] have a very wide scope, referring, for example, to the "relations in the wider world", covering both extraterritorial acts as well as policies with extraterritorial effects. They also require the EU to respect fundamental rights, so it cannot violate them through its policies, as is the case with all of the EU legislation.[124] But, as Bartels says, "whether there is a further obligation to 'protect' human rights in relation to the acts of third parties is doubtful."[125] Article 3(5) states that the EU shall uphold and promote fundamental rights in its external relations.[126] The word 'uphold' is ambiguous as to whether its meaning also includes 'protect'. Although the EU has a clear duty to promote and respect fundamental rights, also in relation to an agreement with a third country, the duty

[121] King, 2011.
[122] King, 2011; Bartels, 2014.
[123] Article 3 Treaty on the European Union [2007] OJ C 326; Article 21 Treaty on the European Union [2007] OJ C 326
[124] Moreno-Lax, V. and Costello, C. (2014). The Extraterritorial Application of the EU Charter of Fundamental Rights From Territoriality to Facticity, the Effectiveness Model. In: S. Peers, T. Hervey, J. Kenner and A. Ward, Eds., *The EU Charter of Fundamental Rights: A commentary*. Oxford: Hart Publishing.; Bartels, L. (2015, January 20) The EU's Human rights obligations in relation to policies with extraterritorial effects. European Journal of International Law. [online] Available at: https://academic.oup.com/ejil/article/25/4/1071/385513/The-EU-s-Human-Rights-Obligations-in-Relation-to; Bartels, 2014.
[125] Bartels, 2014, p17.
[126] Article 3 Treaty on the European Union [2007] OJ C 326

to protect these rights with regards extraterritorial policies or the extraterritorial effects of policies is ambiguous.[127]

While the ECHR has a clause that clearly delimits its extraterritorial scope and jurisdiction[128], the jurisdiction of the CFREU is a more open question.[129] The Commission, Parliament and the High Representative for Foreign Affairs and Security Policy have all stated that the CFREU applies in all aspects of EU external action, but these are merely political statements without a binding legal element.[130] Certainly, the CFREU applies to external policies, but what do these rights *mean* for the pursuit of external trade and development policies? Some would argue that the CFREU is a parameter of legality for the EU's international agreements, especially with regards to social rights, when a trade agreement would breach workers' rights as established in the CFREU. Subsequently, the agreement could be subjected to judicial review by the Court. In practice, however, this is difficult as it raises the issue of the legal standing of non-privileged applicants before the CJEU and the feasibility of the possibility that CFREU workers' rights may apply in third countries through external trade agreements.[131]

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[127] Bartels, 2014.
[128] Article 1 European Convention on Human Rights [1950]
[129] Bartels 2014; Velluti, 2016.
[130] Bartels, 2014.
[131] Article 263 Treaty on the Functioning of the European Union [2007] OJ C 326

5 CJEU Case Law on Fundamental Rights

As was already explained in the previous chapter, the role of fundamental rights in the EU was minimal in the original Treaties. They were consolidated only in 1993 in the Treaty of Maastricht. But whilst they were not formally adopted into the Treaties, the CJEU laid the foundation for the current fundamental rights framework of the EU through its case law. This chapter will give an overview of the most significant case law regarding fundamental rights. Secondly, it will give a detailed analysis of the case law regarding the matters of external trade agreements, extraterritorial effect of European fundamental rights legislation and the eligibility of applicants in non-EU territories. Finally, it will analyze the alleged judicial activism of the Court in the area of fundamental rights, seeking to explain it as well as discussing the consequences.

5.1 Fundamental Rights and the CJEU

Although the CJEU became instrumental for the incorporation of fundamental rights into the EU legislative sphere, in its early case law it held that fundamental rights were outside of the competences of the EU, and could therefore not be invoked in the CJEU by the applicant.

In *Stork*, an action for the annulment of a coal sale governing measure by the High Authority of the ECSC infringing the applicant's rights under German basic law, the CJEU in its ruling said that it could not judge on alleged violations of fundamental principles of German law, rejecting the applicant's claim.[132] In *Geitling* the CJEU reiterated it stance and furthermore stated that:

> "Community law, as it arises under the ECSC Treaty, does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights."[133]

[132] Case C-1/58 *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community* [1959] ECR 17.

In other words, the Court did not only decline to review constitutional rules of Member States, it also did not envisage the existence of general principles like fundamental rights within EU law. It further elaborated upon its stance in *Sgarlata*[134], in which a group of fruit farmers in Italy challenged two Commission regulations about fixed prices on citrus fruits on the grounds that they violated fundamental rights established in Italian constitutional law. According to the Court, the treaty provisions could not be overridden by other principles. Therefore, it deemed the case inadmissible.[135] The Court thus rejected the role of fundamental rights in the ECSC in early cases.[136]

The hesitancy of the Court changed with the *Stauder* ruling, in which the Court established that fundamental rights were a general principle of EU law, and therefore protected by the Court.[137] The applicant, Mr Stauder, claimed that the fact that he had to disclose his name in order to make use of a Community welfare scheme[138] was a violation of fundamental rights under German constitutional law. The Court did not reference its earlier opposing case law when it mentioned fundamental rights as "enshrined in the general principles of Community law"[139].

The Court expanded on general principles in case law following the *Stauder* judgment. In *Internationale Handelsgesellschaft*[140], the applicant objected to the system governing the cornmeal market, as it violated fundamental rights provided by German basic law. Although the Court did not find such violation, it stated that fundamental rights are integral to the general principles of EU law, as protected by the CJEU. Furthermore, "the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the [Community]."[141] As the Internationale Handelsgesellschaft pursued the matter at the German Constitutional Court, the CJEU was challenged by the German Courts, which ruled that because there was no catalogue of fundamental rights in the EU, the fundamental rights protection in German basic law would trump EU law, thereby questioning the principle of supremacy.[142]

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[133] Joined Cases C-36-38/59 and C-40/59 *Präsident Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG v High Authority of the European Coal and Steel Community* [1960].
[134] Case 40/64 *Sgarlata and others v. Commission* EEC [1965] ECR 215.
[135] Ibid.
[136] De Búrca, 2011.
[137] Case C-29/69 *Erich Stauder v City of Ulm* [1969] ECR 419.
[138] The welfare scheme in question allowed him to buy butter surplusses at a reduced price via coupons.
[139] Case C-29/69 *Erich Stauder v City of Ulm* [1969] ECR 419.
[140] Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.
[141] Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para. 4.
[142] The Italian Constitutional Court issued a similar ruling in *Frotini v Ministero delle Finanze*.

This was not the final instance in which the efforts of the CJEU to integrate fundamental rights into its legislative structure were met by opposition of national courts, who reserved the right to dismiss European law as inapplicable when the national provisions on the protection of fundamental rights were thought to be incompatible with European law.[143] A prominent example is the German *Solange I* case.[144] The German federal constitutional court ruled that in matters concerning fundamental rights, constitutional provisions took precedence over European law, as European law did not ensure the same standard of protection of fundamental rights as the German constitution. It revised its position several years later in the *Solange II* judgment[145], after the CJEU had considerably strengthened the protection of fundamental rights through its case law.

After *Solange I*, the need arose for the EU to compile a catalogue of fundamental rights, and the development of a European fundamental rights doctrine. The CJEU began establishing additional sources of fundamental rights law in *Nold*[146], in which it was claimed that property rights and right to pursue economic activity were violated by Community legislation on the sales of coal. Firstly, the CJEU established that when EU legislation is in conflict with fundamental rights, said legislation would be dissolved. Secondly, it recognized international human rights treaties as an additional source of fundamental rights in EU law.[147] The *Rutili* case specifically established the ECHR as a source for fundamental rights in EU law.[148] In *Hauer*[149] and *Wachauf,*[150] the Court established that fundamental rights must always be balanced and weighed against wider interests of the EU. The Court limited its competence in fundamental rights to include only Union matters in *Klensch* [151]*, Demirel*[152] and *Bostock*[153]. In other words, national policies and actions by Member States are areas outside of the scope of Union legislation, in which Member States need not comply with EU general principles, such as fundamental rights.

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[143] Claes, M., & Reestman, J. H. (2015). The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case. *German law journal: review of developments in German, European and international jurisprudence*, 16(4), 917-970.
[144] Bundesverfassungsgericht, Beschluß vom 29/5/1974, (BvL 52/71 (Solange I))
[145] Bundesverfassungsgericht, Beschluß vom 22/10/1986 (2 BVR 197/83 (Solange II))
[146] Case C-4/73 *Nold v Commission* [1974] ECR 491.
[147] Ibid., para. 13.
[148] Case C-36/75 *Roland Rutili v Ministre de l'intérieur* [1975] ECR 1219.
[149] Case C-44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.
[150] Case C-5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609.
[151] Joined Cases 201/85 and 202/85 *Klensch and Others v Secrétaire d'Etat* [1986] ECR 3477.
[152] Case C-192/89. *S. Z. Sevince v Staatssecretaris van Justitie* [1990] ECR I-3461.
[153] Case C-2/92, *Bostock*, [1994] ECR I-955.

5.2 Fundamental Rights Case Law After the CFREU

The case law of the CJEU, the Treaties and the CFREU constitute primary EU law, conferring upon the CFREU the same legal value as to the other sources of primary EU law. The CFREU had a profound impact on the legal sphere of the EU. Between December 1 2009 and December 31 2014, the Court referred to it in its rulings 353 times. Still, it has to be noted that it was used twice as a source of European legislative review,[154] with only two Directives struck down because of it.[155]

The Court has established case law dealing with scope of application of EU law and the CFREU, with *Åkerberg Fransson*[156] as the most notable example. This case concerned a Swedish fisherman who had provided false information with regards to his income and VAT, and a tax surcharge had been imposed on him in 2007. When two years later he was also facing criminal charges for the same offense, the case was brought to the CJEU on the belief that it violated the fundamental right of *ne bis in idem.*[157] The Court ruled that this case fell within the scope of the CFREU because the case law said that "the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations."[158] Because Member States are obligated to take all appropriate legislative and administrative measures to ensure VAT collection under Directive/2006/112/EC[159] and are obliged to protect the financial interests of the EU[160], this case indeed fell under the scope of EU law and the CFREU. The verdict of the applicability of the CFREU and EU law on all situations governed by EU law was reiterated on the same day, in fact, by the CJEU in *Melloni*,[161] stating that national courts are only free to apply national standards of fundamental rights protection in situations where its actions are not completely determined by EU law. Even in these cases, the minimum standards of the protection of fundamental rights by the CFREU must be upheld.

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[154] Chalmers and Trotter, 2016.

[155] Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-773.; Case C-293/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* [2014] ECR.

[156] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECR.

[157] Meaning that person cannot be convicted for the same crime twice, as established by Article 50 CFREU.

[158] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECR, para 19

[159] Council Directive 2006/112/EC on the common system of value added tax [2006] OJ L 347/1.

[160] Article 235 Treaty on the Functioning of the European Union [2007] OJ C 326

[161] Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECR.

In *Schecke*[162], the CJEU annulled some provisions of a EU legislative act for the infringement of the right to privacy, and in *Test-Achats*[163] it struck down legislation that invaded the right to equality. Contrarily, the Court thought the European Arrest Warrant (EAW) and the rules governing it were compatible with the rights of defense and the right to a fair trial in *Melloni*.[164] Its reasoning in this case has been thought to be lacking and thinly substantiated.[165] Similarly, the earlier judgment of the Court in *Advocaten voor de Wereld* dismissed the concerns of the referring Belgian Constitutional Court regarding the EAW rules. Likewise, this judgment was also regarded to be lacking in solid argumentation.[166] In *Ireland v Parliament and Council*, the Court was perceived to circumvent the real issue surrounding the Data Retention Directive[167] by focusing on the correct legal basis of the measure.[168] While *Melloni* and other aforementioned rulings stimulate a good working relationship with other European institutions, it does not eliminate the doubts of the National Constitutional Courts whether the Court acts a truly independent and genuine guardian of fundamental rights against infringements by European legislation.[169]

5.3 On External Trade Agreements and Fundamental Rights

International agreements with third countries, trade related or other, are important to European external relations, as was established in the previous chapter. Whereas many of the powers of the EU and its institutions are explicitly defined in treaty articles, the case law regarding fundamental rights in external agreements predominantly concerns the implicit powers of European institutions. The theory of implicit power states that when there is explicit power in a particular area within the EU, the treaties implicitly confer similar powers onto the EU to conclude agreements with third countries in respective fields.[170] Thus, explicit

[162] Joined cases C-92/09 and C-93/09 *Schecke and Eifert v. Land Hessen* [2010] ECR I-11063 .
[163] ECR I-5573 Case C-236/09 *Association Belge de Consommateurs Test-Achats ASBL v. Conseil des Ministres* [2011] ECR I-773.
[164] Case C-399/11 *Stefano Melloni* [2013] ECR.
[165] De Vries, 2013.
[166] Albi, A. (2010). From the banana saga to a sugar saga and beyond: could the post-communist Constitutional Courts teach the EU a lesson in the rule of law? *Common Market Law Review* 47, 791–829; De Vries, 2013.
[167] Council and Parliament Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L 105/54.
[168] Case C-301/06 *Ireland v. Parliament and Council* [2009] ECR I-82.
[169] De Vries, 2013.
[170] Eeckhout, P. (2011). The Courts and international agreements. In: P. Eeckhout, *EU External Relations Law*. Oxford: Oxford University Press.

internal competences result in competence in external matters. An example is the *ERTA* doctrine[171], which was mentioned earlier, establishing the competence of the EU to enter into an international agreement when it is necessary to attain EU objectives in the respective field. The subsequent case law elaborated upon this judgment. For example, *Kramer* established that the EU could enter international agreements on behalf of its Member States for the conservation of sea resources.
The legal standing of these agreements leads to questions on the jurisdiction of the CJEU on their validity and the legality. Some were answered in Articles 218, 263 and 267 TFEU,[172] but the CJEU's jurisdiction was established more firmly through case law. This section shall focus upon the jurisdiction of the CJEU regarding actions for annulment of international agreements to explore the precedents for cases like Polisario Front.

In *Opinion 1/75*[173], the Court established that international agreements could be subjected to judicial review.[174] Although *Opinion 1/75* was issued in 1975, it was not until *France v Commission*[175], in 1994, until a concluded international agreement was first challenged. France's action related to the Commission concluding this agreement without the involvement of the Council, contrary to Article 218 TFEU[176]. The Commission argued that the case ought to be directed at the Decision authorizing the signing of the agreement rather than the agreement itself. The Court, however, found that any act of an institution that produces a legal effect can be the basis for an action for annulment, and that as the international agreement produced legal effects, it could be challenged for judicial review.[177] It echoes the Court's decision in *Haegeman*[178] that if the agreement is an act of a European institution, it can be used as the basis for a preliminary ruling. As the opinion of Advocate General Tesauro on *France v Commission* held, why should this then not be the case for an action for annulment?[179] In *Germany v Council,* the Court elaborated and allowed specific provisions of an international agreement be subjected to judicial review and be the basis for an action for annulment. Partial annulment, then, is possible.[180] The difficulty with the annulment of international agreements is that it creates contrary obligations under international law, as the CJEU cannot annul the agreement as an act of

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[171] Case C-70/22 *Commission of the European Communities v Council of the European Communities(European Agreement on Road Transport or ERTA)* [1971] ECR 263.
[172] Article 218 Treaty on the Functioning of the European Union [2007] OJ C 326; Article 263 Treaty on the Functioning of the European Union [2007] OJ C 326; Article 267 Treaty on the Functioning of the European Union [2007] OJ C 326.
[173] Opinion 1/75 *re Local Cost Standard* [1975] ECR 1355.
[174] Opinion 1/75 *re Local Cost Standard* [1975] ECR 1355.
[175] Case C–327/91 *France v. Commission* [1994] ECR I–3641.
[176] Article 218 Treaty on the Functioning of the European Union [2007] OJ C 326.
[177] Case C–327/91 *France v. Commission* [1994] ECR I–3641.
[178] Case 181/73 *Haegeman v. Belgium* [1974] ECR 449, paras 2–6.
[179] Case C–327/91 *France v. Commission* [1994] ECR I–3641; Case C–327/91 *France v. Commission* [1994] ECR I–3641, Opinion of AG Tesauro, paras 9–11.
[180] Case C–122/95 *Germany v. Council* [1998] ECR I–973.

international law. Thus, under international law the respective agreement is only annulled in case the EU can argue invalid consent under the law of the Treaties. This means that after an annulment by the CJEU, the respective agreement needs to be terminated or renegotiated by the EU, should it want to prevent itself from not fulfilling their EU law or their international law obligations.[181]

The aforementioned cases also establish the grounds on which an international agreement can be challenged for an action for annulment. These include the Treaties in additional to general principles of EU law, like fundamental rights.[182] Apart from being governed by EU law and EU principles, international agreements also have to contend with provisions of international law. The commitment of the EU to adhere to international law as well as EU law is laid down in several treaty articles, like Articles 3 and 21 TEU and Articles 205 and 216 TFEU, both ensuring that the UN Charter and provisions of international law shall guide European external action and that international agreements by the EU are binding. The integrality of international law to international agreements concluded by the EU is reaffirmed in *International Fruit Company v Produktschap voor Groenten en Fruit*.[183] This case established that additionally to having to abide by international agreements concluded by the EU, according to the Treaties[184], the EU also had to abide by international law. This was further emphasized by *Nederlandse Spoorwegen v Inspecteur der Invoerrechten en Accijnzen.*[185]

Although the aforementioned case law is international law friendly, generally accepting the direct effect and primacy of international law, this image has become more complex following recent case law. Notably, *Kadi*[186] concerned the implementation of UN Security Council Resolutions by EU Regulations. Under these Regulations, the assets of Mr Kadi, a Swedish resident from Saudi Arabia, were frozen. He claimed that this violated his fundamental rights, protected under EU law. The Court held that fundamental rights were a constitutional guarantee stemming from the EC Treaty, and therefore, although it has no jurisdiction over UN resolutions, the EU Regulations transposing these resolutions into EU law were a violation of EU law. Hence, the Court annulled these regulations.[187] In a judgment on the United Nations Convention on the Law

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[181] Eeckhout, 2011.
[182] Case C–327/91 *France v. Commission* [1994] ECR I–3641.; Case C–122/95 *Germany v. Council* [1998] ECR I–973.
[183] Joined Cases C-51-54/71 *International Fruit Company NV and others v Produktschap voor groenten en fruit* [1974] ECR 1107.
[184] Article 216(2) Treaty on the Functioning of the European Union [2007] OJ C 326.
[185] Case C38/75 *Douaneagent der NV Nederlandse Spoorwegen v Inspecteur der invoerrechten en accijnzen* [1975] ECR 1439.
[186] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351.
[187] Ibid.

of the Sea (UNCLOS), in *Intertanko*[188], the CJEU denied UNCLOS' direct effect. While this seems a dubious evaluation of the UNCLOS,[189] it illustrates the CJEU's course to establish its own autonomy as a European legal order.

The Court also addressed the extraterritorial scope of EU law, specifically in relation to external agreements and external relations. In *Parliament v Council*,[190] a EU Regulation was challenged by the Parliament. Since the Treaty of Lisbon, measures concerning fundamental rights can only be adopted by the ordinary legislative procedure, including parliamentary consent. This regulation, however, was not covered by the fundamental rights guarantee of parliamentary consent because it was adopted using external relations procedures. The CJEU ruled that all EU's institutions and their actions have the duty to respect fundamental rights in accordance with Article 51(1) of the CFREU.[191] Consequently, any effects of EU legislation on persons in the EU would be covered by the CFREU; it does not include the protection of fundamental rights of persons outside of EU territory.

In combination with the previously discussed Articles 3(5) and 21 TEU,[192] CFREU has broader meaning, as these Articles refer specifically to the EU's global relations and the external aspects of EU policies; they refer to extraterritorial effects of policies as well as to extraterritorial acts. It is unclear, however, whether the duty to uphold fundamental rights in extraterritorial policies or effects thereof also includes the duty to protect.[193] For example, in *Mugraby,*[194] on alleged violations of fundamental rights by Lebanon, the applicant argued that the EU-Lebanon Association Agreement, including the "appropriate measures" clause, meant that the Commission and the Council had the obligation to take appropriate measures. But both the GC[195] as well as the CJ[196] dismissed his claim, because the appropriate measures clause constitutes a right, not an obligation. The CJEU did not, however, consider the possible existence of such an obligation under EU law and its general principles.[197]

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[188] Case C-308/06 *Intertanko and Others v Secretary of State for Transport* [2008] ECR I-4057.
[189] De Waele, Henri. (2011) *Layered Global Player: Legal Dynamics of EU External Relations*. Springer-Verlag Berlin Heidelberg; Eeckhout, P. (2009). Case C-308/06, The Queen on the application of Intertanko and Others v Secretary of State for Transport, judgment of the Court of Justice (Grand Chamber) of 3 June 2008, nyr. *Common Market Law Review* 46(6), 2041-2057.
[190] Case C-130/10 *European Parliament v Council of the European Union* [2012] Digital Reports.
[191] Article 51(1) Charter of Fundamental rights of the European Union [2000] OJ C 326.
[192] See Chapter 4.
[193] See Chapter 4.
[194] Case C-581/11 P *Muhamad Mugraby v Council of the European Union and European Commission* [2012] ECR 2012-0.; Case T-292/09 *Muhamad Mugraby v Council of the European Union and European Commission* [2011] ECR II-255.
[195] Case T-292/09 *Muhamad Mugraby v Council of the European Union and European Commission* [2011] ECR II-255.
[196] Case C-581/11 P *Muhamad Mugraby v Council of the European Union and European Commission* [2012] ECR 2012-0.
[197] Bartels, 2014.

5.4 CJEU and Judicial Activism in Fundamental Rights

Hence, despite the CJEU's judicial activism regarding the position of fundamental rights in the European legal framework in the earlier years, its involvement in consolidating fundamental rights since the Lisbon Treaty has been mixed. It has become more hesitant, even limiting its jurisdiction in policy areas but with regards to the extraterritorial effects of EU actions and policies as well.[198] At the moment, the Court seems to be balancing the acceptability of its judgments to national Member States with the appeasement of European institutions.[199] Nevertheless, the CJEU's role and involvement in the consolidation of fundamental rights is considerable. The CJEU's rulings have not been restrained in sensitive matters[200] like the rights of suspects of international terrorism, and LGBT rights.[201] Simultaneously, the CJEU has reaffirmed the EU's autonomy as a legal order in the light of international law, establishing that fundamental rights, as general principles of EU law, have precedent over international legislation when it is transposed into EU law, as it did in *Kadi*. Similarly, it reiterated its jurisdiction over European external and international agreements, establishing that all EU actions with legal effect can be subject to judicial review. Moreover, it confirmed the competence of the EU to conclude international agreements on behalf of Member States.

Fundamental rights are an integral part of the European Union, and the CFREU integrated them into the EU legal order. The legal texts *an sich* do not justify how EU law is used, the interpretation of the CJEU is necessary to establish the relationship between law and implementation.[202] The extensive involvement of the CJEU in the solidification of the position of fundamental rights can be explained through expanding the notion of the CJEU's self-interest. This self-interest has two distinctions. Firstly, the institutional interest refers to the expansion of the CJEU's jurisdiction and authority by the CJEU itself.[203] Secondly, is what is called the "non-material self-interest", referring to the idea that the CJEU is the guardian of the Treaties and the values and norms

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[198] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECR.
[199] de Búrca, G. (2013). After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator? *New York University Public Law and Legal Theory Working Papers*, 420. Retrieved at: http://lsr.nellco.org/nyu_plltwp/420
[200] De Waele and Van der Vleuten, 2011; Douglas-Scott, S. (2011). The European Union and Human Rights after the Treaty of Lisbon. *Human Rights Law Review* 11(4), 645-682.
[201] For example: T-163/96 *Connolly v Commission* [1999] ECR II-463; Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143: and Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat v Council* [2008] ECR I-6351.
[202] Chalmers and Trotter, 2016.
[203] De Waele and Van der Vleuten, 2011; Douglas-Scott, 2011.

underpinning these Treaties, e.g. fundamental rights.[204] Thus, the second component of the Court's self interest can be identified as the guardianship of the fundamental rights.[205] This idea gives rise to criticism. After all, the notion of a European people is a contentious one, presuming individuals all across Europe identify with each other and with the idea of being "European".[206] The discussions on the Constitutional Treaty have proven the controversy around the concept of European citizenship, which is too closely associated with the idea of a federal Europe.

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[204] De Waele and Van der Vleuten, 2011.
[205] De Waele and Van der Vleuten, 2011; De Vries, 2013.
[206] De Burca, 2011.

6 Polisario Front: The Case

This chapter aims to provide background on the *Polisario Front* case by contextualizing the legal procedure in the political context of the occupation of Western Sahara. Secondly, it uses the political background to identify the parties in the CJEU proceedings and their interests in the outcome of said proceedings. Finally, an overview of both the GC judgment and the appeal judgment of the CJ is given.

6.1 Background to the Conflict

Since the Spanish colonized Western Sahara in 1884, its independence has been an issue. In 1963, the United Nations General Assembly (UNGA) adopted Resolution 1514 (XV)[207], determining Western Sahara is a non-self-governing territory to be decolonized, listed under Article 73 of the United Nations Charter.[208] UNGA Resolution 2072 (XX) in 1966 urged Spain to decolonize Western Sahara and to hold a referendum for the inhabitants of Western Sahara to exercise their right to self-determination.[209] In 1973, the Polisario Front movement was founded with the aim of liberation of Western Sahara. The UN recognizes it as the spokesperson for the Sahrawi people and their representative in the continuing peace negotiations with Morocco.[210] Finally, when Spain signed off administrative control in 1975 in the anticipation of a referendum and officially withdrew from the territory, both Morocco and Mauritania made

[207] General Assembly resolution 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples, A/RES/1514(XV) (14 December 1960).
[208] Article 73 United Nations Charter [1945] Article 73.
[209] General Assembly resolution 2072 (XX) Question of Ifni and Spanish Sahara, A/RES/2072(XX) (16 December 1965).
[210] Kube, V. (2017). The Polisario case: Do EU fundamental rights matter for EU trade policies? European Journal of International law. [online] Available at: https://www.ejiltalk.org/the-polisario-case-do-eu-fundamental-rights-matter-for-eu-trade-polices/; Hummelbrunner, S. and Prickartz, A. (2017) EU-Morocco Trade Relations Do Not Legally Affect Western Sahara – Case C-104/16 P Council v Front Polisario.[online] Available at: https://europeanlawblog.eu/2017/01/05/eu-morocco-trade-relations-do-not-legally-affect-western-sahara-case-c-10416-p-council-v-front-polisario/

competing historical claims to Western Sahara.[211] A few days after a UN requested opinion of the International Court of Justice (ICJ)[212] stated that Western Sahara had neither a legal connection to Mauritania nor Morocco that could affect the Sahrawi's right to self-determination,[213] Morocco invaded the territory with armed forces. After three years of armed conflict between Polisario Front, Morocco, and Mauritania, Mauritania relinquished its claim in a peace agreement with Polisario Front. Immediately after Mauritania's forces withdrew, Morocco annexed Western Sahara.[214]

The armed conflict between Polisario Front and Morocco lasted until a ceasefire was brokered by the UN in 1991, which included a promise to the organization of a referendum on self-determination and the establishment of UN Mission for the Referendum in Western Sahara (MINURSO).[215] But although the ceasefire has held, the referendum has not been organized yet because of disagreements between the parties as to the terms. Since the truce, a small part in the East of Western Sahara has been under control of Polisario Front, with a 2700 kilometers long, Moroccan-built, sand wall, reinforced with land mines and other military equipment, separating this territory from the part controlled by Morocco.[216]

Since, Morocco has been accused of the alleged exploitations of natural resources in Western Sahara by foreign companies and states, having been granted Moroccan licenses to do so. These resources include, amongst others, phosphate mineral rock, coastal fishery, seabed petroleum, agricultural products, sand aggregates and salt.[217]

Despite the UNGA's condemnation of the Moroccan "occupation" of Western Sahara, so far UN efforts to resolve the conflict have failed. Since Spain transferred its administrative control in 1975, it considers itself exempt from any responsibilities in the matter. However, the UN still recognizes Spain as the de jure administering power, because it cannot singlehandedly transfer the administering power. Meanwhile, Morocco has effective control over the majority

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[211] Kassoti, E. (2017). The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration. *European Papers* 2(1), 339-356.
[212] *Western Sahara*, Advisory Opinion, [1975] ICJ Rep 100 at 102.
[213] Ibid.
[214] Kassoti, 2017
[215] Hummelbrunner and Prickartz, 2016; Spencer, C. (2016, May 16). Western Sahara: The Forgotten Conflict at Risk of Re-escalation. *Chatham House.* Available at: https://www.chathamhouse.org/expert/comment/western-sahara-forgotten-conflict-risk-re-escalation#
[216] Hummelbrunner and Pickartz, 2016; Kassoti, 2017; Fortin, K. (2016) EU, Morocco and the Polisario Front: A Step in the Right Direction? Utrecht Centre for Accountability and Liability Law. [online] Available at: http://blog.ucall.nl/index.php/2016/10/eu-morocco-and-the-polisario-front-a-step-in-the-right-direction/.
[217] Fortin, 2016; Hummelbrunner and Pickartz, 2016.

of Western Sahara, and can thus either be regarded as the *de facto* administering power, or an occupying power. Morocco itself advocates a third option, where Western Sahara is included as part of the Kingdom of Morocco.[218]

An Association Agreement, between Morocco and the EU was concluded in 1996 and entered into force in 2000. It aimed, *inter alia,* to provide for a greater liberalization of trade between the European bloc and Morocco in agricultural and fishery products. To facilitate this liberalization even more, a Liberalization Agreement on these products was concluded in 2010.[219] This Agreement followed the provisions of the Association Agreements, or amended them.

6.2 The Case

Upon the entry into force of the Liberalization Agreement in 2012, Polisario Front made the unexpected move to file for an action for annulment of the Council Decision 2012/496/EU adopting the Agreement[220] at the CJEU, insofar as the provisions of the Agreement applied to Western Sahara.[221] They based their claim on the presumed violation of EU and international law on, *inter alia*, the right to self-determination and the principle of permanent sovereignty over natural resources.[222] According to Polisario Front, the Liberalization Agreement indirectly condones Morocco's economic domination of Western Sahara and obstructs the organization of the referendum. Hence, the Liberalization Agreements infringes upon fundamental rights, as enshrined by EU law, international law and European general principles.

Article 94 of the Association Agreement, which also applies to the Liberalization agreements, determines the scope of the Agreements to be the Kingdom of Morocco.[223] But both Agreements were *de facto* applied to Western Sahara, as Polisario Front argued and the Council and Commission admitted during proceedings. On the EU list of approved exporters, there were companies located in Western Sahara, and the Food and Vetinary Office of the Commission

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[218] Hummelbrunner and Pickartz, 2016; Kassoti, 201,7
[219] Kassoti, 2017; Fortin, 2016.
[220] Council Decision 2012/496/EU on the signature of the Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2012] *OJ L 241/1*.
[221] Fortin, 2016.
[222] Kassoti, 2017.
[223] Kassoti, 2017.

conducted a physical examination of sanitary standards in Western Sahara as well.[224]

6.3 The Parties

6.3.1 Polisario Front

Polisario Front is recognized internationally as the official representative of the Sahrawi in their independence struggle. The ongoing occupation of Western Sahara has been an economic strain. The territory is rich in natural resources, currently exploited by Morocco and international companies. This exploitation does not benefit the Sahrawi. Not only does it deprive them of the economic gains that the exploitation may provide, but the commercial interests involved in the international resource trade also cause the indirect recognition of Morocco's authority over Western Sahara. Although countries like the United States exempt Western Saharan products from their Free Trade Agreement with Morocco, it still trades in resources from the territory, be it directly or indirectly, through transnational companies.[225] The 2014 EU-Morocco Fisheries Partnership Agreement does not exclude Western Sahara from its scope, and gives several European Member States a license to exploit fish in its waters.[226] This, then, can be interpreted as a silent acceptance of Morocco's status as the *de facto* administrative power in Western Sahara.[227]

The consequences of the occupation by Morocco of Western Sahara reach beyond losing political control and the gains of the exploitation of their resources; it also sparked a humanitarian crisis that has largely been forgotten by the international community. After the Moroccan invasion in 1975, thousands of inhabitants had to flee Western Sahara. Unable to return for the past forty years, they now live in refugee camps in Algeria.[228] Moreover, reports by watchdogs indicate that human rights violations occur on a daily basis in Moroccan occupied

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[224] Kubi, 2017.
[225] White, N. (2014). Conflict Stalemate in Morocco and Western Sahara: Natural Resources, Legitimacy and Political Recognition. *British Journal of Middle Eastern Studies 42*(3), 339-357. DOI: 10.1080/13530194.2014.949220.
[226] Power, S. (2016). EU Exploitation of Fisheries in Occupied Western Sahara: Examining the Case of the Front Polisario v Council of the European Union in light of the failure to account for Belligerent Occupation. *Irish Journal of European Law* 19(1), 27-37. Available at: https://www.isel.ie/article/view-free/id/211
[227] White, 2014.
[228] Shefte, W. (2015, January 6). Western Sahara's Stranded Refugees Consider Renewal of Morocco Conflict. *The Washington Post.* Available at:

territory.[229] Although the 1991 ceasefire came with the promise of a referendum on the right to self-determination, the continued absence of efforts to realize this referendum leaves many questioning if it will ever come. With the situation in deadlock, the risk of violent escalation remains high.[230] It is also a matter of identity, the Sahrawi do not see themselves as Moroccan, the settler as opposed to the natives. The battle for the right to self-determination is also a quest for their democratic claim to the territory.[231]

The unusual move by Polisario Front to push for legal action might also stem from the objective to generate more attention for the conflict in Western Sahara, hoping that more public attention might result in intensified efforts to resolve the situation, as well as providing an outcome that will lead to the exploitation of natural resources becoming a national privilege of the Sahrawi people again.[232] The latter is significant as the profits of resource exploitation can aid them in their efforts to develop their future democracy and stability.[233] If efforts to find a resolution for the conflict by the international community are increased, this will also decrease the chances for the reemergence violent escalation.

6.3.2 The Union

Despite the fact that over 40 countries worldwide recognize Polisario Front and Western Sahara, the EU has not taken a position on the status of Western Sahara, not officially recognizing Polisario Front nor the Moroccan claims to the territory.[234] The EU may be guided by the political motive to maintain good cooperation with Morocco, for purposes of migration and counter-terrorism. Furthermore, it would be difficult to take one stance as the EU when the

https://www.theguardian.com/world/2015/jan/06/morocco-western-sahara-referendum-delay

[229] Kennedy, K. (2015, July 23). Kerry Kennedy: Morocco has pressured UN to ignore Western Sahara. *The Guardian.* Available at: https://www.theguardian.com/global-development-professionals-network/2015/jul/23/kerry-kennedy-morocco-international-community-western-sahara

[230] Shefte, 2015; The Economist (2017, February 23). Western Sahara edges closer to renewed conflict. *The Economist.* Available at: https://www.economist.com/news/middle-east-and-africa/21717383-back-spotlight-fate-western-sahara-no-closer ; Kingsbury, D. (2015). The role of resources in the resolution of the Western Sahara issue. *Global Change, Peace & Security* 27(3), 253-262. DOI: 10.1080/14781158.2015.1084615

[231] Zunes, S. & Mundy, J. (2010). *Western Sahara: War, Nationalism and Conflict Resolution.* Syracuse: Syracuse University Press. https://books.google.nl/books?id=6XzuIbQAXUIC&dq=western+sahara&lr=&source=gbs_navlinks_s

[232] Black, 2015.

[233] Kingsbury, 2015.

[234] Gehring, M. (2016) EU/Morocco Relations and the Western Sahara: the ECJ and International Law. [online] Available at: http://eulawanalysis.blogspot.nl/2016/12/eumorocco-relations-and-western-sahara.html

individual Member States are divided, based on their own bilateral diplomatic and economic relations with Morocco.

In Spain, being the former colonial power of Western Sahara, there is a collective guilt for the chaotic situation it left behind after pulling itself from the territory. It failed to leave behind clarity as to the right of self-determination of the Sahrawi people and to leave in place administrative infrastructure.[235] Other considerations in their interests in Western Sahara are twofold. Firstly, Spain wants to improve its relations with Algeria, which is one of the staunchest supporters of the Polisario Front. This has led them to encourage the organization of a referendum on the self-determination of Western Sahara. Secondly, however, Spain has vested interests in the region with regards to its resources that stem from its colonial days.[236] Ensuring their continued access to these resources, it is important to maintain on good terms with the Moroccan authorities. Moreover, given the migration streams coming from Morocco to Spain, cooperation with the Moroccan government is vital. While Spain thus quietly supports Polisario Front and their efforts, partially out of post-colonial guilt, partially out of the desire for improved relations with Algeria, Spain walks a fine line to continue good cooperation with Morocco.

France, on the other hand, wants to maintain good bilateral relations with Morocco. France is one of the biggest supporters of Morocco in the EU.[237] It is its second largest arms' supplier[238], its largest trading partner,[239] and thus has gained much advantage from the 2014 EU-Morocco Fisheries Partnership Agreement.[240] Furthermore, it can be argued that France is the reason behind the inability of the UNSC to handle the matter of Western Sahara more effectively, threatening to use its veto on UN Resolutions that would undermine Morocco's position in the conflict.[241]

Sweden and the Netherlands are the two Member States that are the most forthright and adamant about their recognition of Western Sahara as an occupied territory, attesting that the EU-Morocco Agreements are solely applicable to the

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[235] Sakthivel, V. (2016, June 10). The EU, Morocco, and the Western Sahara: a Chance for Justice. *European Council on Foreign Relations. [online]* Available at: http://www.ecfr.eu/article/commentary_the_eu_morocco_and_the_western_sahara_a_chance_for_justice_7041
[236] Ibid.
[237] Bruneau, C. (2017) EU deeply divided over Western Sahara policy. Almonitor. [online] Available at: http://www.al-monitor.com/pulse/originals/2017/03/morocco-western-sahara-eu-exports-polisario-front.html
[238] Sakthivel, 2016
[239] White, 2015.
[240] Power, 2016.
[241] Bolopion, P. (2010). Western Sahara: France against Human Rights. Human Rights Watch. [online] Available at: https://www.hrw.org/news/2010/12/22/western-sahara-france-against-human-rights.

territory of Morocco, not to products from Western Sahara.[242] Furthermore, after it was revealed that a major supermarket chain in the Netherlands, Albert Heijn, sold tomatoes from occupied Western Sahara while claiming to be originating from Morocco[243], the Dutch government asked companies to not invest in the territory in any way.[244] This call was echoed by the Danish parliament in 2016, calling upon companies and public institutions to exercise due vigilance.[245] When in 2015 rumors spread that the Swedish government would officially recognize Western Sahara as an independent country, Moroccan authorities obstructed an IKEA opening in Casablanca.[246] Germany, though less vocal than Sweden and the Netherlands, has also recently stated that the referendum on self-determination should proceed swiftly.[247]

While many non-EU countries, such as the USA, and the countries in the EFTA trading bloc have taken the consistent view that the independence of the territory of Western Sahara ought to be respected and that the exploitation of resources in this area by Morocco does not benefit the Sahrawi people and have excluded products from the territory from their trade agreements with Morocco, the EU has failed to do so.[248] The division amongst the Member States in relation to the legal status of Western Sahara obstructs the Commission's ability to formulate a firm stance on the issue, resulting in the following official stance: "a non-self-governing territory 'de facto' administered by the Kingdom of Morocco."[249] In other words, the EU is deadlocked in a joint decision trap, while an exit may be provided through the judgment of the CJEU.

6.3.3 Morocco

After Morocco became independent in 1957, the country became dependent on the revenue of foreign exports. The resources in Western Sahara added significant sources of revenue to the Moroccan state, necessary for the development of the country. Western Sahara's phosphate reserves are significant, both because of their high quality as well as their easy extraction, given that they are close to the

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[242] Western Sahara Resource Watch (2013, March 3). Dutch government repeats: Western Sahara products are not from Morocco. [online] *Western Sahara Resource Watch*. Available at: http://www.wsrw.org/a105x2541.

[243] Western Sahara Resource Watch, 2012b.
[244] Western Sahara Resource Watch, 2013.
[245] Sakthivel, 2016.
[246] BBC (2015, September 29). Ikea Morocco opening 'halted over W Sahara row'. *BBC.* Retrieved rom: http://www.bbc.com/news/world-africa-34396547
[247] Sakthivel, 2016.
[248] Zaręba, S. (2017). Court of Justice Ruling on Western Sahara Reveals EU's Mixed Signals. *The Polish Institute of International Affairs 54*(994), 1-2. Available at: https://www.pism.pl/files/?id_plik=23252
[249] a "non-self-governing territory 'de facto' administered by the Kingdom of Morocco".

surface.[250] Even more profitable, however, are the fish. Morocco benefits greatly, directly or indirectly, from contracts with other countries concerning fishing licenses. Furthermore, interest has been sparked in the region for the oil and hydrocarbon reserves.[251]

But the exploitation of the resources of Western Sahara is not extremely profitable, considering the costs of the occupation and the invasion of the territory. The interests of Morocco can thus not be considered as wholly economic.[252] The economic narrative of the exploited riches of the Western Saharan natural resources serves to generate support for Morocco's self-imposed status in Western Sahara among the international community. As was explained before, trade in natural resources and local products have served as an indirect way of recognizing Morocco's authority in the occupied territory.

Morocco's interests go beyond the benefits it reaps from the natural resources of the Western Sahara. Some describe the conflict as a "meta-conflict",[253] meaning that the struggle between the parties is primarily a clash between two different ideas, or two different interpretations of nationalism. The nationalism of the Sahrawi means independence from Morocco. However, Morocco promotes the idea of a "real" or "greater" Morocco, consisting of a territory dating back to before colonial times, including territory in Mauritania and Algeria and Western Saharan. Consequently, the borders drawn up between Western Sahara and Morocco were imposed by European colonial powers. This justified the armed invasion of Western Sahara in the '70s, and the continued insistence on its rights to the disputed territory. The ideology of Moroccan nationalism and its consequences for the territory of the Western Sahara also means it is irreconcilable with the wishes for self-determination by the Sahrawi people.[254]

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[250] White, 2014.
[251] Power, 2015; Kingsbury, 2015.
[252] Kingsbury, 2015
[253] Zunes and Mundy, 2010; White, 2015.
[254] Zunes and Mundy, 2010.

6.4 Judgment: The General Court

6.4.1 Admissibility

The case was first brought in front of the GC. Before considering the substance, the GC had to review the admissibility of the case.[255] Was Polisario Front a legal person that could file for an action for annulment?

The GC had to decide whether Polisario Front had the legal personality and the direct concern to be able to bring an action for annulment in front of the CJEU under Article 263 TFEU. Upon reviewing the case law, the GC found that although that a legal personality was required for bringing an action in front of the Court[256], the concept of what constitutes a legal person may go beyond what is established in the legal systems of the Member States.[257] Entities might be considered a legal person in so far that their structures gave them the independence to act as responsible bodies in legal matters and have been officially recognized as negotiating bodies.[258]

This case law established that the CJEU may recognize an entity without legal capacity bestowed upon them by law. The requirements thus include, amongst others, that they must have "the independence necessary to act as responsible entities in legal relationships."[259] If such, an entity lacking a legal personality under Member State or third-state law, may be still be a legal person as meant by Article 263 TFEU. The GC considers these conditions to be fulfilled in the case of Polisario Front. It has the structure that enables Polisario Front "to act as a responsible body in legal relations, especially since [...] it has participated in UN-led negotiations and has even signed a peace agreement with an internationally recognized State, namely the Islamic Republic of Mauritania."[260]

The Commission argued that Polisario cannot claim direct concern, as the Agreement does not refer to them. But the GC recognized Polisario Front's role as one of two parties to the dispute concerning Western Sahara. Furthermore, it established the impossibility for Polisario Front to become a legal person under

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[255] Case T-512/12 *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v Council of the European Union* [2015] ECR, para 46-60.
[256] Case C-135/81 *Groupement des Agences de voyages* v *Commission* [1982] ECR 3799, para 10.
[257] Case C-175/73 *Union syndicale — Service public européen and Others* v *Council* [1974] ECR 401, paragraphs 9 to 17, and Case C-18/77 *Syndicat général du personnel des organisms européens* v *Commission* [1974] ECR 933.
[258] Case C-229/05 *PKK and KNK* v *Council* [2007] ECR II-45, para 109 -112; Case C-15/63 *Lassalle* v *Parliament* [1963] ECR 50, para 50.
[259] Case T-512/12 *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v Council of the European Union* [2015] ECR, Para 51.
[260] Ibid., para 54.

Western Saharan law, as this does not yet exist. To become a legal person under Moroccan law would be possible, but lies at the heart of the dispute that the UN is attempting to solve, thus Polisario Front cannot be required to do so. In these specific circumstances, the GC ruled that Polisario Front must be regarded as a legal person with direct concern under Article 263 TFEU.

6.4.2 Judgment

In order to support its case, Polisario Front put forward 11 pleas in law, all rejected by the GC.[261] The GC found that on the basis of the pleas put forward by Polisario, there was no absolute prohibition for the EU to conclude treaties with third countries, which may be applied to disputed territories.[262] As was established in *Odigitria*, the possible application of an agreement between the EU and a third country to a disputed territory is not in all cases contrary to EU law or international law.[263] EU institutions have wide discretion with regards to external economic agreements, specifically in the area of fisheries and agriculture.[264] In this regard, the GC also mentioned the letter of the UN Legal Council in 2002, which found that an absolute prohibition on concluding an agreement concerning a disputed territory cannot be supported.[265]

As the EU institutions enjoy wide discretion on the appropriateness of an agreement with a non-EU state that may be applied to a disputed territory, the role of the CJEU is to review whether or not the respective EU institution, in this case the Council, made errors of assessment.[266] In other words, did the Council carefully and impartially consider all the facts of the case? Polisario Front argued it did not, especially concerning the consequences of the application of the agreement to Western Sahara.[267] The GC ruled that although the CFREU does not impose an absolute prohibition to conclude such agreements with third countries, the protection of fundamental rights of the population of said territory should be considered by the Council before entering the agreement.[268] It states:

> "[…] The Council must examine, carefully and impartially, all the relevant facts in order to ensure that the production of goods for export is not

[261] Ibid., para 115 - 213
[262] Ibid., para 215
[263] Ibid., para 221
[264] Ibid., para 219
[265] Case T-512/12 *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v Council of the European Union* [2015] ECR, para 222.
[266] Ibid., para 224.
[267] Ibid., para 226-227.
[268] Ibid., para 227.

conducted to the detriment of the population of the territory concerned, or entails infringements of fundamental rights ."[269][270]

Despite the Council's argument that the EU cannot be liable for any actions infringing fundamental rights committed by the country it entered into an agreement with[271], the GC ruled that the agreement may indirectly encourage infringements on fundamental rights, if the EU allows export from the third country of products that were produced without respecting the fundamental rights of the population of the disputed territory from where they originate.[272] Moreover, the fact that Morocco does not have a mandate of the UN or another international body for its administration of Western Sahara means that it does not transmit information provided for by Article 73(e) of the UN Charter.[273][274] Therefore, the Council cannot conclude that it is Morocco's duty to ensure that the natural resources are not being unlawfully exploited. Instead, according to the GC, the Council must carry out an examination to satisfy itself that there was no unlawful exploitation that would harm the Sahrawi people and their fundamental rights.[275] Polisario Front has made allegations of fundamental rights violations and brought these to the attention of the UN, thus merited attention and examination by the Council.[276] Hence, the GC concluded that the Council failed to fulfill its obligation to conduct a careful examination of the facts of the case. Accordingly, the GC upheld the action of Polisario Front and annulled the Council Decision in so far as it applies to Western Sahara.[277]

There are several noteworthy elements in this judgment. First of all, it confers onto the EU the obligation to ensure respect of fundamental rights of non-EU citizens in non-EU territories. Secondly, it holds that agreements which are neutral *an sich* and do not require the infringement of fundamental rights, may still indirectly violate fundamental rights if they favor the occurrence of such infringements. Thirdly, a violation of fundamental rights may still be a

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[269] Ibid., para 228.

[270] The GC specifically mentions the rights to human dignity, to life and to the integrity of the person (Articles 1 to 3 CFREU), the prohibition of slavery and forced labor (Article 5 CFREU), the freedom to chose an occupation and right to engage in work (Article 15 CFREU), the freedom to conduct a business (Article 16 CFREU), the right to property (Article 17 CFREU), the right to fair and just working conditions and the prohibition of child labor and the protection of young people at work (Articles 31 and 32 CFREU).

[271] Case T-512/12 *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v Council of the European Union* [2015] ECR, para 230.

[272] Ibid., 231.

[273] Article 73(e) of the UN Charter states that states exercising administrative control over a disputed territory must regularly transmit information relating to the economic, social and educational conditions in said territory.

[274] Case T-512/12 *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v Council of the European Union* [2015] ECR, para 233-235.

[275] Ibid., para 241.

[276] Ibid., para 245.

[277] Ibid., para 247.

consequence or effect of an agreement with a third country, even if such a violation was not the object of said agreement. This fact is sufficient to confer the duty onto EU institutions to consider the specific elements of the agreements.

6.5 Judgment: The Court of Justice

The Council filed an appeal to the GC judgment at the CJ, which ruled on 21 December 2016.[278] The CJ focused primarily upon the legal interpretation of the GC. It argued that the GC had failed to look at all relevant and applicable rules of international law, thus reaching the wrongful conclusion on the inclusion of Western Sahara within the scope of the Association Agreement and the Liberalization Agreement.

The GC interpreted the territorial scope of the Liberalization Agreement in light of Article 94 of the Association Agreement, which stated that the agreement applied to the territory of the Kingdom of Morocco. As the Kingdom of Morocco considers Western Sahara to be a part of its territory, and the Council and the Commission were aware of this Moroccan position, the GC concluded that Western Sahara fell within Article 94, as either Agreement did not specifically exclude Western Sahara from its scope.[279] The CJ argued that this interpretation was not founded upon all the relevant rules of international law that were applicable to this case. In that light, the CJ proceeded to examine these rules, specifically deriving from the principle of self-determination.

The principles of international law are applicable to all non-self-governing territories. The right of self-determination is thus a legally enforceable right, and essential to the principles of international law. UNGA Resolution 2625 (XXV) bestowed a separate and distinct status onto non-self-governing territories on the list of the UN, including Western Sahara.[280] This distinct status is accorded to Western Sahara by the principle of self-determination. The CJ thus held that 'Kingdom of Morocco', as it states in Article 94 of the Association Agreement cannot be interpreted to include Western Sahara in the territorial scope of the agreement.[281]

Moreover, the CJ referred to Article 29 of the Vienna Convention, which states that unless a different intention is derived from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.[282] The possessive adjective "its" and the ordinary meaning of "territory" makes this

[278] Case C-104/15 P Council of the European Union v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) [2016] ECR.
[279] Ibid., para 85.
[280] Ibid., para 90.
[281] Ibid., para 92 -99.
[282] Ibid., para 94.

provision refer to the “geographical space over which the state exercises the fullness of the powers granted to sovereign entities by international law.” Hence, the CJ says, if an agreement applies beyond a state, the treaty must expressively provide for it.[283] Therefore, Western Sahara is precluded from being regarded as within the scope of the Agreements. The GC, the CJ says, incorrectly presumed that the awareness of the Council and the Commission of the inclusion of Western Sahara in Morocco’s definition of its territory was sufficient for the Agreements to be applicable to Western Sahara.[284]

The CJ referred to Article 34 of the Vienna Convention, which states that based on the principle of relative effect of treaties, treaties cannot impose any obligations or confer rights upon third states without their consent.[285] The advisory opinion on Western Sahara by ICJ did not establish any territorial sovereignty of Morocco over Western Sahara and that its population has the right to self-determination.[286] Therefore, it follows that the population of Western Sahara, represented by Polisario Front, are a third party within the meaning of the principle of relative effect. As they did not give their consent to the Liberalization Agreement, Western Sahara is not included in its scope.[287]

Furthermore, the GC also wrongly presumed that because the Commission and Council were aware of the *de facto* application of the Agreement to Western Sahara and never opposed this, the practice after the conclusion of an agreement justified the inclusion of Western Sahara in the scope of Article 94.[288] Instead, the CJ said, the intention of the EU to implement the Association and Liberalization Agreements, including Western Sahara, would be incompatible with the principles of self-determination and the relative effect of treaties, despite the EU’s reiteration of its support for these principles.[289]

Finally, the CJ considered the admissibility of the case and the ability of Polisario as a legal entity to initiate proceedings. It stated that under Article 263 TFEU, natural or legal persons may start an action for annulment if the act is either of direct or individual concern to said persons.[290] This is not the case for Polisario, because Western Sahara does not fall within the scope of the Liberalization Agreement.[291] On this basis, the CJ concluded that Polisario had no standing to seek an action for annulment, because it established Western Saharan territory did not fall under the scope of the Liberalization Agreement.

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[283] Case C-104/15 P Council of the European Union v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) [2016] ECR, para 95.
[284] Ibid., para 99.
[285] Ibid., para 100-103
[286] Ibid., para 104.
[287] Ibid., para 106-108
[288] Ibid., para 99
[289] Ibid., para. 123-125.
[290] Ibid., para 130.
[291] Ibid., para 131-132

By focusing on the legal interpretation of the GC, the CJ avoided the consideration of the claims brought forward by Polisario Front. It also meant that the CJ largely circumvented the issue of the *de facto* application of the agreement to Western Sahara by the Commission, the Council and Morocco. However, its judgment did make this *de facto* application illegal, by excluding Western Sahara from the definition of Moroccan territory. Through a different method focused on sources of international law that void Morocco's claim to Western Sahara and fortify the latter's rights to self-determination, the CJ's judgment has the same effect as the GC's, of nullifying the application of the Liberalization Agreement in Western Sahara. Furthermore, the CJ interpreted the people of Western Sahara to constitute a third party under the principle of the relative effect of treaties. Thereby, the CJ extended the application of this principle to non-State parties, instead of the customary interpretation, which refers to third states explicitly.

7 The Polisario Front Cases: Judicial Activism?

In the previous chapters, the role of fundamental rights has been discussed in EU legislation and CJEU case law, while the background and context to the Polisario Front case was given and explained. This chapter will seek to combine these chapters with the concepts of judicialization and judicial activism as explained in the theoretical framework and methodology. Firstly, it will discuss the Polisario Front case in the light of the phenomenon of judicialization. Secondly, it will analyze the four benchmarks of judicial activism as established in the methodology of this thesis in the light of the Polisario Front case. Finally, it will discuss the judgments of the GC and the CJ in the context of fundamental rights and judicial activism.

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7.1 Judicialization

Before analyzing the cases, the concept of judicialization needs to be revisited. Briefly recalling the concept as explained in chapter 2, judicialization is the reliance on the CJEU's decisions in politically charged matters. This section will argue that the Polisario Front case is an instance of judicialization.

The resolution to the Western Sahara conflict is not yet in sight, because of the strongly diverting interests of Morocco and Polisario Front. Up until this case, the EU refrained from taking a stance in this dispute, because of vested interests in the relationship with Morocco, and the incoherency among Member States. Although the outcome of the case might not have changed the EU's hesitation, it does force them into action, and into acknowledgement of Western Sahara. The consequences of the CJEU's rulings will be discussed in the following section on judicial activism, but this section concentrates on the very fact that the CJEU was involved in this matter.

Sweet had three indicators of judicialization.[292] Firstly, the requirement of there being cases to discuss. By initiating the CJEU procedure, Polisario Front managed to frame the issue of the territorial claims to Western Sahara as an issue

[292] Sweet, 2010.

of European law that needed to be interpreted by the Court. Secondly, these cases must result in defensible case law. This requirement is met because all judgments become part of the official case law of the EU, becoming a primary source of EU law. The judgment of the CJ, which overhauled the GC judgment, will become part of the CJEU's case law and can be used in future cases. Finally, Sweet says that the outcome of the judgment must be accepted. This is particularly interesting in this case because the Council and the Commission appealed to the GC's judgment. Yet, after the CJ's judgment hailed the same result as the GC's judgment, the Commission and the Council did not undertake any steps to reverse the CJ's decision. Thus, it is concluded that the three conditions for judicialization by Sweet have been met.

Hence, Polisario Front managed to transform a matter of international politics into a case in which the Court had the highest authority, able to decide upon the course of the EU in this matter. The alleged unlawful occupation of Western Sahara by Morocco became an issue of European law that presented the need for the interpretation by the CJEU. In other words, the discretionary power to preside over this politically controversial issue was bestowed onto the CJEU, leaving it in the position to become a driver of political change, or to engage in political activism. Therefore, the initiation of proceedings by Polisario Front are categorized as judicialization, which sees the CJEU becoming the decision-making authority in a political matter.

7.2 Judicial Activism

The phenomenon of judicialization that brings politically charged cases within the review and interpretation of the CJEU presents the CJEU with the ability to make judicial activist rulings. It is difficult to establish when judicial activism occurs. In any case that has a slightly political background it is easy to mistake judicial reasoning for judicial activism, while vice versa it is difficult to discern sound judicial argumentation from reasoning beyond the scope of EU law. In the methodology of this thesis, certain conditions and circumstances indicating judicial activism were established on the basis of academic literature.

7.2.1 What happened to the standing legislation in the decision?

The first question that must be answered to shed light on the GC's and CJ's judgments with regards to judicial activism, is what happened to the standing legislation in the judgment. Was it repealed or reinforced? The contested

legislation in this case is Council Decision 2012/496/EU adopting the 2010 EU-Morocco Agreement on agricultural and fisheries products.[293]

While the judgment of the GC annulled this Decision, though only in so far it was applied to Western Sahara, the CJ deemed the case was inadmissible because Moroccan territory does not include Western Sahara, thus Polisario Front does not meet the requirements for individual concern necessary to be able to file an action for annulment. While this judgment did not strike down the standing legislation, it did *de facto* annul the application of the agreement to Western Sahara.

According to the CJ, the agreement could not be applied indirectly to Western Sahara as it is not included in the scope of the agreement, as Article 94 of the Association Agreement only mentions the Kingdom of Morocco. Including Western Sahara would only be possible if it was specifically included in the agreement, and when Western Sahara gave consent. Recognizing the right to self-determination by the Sahrawi, the CJ argued that consent is necessary under the principle of relative application of treaties, meaning treaties can only impose obligations and confer rights onto a country if it has given its consent. Normally, this only applies to states, but the CJ also included Western Sahara with regards to this principle. Therefore, although the Agreement hitherto had been *de facto* applied to Western Sahara, the CJ dismissed this application. Although the CJ did not officially, partially, annul the Agreement like the GC, the effects of its judgment were, indirectly, the same.

Moreover, the GC implied new obligations for EU institutions entering into international agreements with third states, thus expanding the standing legislation. Using Articles 2, 3(5) and 21 TEU and Article 205 TFEU, the GC interpreted that the references to the value of fundamental rights in external action meant that the EU was obligated to, upon entering international agreements with third countries, conduct a careful and impartial impact assessment. This needs to ensure that the international agreements are neither the source of fundamental rights violations nor do they encourage such violations, thereby benefiting the EU. Within this impact assessment, the GC included the careful examination of fundamental rights under the CFREU, reading into Article 51 CFREU an extraterritorial application of the CFREU.

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[293] Council Decision 2012/496/EU on the signature of the Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2012] OJ L 241/1.

7.2.2 Reversal of actions by the executive branch?

The second question concerns the reversal of actions by the executive branch through the CJEU's judgment. If the action for annulment was granted, it implies the reversal of a decision by the executive branch, here the Commission and the Council, and possibly also its actions.

The GC did rule in favor and annulled the Liberalization Agreement, in so far it applied to Western Sahara. It thus reversed the Council Decision on the EU-Moroccan Agreement. Simultaneously, this judgment also meant that certain actions by the executive branch had to be reversed. The list of companies that was compiled under the Agreement to receive lower tariffs, for example, had to be cleared of Western Saharan companies. The GC's judgment, therefore, did not only include the reversal of the Council Decision, but also the reversal of actions stemming from that decision.

As the CJ did not officially partially annul the Agreement, a similar argument regarding the reversal of the decision and the actions of the executive branch cannot be made. However, as was argued in the previous section as well, the consequences of the CJ judgment are *de facto* largely the same as the judgment of the GC, in so far as that the conclusion means the reversal of the application of the Agreement to Western Sahara. This also includes the reversal of actions by the Commission and the Council that considered Western Sahara to be within the scope of the Agreement.

7.2.3 Were prior precedents overruled?

The third indicator of judicial activism is the careful examination of prior precedents and their role in the case argumentation. Were they overruled or used to build solid reasoning?

The GC used several sources of EU law to interpret the scope of an impact assessment on the fundamental rights implication stemming from a European agreement with a third country. By interpreting the value of fundamental rights in external agreements, it used the same interpretation of Article 21 TEU as the Commission did to assign itself the guidelines on human rights impact assessments for measures of trade. This impact assessment considers relevant instruments of fundamental rights, both European as well as international, including the CFREU. While some argue that the interpretation of the GC is too encompassing, including the entirety of the CFREU, the GC's ruling is thus in accordance with earlier legislative measures, as imposed by the Commission on trade legislation.

Using a legal approach focused on EU law while determining the legal personality of Polisario Front, disregarding arguments stemming from of international law, the GC's approach echoes the CJEU's approach in *Kadi*[294]. The GC used, *inter alia, Groupement des Agences de Voyages*[295] to illustrate that in cases where legal personality was lacking on the basis of national law, the legal personality could still be established through the recognition of the Commission. However, this precedent does not wholly conform to the case of Polisario, as it had not been formally recognized by the EU, and had not participated in the negotiations on the Agreement. Thus the GC complied with the legislative precedent, as self-imposed by the Commission on trade measures, it also interpreted the precedent of granting legal personality to Polisario Front too broadly.

Concerning the principle of relative effect of treaties, the CJ followed the precedent it had set in *Brita*[296], but extended the application of the principle to non-state parties. Yet, the CJ followed the precedent of *Brita*. Nevertheless, the case differed from Western Sahara, because, while some Member States had recognized Palestine as a non-self-governing territory with the right to self-determination, this was not the case with regards to Western Sahara. The judgment by the CJ thus built on the *Brita* precedent and extended it to include territories that were not yet recognized as non-self-governing territories with the right to self-determination by one or more Member States.

7.2.4 Did the judgment expand the Court's jurisdiction?

Finally, one ought to consider the consequences of the judgment of the Court's jurisdiction.

Arguably, the GC's judgment does so in several manners. Firstly, as mentioned above, the judgment imposed on EU institutions the obligation to conduct a careful and impartial impact assessment of the proposed Agreement regarding fundamental rights. As the GC argued in its judgment, its own scope of review was limited as to the question whether or not the Council had made manifest errors of assessment,[297] and to do so, the GC must verify whether or not the Council had "examined carefully and impartially all the relevant facts of the individual case, facts which support the conclusions reached."[298] Seemingly, this limits the CJEU's jurisdiction to only being able to review whether such assessment has been conducted. Does this mean that executing a relatively simple

[294] Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat v Council* [2008] ECR I-6351.
[295] Case C-135/81 *Groupement des Agences de voyages* v *Commission* [1982] ECR 3799.
[296] Case C-386/08 *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECR I-1289.
[297] Case T-512/12 *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v Council of the European Union* [2015] ECR, para 224.
[298] Ibid., para 225.

bureaucratic procedure by the Council prevents the future challenging of international agreement with third countries on the infringement of fundamental rights, directly or indirectly, by said agreement? If the Council compiled such a report, included it in its decision but nevertheless still entered into the same concluded agreement, would the CJEU still be able to judge whether or not the Council has made manifest errors of assessment? In other words, is the compiling of such an assessment enough to prevent similar challenges to international agreements with third countries in the future?

It must be realized that the GC not merely placed upon the Council the obligation to conduct an assessment, but that it must be "carefully and impartially"[299] examined, and that the facts of this assessment must support the conclusions drawn with regards to the agreement. Therefore, the CJEU must not only look at whether or not an assessment was conducted, but also whether or not this assessment was conducted carefully and impartially and whether the conclusions of the assessment match the decision taken by the Council. The jurisdiction of the CJEU will thus include the contents of the assessment and its impact on the decision as well as the existence of the assessment.

Secondly, the GC also outlined specifically what the assessment must concern itself with in ensuring that the agreement does not include infringements of fundamental rights, be it directly or indirectly. It specifically lists 11 rights based on the CFREU.[300] According to Advocate General (AG) Wathelet, who conducted the opinion before the appeal of the case at the CJ, the criteria set out by GC were too broad, and instead such an assessment should be covered by the principles of *jus cogens*[301] and *erga omnes.*[302][303] The extraterritorial scope of the CFREU, according to AG Wathelet, is only relevant when an activity is governed by EU law or carried out under the effective control of the EU and/or a Member State.[304] And, "since in this case neither the European Union nor its Member States exercise control over Western Sahara and Western Sahara is not among the territories to which EU law is applicable, there can be no question of applying the

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[299] Ibid., para 225.
[300] Case T-512/12 *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v Council of the European Union* [2015] ECR, para 228: the rights to human dignity, to life and to the integrity of the person (Articles 1 to 3 CFREU), the prohibition of slavery and forced labor (Article 5 CFREU), the freedom to chose an occupation and right to engage in work (Article 15 CFREU), the freedom to conduct a business (Article 16 CFREU), the right to property (Article 17 CFREU), the right to fair and just working conditions and the prohibition of child labor and the protection of young people at work (Articles 31 and 32 CFREU).
[301] The internaitonal law principles that cannot be set aside, such as the prohibition on the use of force and the principle of non-discrimination.
[302] Rights that are owed to all, for example genocide, and the principle to self-determination.
[303] Case C-104/15 P Council of the European Union v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) [2016] ECR. Opinion of AG Wathelet, para 257-259.
[304] Ibid., para 270.

CFREU of fundamental rights there."[305] The reliance of the GC on the CFREU, expanding its scope to Western Sahara, was an error of law according to AG Wathelet.

The CJ used international law as a tool of its interpretation, affirming the role of international law in the interpretation of treaties as it did in *International Fruit Company v Produktschap voor Groenten en Fruit*[306] and *Nederlandse Spoorwegen v Inspecteur der Invoerrechten en Accijnzen.*[307] According the CJ, the GC erred by failing to consider international law in its judgment. A broader interpretation of this statement by the CJ leads to the CJEU having a duty to interpret agreements with third countries in line with international law, as failing to do so, as the GC did, leads to an error of law.

7.3 Discussion

The mixed involvement of the CJEU in the affirmation of fundamental rights in the European legal framework is illustrated by these two judgments. Whereas the GC's judgment extended the scope of application of the CFREU to third territories through inclusion of an assessment of the impact of the Agreement, the AG's opinion presented a more conservative stance, limiting this assessment to the principles of *jus cogens* and *erga omnes*. The CJ avoided this discussion entirely by ruling the case to be inadmissible.

However, the obligation of conducting a fundamental rights assessment was not reiterated by the judgment of the CJ, because it found the action by Polisario Front inadmissible. Moreover, such duty was also regarded to exist in the opinion of AG Wathelet. Although the CJ does not use the occasion to strengthen the stance of fundamental rights in international agreements with third countries, it does not imply the opposite of the GC and the AG's opinion, hence leaving the uncertainty to be interpreted in the future.

Likewise, the declared inadmissibility of the Polisario Front case may at first sight seem a victory for the Council, Commission and Morocco, but its effects on the application of the Liberalization Agreement with Morocco to Western Sahara remain the same. In no uncertain terms, the CJ's judgment ruled that Western Sahara is not part of the territory of the Kingdom of Morocco, and should the EU's agreements apply to the territory without the consent of Western Sahara, it is in violation with international law and violates the right to self-determination of the Sahrawi people.

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[305] Ibid., para 271.
[306] Joined Cases C-51-54/71 *International Fruit Company NV and others v Produktschap voor groenten en fruit* [1974] ECR 1107.
[307] Case C38/75 *Douaneagent der NV Nederlandse Spoorwegen v Inspecteur der invoerrechten en accijnzen* [1975] ECR 1439.

Considering the benchmarks of judicial activism as established by academic literature, it can be concluded that the judgment by the GC is classified as judicially activist. It did not only alter standing legislation, creating new obligations for EU institutions entering into international agreements in the form of fundamental rights assessment, it also reversed the actions of EU institutions by annulling the application of the Liberalization Agreement to Western Sahara. Furthermore, it expanded precedents, such as the requirements for the legal personality of Polisario as demonstrated above. Finally, the judgment expanded the judicial scope of review beyond the mere existence of a fundamental rights assessment to its contents and use of its conclusions as well. However, while it seemingly created new obligations for EU institutions, these were already self-imposed by the Commission in trade measures. Moreover, it built on precedents in case law to defend its approach embedded in EU law rather than international law. Therefore, when considering the applicability of the term of judicial activism to this judgment, it is noteworthy to consider that the approach used by the GC was embedded with precedents and that it build upon the standing legal norms in its judgment.

Similarly, the CJ followed the previously used approach by the CJEU in *Brita* while examining Polisario Front. While its use of international law to underpin its reasoning is not a uniform approach by the CJEU, it does not unreasonably expand the norms of international law. Still, it did expand the principle of relative direct effect of treaties to include non-state actors, building its own precedent. Furthermore, it affirmed and expanded the duty of the CJUE to consider international legal norms in interpreting the application of international agreements with third countries. And although the CJ did not officially annul the agreement, *de facto* its ruling had a similar effect by declaring Western Sahara not to be a part of Moroccan territory. It shows that determining judicial activism is complex, but the judgment meets the benchmarks of judicial activism as were provided by the literature.

8 Conclusion

This thesis set out to analyze the concept judicial activism using *Polisario Front* as an example, answering the following question:

> Was the CJEU taking an activist stance in the two *Polisario Front* rulings and if so what was their impact on fundamental rights law in European external relations?

It sought to look at occurrence of judicial activism, and by extension judicialization, and how the rulings of these cases through this light might have impacted the larger legal framework on fundamental rights in the field of European external relations.

Fundamental rights were absent in the early days of the EU, but have grown in importance and became integral to the European legislative framework and the EU as a whole. This was largely due to the CJEU and its case law. In landmark cases such as *Stauder*[308] and *Nold*[309], the CJEU established fundamental rights as general principles of European law by establishing its own fundamental rights doctrine based on EU law, the national principles of European Member States as well as international sources of law. The case law was consolidated with Maastricht treaty and further embedded into EU law with the CFREU. They became central in nearly all European policy areas, especially European external relations. Promoting fundamental rights worldwide was presented as one of the main foreign policy objectives of the EU. Yet, despite these lofty ambitions, the actual fundamental rights law remained vague in its implementation, particularly its extraterritorial application. There are still ambiguities and gaps in terms of the reach of the CFREU and the duty to uphold and/or protect fundamental rights abroad.

It is a task of the CJEU to, when a case arises, interpret these gaps and ambiguities in legislation, and, for example, to rule on what specific obligations or duties can be derived from the treaties. It is the phenomenon of judicialization that involves the initiation of Court proceedings on politically controversial matters. As was carefully explained in the previous chapters, Polisario Front brought their case on a relatively technical matter, but it was in fact about a larger issue

[308] Case C-29/69 *Erich Stauder v City of Ulm* [1969] ECR 419.
[309] Case C-4/73 *Nold v Commission* [1974] ECR 491.

concerning the occupation of Western Sahara by Morocco. The strong political element of this case also ensured that the judgments had political consequences.

In the *Polisario Front* judgment, the GC try to comply with the duty to interpret gaps and ambiguities in European legislation, deriving from several treaty articles the obligation for EU institutions to conduct an impact assessment of the international agreement with a third country on fundamental rights. Furthermore, it referenced specific rights derived from the CFREU, thereby extending its scope to include consequences of European external trade agreements. The question arose, however, whether the GC was faithfully interpreting the Treaties, or if its interpretation went beyond the Treaties' limits, and could be used as an illustration for judicial activism. While the duty for EU institutions to conduct a careful and impartial impact assessment can be argued to derive from the treaties and previous legislation, especially as the Commission has a self-imposed similar assessment in place for its trade measures, the inclusion of fundamental rights derived from the CFREU may raise eyebrows, as it seemingly exceeds the provisions on the scope of the CFREU. The term judicial activism, then, can be applied to this situation, as the previous chapter has also shown in more detail.

However, the Council and Commission appealed to the GC's judgment, and a second judgment by the CJ on the earlier verdict was made. According to the CJ, the GC's verdict did not stand. It saw several errors in law in the GC's judgment. However, the CJ did not address them all because it deemed the action for annulment to be inadmissible, thereby preventing itself from addressing all the facets of the case. Still, the reasoning of the CJ in the declaration of the inadmissibility of the case is interesting with regards to the concept of judicial activism in its own right. Because the CJ argued that the case is inadmissible as Polisario Front does not meet the requirement of direct concern necessary to bring an action for annulment in front of the CJEU, because Western Sahara is not included in the territory of Morocco, and therefore the Liberalization Agreement does not apply to Western Sahara. While this line of reasoning avoided the more contentious areas of the GC's judgment, it also left room for future cases regarding the application of fundamental rights in external trade agreements. Furthermore, one of the reasons why the GC erred in law, according to the CJ, was because it failed to consider the necessary sources of international law. This implies a duty for the CJEU to use sources of international law in its judgments and its reasoning, vis-a-vis earlier case law such as *Kadi*,[310] in which European law was established as an autonomous source of law. Therefore, while seemingly conservative in its expansion of fundamental rights in the EU, the CJ's judgment

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[310] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351.

de facto heeded similar consequences as the GC's judgment, and extended the jurisdiction of the CJEU with regards to international law as well as the inclusivity of the principle of relative direct effect of Treaties. Therefore, this thesis would conclude that the CJ's judgment has judicially activist elements.

The full impact of the judicially activist rulings of the CJEU cannot be assessed without taking proper note of the political context of the legal conflict. This thesis outlined the main parties to the conflict and in detail analyzed their political motives and interests. It is important to note hereby that the interests of the Council and other EU institutions are anything but coherent, as Member States have diverting views on the conflict. While some, for example France, have vested interests in a smooth bilateral relation with Morocco, others, like Sweden and the Netherlands, emphasize their support to the right to self-determination of the Sahrawi people. However, it can be said neither judgments had the consequences the Council and Commission were hoping for, emphasized by their appeal. The CJEU in both instances carefully considered both European and international legal arguments, rather than accepting the view of the Commission and Council at face value, opposing the theoretical view of the CJEU as a puppet of the Member States, instead reaffirming itself as a driver for political change and integration.

Finally, both judicialization and judicial activism are terms that have a huge normative connotation. The use of these terms often carries a judgment of value. Was the Court right in its judgment? Were the consequences of the judgment good or bad? Was the judgment progressive or conservative? The motivations of the CJEU are regarded to be normative, even by the literature. A vested interest of the CJEU, after all, is the protection of the fundamental rights for European citizens, or fundamental rights in general. It is fair to conclude that both the GC's and CJ's judgment in the end safeguarded Western Sahara's right to self-determination, be it the former more extensively than the latter.

Whether this was good or bad was not the aim of this thesis to answer. The question does illustrate a difficulty with the analysis of judicial activism and judicialization. As the very concepts themselves are loaded with ideological points of view, providing an analysis without ideological prejudice is complex. This thesis aimed to do so by focusing upon arguments of reasoning or arguments of which the basis can be found in law or supported by academic literature. Nevertheless, the normative dimension ought to be explored in future research. Furthermore, in order to draw more generalizable conclusions, a large *n* study must be conducted over different policy fields.

In conclusion, the social responsibility of the European consumer is reassured, as the sale of conflict tomatoes in their supermarkets has been prevented by efforts of the CJEU and Polisario Front.

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