Rethinking Sustainable Development in EU External Relations Law

Edited by

Luca Pantaleo e Cristina Contartese

Giappichelli

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INTRODUCTION

Luca Pantaleo and *Cristina Contartese*[*]

Sustainable development has become one of the most pervasive (and contested) concepts of contemporary international and EU law. It operates simultaneously as a normative aspiration, an interpretative principle, a policy objective, and an argumentative shortcut expression capable of travelling across regimes as diverse as trade, investment, environment, human rights, fisheries, EU enlargement, and beyond. This very success, however, has a cost: as the notion expands, it risks losing its capacity to discipline legal reasoning, to set priorities, and to deliver economic, environmental and social outcomes in accordance with its three-component structure.

This volume dwells on this ambivalence. On the one hand, sustainable development is now embedded in the EU's constitutional vocabulary and projected externally through a dense set of instruments, including international agreements, conditionality, and unilateral measures. On the other hand, the EU's "sustainability turn" generates frictions and hard questions: how to reconcile trade liberalisation and non-discrimination with ambitious unilateral regulation; how to make "social sustainability" legally meaningful beyond best-efforts language; how to square normative power narratives with selective enforcement; how to provide access to justice and participation when environmental harm unfolds across borders and over generations; and so forth.

Two methodological choices guide the volume. First, it treats sustainable development as a cross-cutting legal problem rather than a sectoral speciality: the contributions move from conceptual and systemic debates to concrete legal issues and to their practical constraints. Second, it reads EU external action in dialogue with wider international law developments, paying attention to how "sustainability" is reframed by recent litigation, institutional practice, and evolving regulatory techniques (including those with clear extraterritorial effects).

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The result is a collection that does not assume a one-size-fits-all model of sustainability. Instead, it maps the competing paradigms currently at work: cooperative versus coercive strategies; "mainstreaming" versus prioritisation; anthropocentric versus ecocentric understandings; soft governance versus enforceable obligations; and present-oriented policymaking versus intergenerational responsibility. In doing so, the volume aims to be useful to scholars, practitioners, and policymakers.

In Chapter 1, Ferdinando Menga presents a philosophically informed legal reflection on intergenerational justice as a core yet persistently challenging dimension of sustainability. It reconstructs the historical and institutional emergence of intergenerational responsibility and then confronts the conceptual and political obstacles that "presentism" creates for law and governance. By insisting on the need to face the transgenerational dilemma directly (rather than deflecting it through rhetorical shortcuts), the chapter reframes sustainability as a genuinely diachronic principle. It opens the volume with a refreshing and much-needed glimmer of hope.

Chapter 2, written by Ivan Ingravallo, examines whether sustainable development has paradoxically become unsustainable as a guiding principle for effective environmental protection. By tracing its evolution from a concept of uncertain definition to an increasingly expansive container, the chapter argues that the broadening of the notion has often weakened its environmental core and reduced its normative bite, inviting a rethinking of how to restore environmental primacy (and, if necessary, to move beyond the traditional sustainability frame).

Chapter 3, authored by Karin Arts, explores the intricate relationship between sustainable development and human rights in international law. It demonstrates how the two agendas mutually reinforce and sometimes constrain one another: human rights can provide substantive content and procedural guarantees to sustainability policies, while sustainability frameworks can reshape the interpretation of rights in contexts such as climate change, resource allocation, and development. The chapter highlights both the promise and the tensions of rights-based approaches to sustainability.

In Chapter 4, Rolando traces the evolution of EU environmental law and shows why it has "necessarily evolved alongside a consistent external action," given the collective-action nature of environmental protection. She highlights the risks of relocation and offshoring, as well as the potential for carbon leakage. She demonstrates that these phenomena can undermine ambitious EU standards and explains how the EU responds through instruments with external spillovers, such as the ETS/CBAM schemes, which effectively export EU standards beyond the Union's jurisdiction. The chapter then situates "green deal diplomacy" within the Union's broader external environmental action and identifies emerging scenarios for internal-external coherence.

Chapter 5, written by Giulia D'Agnone, examines the legal basis of sustainability in EU free trade agreements, utilising the evolution of trade and sustainable development (TSD) chapters as a lens. It engages with the post–*Opinion 2/15* landscape and explains how the characteristics of early TSD chapters, especially their enforcement limits, shape competence and design debates, including the relationship between sustainability commitments and the scope of the Common Commercial Policy.

Chapter 6, written by Angelos Dimopoulos, examines sustainable development in international investment law through the EU's treaty practice and reform agenda. It analyses how sustainability is "written into" investment protections (and rebalanced against regulatory space), and what legal techniques, such as substantive standards, exceptions, investor obligations, and dispute-settlement reforms, can realistically align investment governance with environmental and social objectives.

Chapter 7, co-authored by Carmen Di Carluccio and Eva Licková, tests the "Brussels effect" through the EU's new generation of mandatory sustainability duties, with a special focus on corporate due diligence. It asks whether extraterritorial regulatory influence can substitute for (or complement) treaty-based conditionality, and it identifies key effectiveness and legitimacy challenges, ranging from enforcement capacity to the risk of formalistic compliance and uneven burdens along global value chains.

In Chapter 8, Gabriela Oanta turns to fisheries and the EU's Sustainable Fisheries Partnership Agreements, focusing on how sustainability is operationalised in a sector where ecological limits, third-country rules, and EU market demand intersect. The chapter discusses the legal and institutional tools used to steer fisheries practices and situates them against broader controversies in EU external action, including litigation that has tested the legality of EU agreements in the context of the famous Western Sahara saga.

In Chapter 9, Rosita Silvestre develops the "social pillar" of sustainability, with "decent work" at its centre. It explains how the EU utilises external economic instruments, particularly in the field of trade, to promote international labour standards, while highlighting structural weaknesses, including asymmetries between internal and external social frameworks, the predominance of soft cooperation, and the absence (or fragility) of coercive enforcement. The chapter thus highlights the design gap between ambition and legal action.

Francesca Tammone, in Chapter 10, provides a practice-based overview of how social sustainability commitments have evolved in EU FTAs. It maps the evolution of such agreements by focusing on the widening of their scope, the use of more prescriptive language, and a gradual strengthening of enforceability, which marked a move from generic references to ILO fundamentals towards more concrete obligations (e.g., workplace safety, minimum wage, non-discrimination, inspections, and remedies). The chapter clarifies what is genuinely new in recent agreements and where limitations persist.

Chapter 11, written by Allan Tatham, analyses sustainability in EU enlargement policy, taking the Western Balkans as its focal point. It demonstrates how sustainability has evolved from implicit components to a more explicit structuring principle, reinforced through funding instruments and conditionality, and is increasingly connected to SDG-oriented objectives. The chapter also situates this evolution within the Union's broader geostrategic turn and the changing political economy of enlargement.

In Chapter 12, Felipe Tomazini de Souza investigates the EU Deforestation Regulation as a paradigmatic "market power" instrument that conditions access to the EU market on sustainability-related requirements. It assesses the measure's compatibility with national treatment in EU FTAs (and with the TBT framework), arguing that origin-neutral design can still produce *de facto* discrimination through compliance burdens and benchmarking choices, raising the classic tension between environmental ambition and trade fairness.

Vincenzo De Falco, who has written Chapter 13, addresses environmental access to justice through the *locus standi* of environmental associations, examining the dialogue (and divergences) between the CJEU and the ECtHR. Using the *Toxic Waste* case in Campania as a concrete backdrop, it discusses the implementation of the Aarhus Convention in EU law, the practical barriers created by restrictive interpretations of standing, and the implications of distinguishing between "climate" and "environment" for the protection of intergenerational interests.

Chapter 14, written by Veronica Caporrino, shifts the lens to sustainable finance and the governance of ESG information. It connects market integrity tools (notably insider information concepts) with the credibility and future of sustainability-oriented investment, highlighting divergences between European and US trajectories and the tension between socially oriented objectives and market-efficiency narratives. The chapter suggests that the effectiveness of sustainability increasingly depends on the legal reliability of information regimes.

In Chapter 15, which concludes the volume, Adriana Brusca, Felipe Tomazini de Souza and Luca Pantaleo offer a structured account of the EU's main normative approaches to advancing sustainability externally. They analyse conditionality and contrast it with ecocentric models that call for a deeper reconfiguration of legal priorities. The chapter's comparative lens clarifies what conditionality can realistically achieve, what it tends to overlook, and which design choices are crucial for ensuring that the Union's sustainability agenda remains consistent with the principles and values underpinning EU external action. Overall, the chapter connects the dots, offering a synthetic reconstruction of the normative choices at stake.

IL PRINCIPIO DI GIUSTIZIA TRA SOSTENIBILITÀ E INTERGENERAZIONALITÀ: UN INTRECCIO NECESSARIO

Ferdinando G. Menga[*]

> «Nulla impedisce – e molte ragioni lo raccomandano – che le generazioni future siano, rispetto agli uomini attuali o a quelli di domani, titolari di certi diritti»
> (R. Demogue, *La notion de sujet de droit*) [1]

SOMMARIO: 1. Introduzione: il principio sostenibilità in chiave diacronica. – 2. Lo sviluppo politico-istituzionale del tema intergenerazionale. – 3. Ostacoli alla giustizia verso le generazioni future: il presentismo etico, politico e giuridico. – 4. Il Noi collettivo esposto al futuro: conclusioni politico-giuridiche.

1. *Introduzione: il principio sostenibilità in chiave diacronica*

A partire dalla seconda metà del secolo scorso, la necessaria connessione concettuale e prasseologica tra discorso della sostenibilità e discorso della giustizia intergenerazionale si è annunciata tanto in forma implicita, quanto in modalità assolutamente manifesta. Se la prima traiettoria può essere ricondotta ai vari pronunciamenti internazionali che hanno messo generalmente al centro l'importanza di provvedere a forme di salvaguardia di una vita dignitosa per le generazioni future – e questo sin a partire dalla Dichiarazione delle Nazioni Unite di San Francisco –, la seconda modalità, invece, quanto meno a partire dal celebre rapporto Brundtland *Our Common Future* [2], ha posto espressamente

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[1] R. Demogue, *La notion de sujet de droit. Caractère et conséquences*, Libraire de la Société du Recueil J.-B. Sirey et du Journal du Palais, Paris, 1909, p. 22.

[2] Cfr. Report of the World Commission on Environment and Development, *Our Common Future*, Transmitted to the General Assembly as an Annex to document A/42/427 – Development

in cima all'agenda politica l'ineludibile compito di un bilanciamento tra interessi dei presenti e quelli dei posteri proprio sotto il segno della categoria di sostenibilità [3]. Non è un caso, in effetti, che suddetto rapporto definisca il lemma in questione esattamente come segue: «Lo sviluppo sostenibile è uno sviluppo che soddisfa i bisogni del presente senza compromettere la capacità delle generazioni future di soddisfare i propri» [4].

Di qui, il sodalizio tra questi due concetti ha inaugurato ed è andato sempre più consolidando quella che potremmo definire una vera e propria stagione culturale e politica, la quale, non soltanto ha incrementalmente segnato il dibattito pubblico internazionale, ma è giunta altresì a sollecitare veri e propri riorientamenti istituzionali. Per quanto riguarda il caso italiano, prova eminente ne è la modifica approvata nel febbraio del 2022 all'art. 9 della Costituzione della Repubblica – che registra ora la necessità di tutelare «l'ambiente, gli ecosistemi e la biodiversità […] anche nell'interesse delle future generazioni».

Nondimeno, siffatto sodalizio all'insegna di ciò che potremmo raccogliere sotto il titolo di un chiaro riconoscimento di un principio di sostenibilità in chiave intergenerazionale, costituisce, però, anche un motivo per una rinnovata interrogazione su quella che permane una spinosa questione o, se vogliamo, una vera e propria sfida all'etica, alla politica e al diritto. In effetti, assieme al favore con cui va senz'altro salutata una tale importante acquisizione politico-istituzionale, altrettanto deciso deve essere l'impegno teorico volto a non lasciare disattese le difficoltà di fondo che continuano ad attanagliare il tema della giustizia nei confronti delle generazioni future. La sempre maggiore attenzione che quest'ultimo si è saputo conquistare nell'alveo dei dibattiti pubblici non basta infatti a risolvere di per sé tutta una serie di spinose questioni che esso stesso mette in campo. D'altronde, se così non fosse, risulterebbe inspiegabile l'odierno tenore che scaturisce da quello che potremmo definire un vero e proprio mantra ecologista volto a sollecitare, a tutti i livelli e in modo veemente e urgente, un deciso cambio di passo nelle politiche ambientali al fine di garantire, non soltanto ai presenti, ma anche agli abitanti futuri del pianeta, una vita degna d'essere vissuta [5].

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and International Cooperation: Environment, United Nations 1987 (testo disponibile online all'indirizzo: https://digitallibrary.un.org/record/139811?v=pdf; ultima consultazione: 26 luglio 2025).

[3] Sarà compito del paragrafo successivo schizzare una breve storia dello sviluppo istituzionale riguardo alla questione della giustizia intergenerazionale.

[4] Report of the World Commission on Environment and Development, *Our Common Future*, cit., Part II, § 1.

[5] La veemenza a cui mi riferisco fa segno soprattutto alle poderose e ripetute azioni di protesta condotte oggigiorno da numerose e numerosi giovani di tutto il mondo, preoccupate/i per le sorti del pianeta e di coloro che lo abiteranno nei tempi a venire. Su questo punto mi permetto

In tale prospettiva, affrontare dunque, in tutta la sua problematicità, la matrice intergenerazionale della categoria di sostenibilità, quale chiave per la realizzazione di una equilibrata convivenza planetaria, impone un investimento analitico – o meglio, la traiettoria d'acquisizione di un'intelligenza ermeneutica – che non può limitarsi a svilirne la portata o a offuscarne i contorni teorico-critici. Strategie di sviamento del genere, oggigiorno, assumono vuoi la forma di un dirottamento del peso concettuale del problema attraverso imprese ipertecniciste di stampo unicamente funzionale-strumentale, vuoi la veste di retoriche *à la page* che riscuotono grande successo nei termini di seducenti narrazioni neo-romanticheggianti e/o olistiche sul tema di un abitare o co-abitare armonico. Sia chiaro: qui non si vogliono mettere in dubbio l'importanza e finanche l'utilità di queste traiettorie di discorso funzionali e simboliche. Invece, come ci ha insegnato molto bene Bernard Stiegler, ciò che si tratta di mettere a tema è il fatto che se si vuole davvero realizzare una saggezza generativa e tale da legare assieme i nessi generazionali, si impone l'interrogazione esplicita e circostanziata del dilemma transgenerazionale stesso [6], piuttosto che il depotenziamento tattico e perverso delle sue grandi criticità [7]. Depotenziamento, peraltro, più che mai funzionale alle attuali logiche economiche di stampo neo-liberale tendenti a offuscare i lineamenti strutturali dei processi in gioco precipuamente al fine di perpetuare lo *status quo* predatorio nei confronti del pianeta [8].

Ne conseguono due compiti decisivi che nelle pagine a seguire mi prefiggo di svolgere, al fine di una contestualizzazione maggiormente critica e concettuale della questione intergenerazionale: in primo luogo, il mio impegno sarà volto a dedicare un passaggio in rassegna delle principali tappe dello sviluppo storico-

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di rinviare al mio F.G. Menga, *L'emergenza del futuro. I destini del pianeta e le responsabilità del presente*, Donzelli, Roma, 2021, p. 5 ss. Per una analisi di carattere maggiormente socio-politico del tema si veda: P. Imperatore-E. Leonardi, *L'era della giustizia climatica. Prospettive politiche per una transizione ecologica dal basso*, Orthotes, Napoli, 2023.

[6] Queste riflessioni prendono corpo soprattutto in: B. Stiegler, *Prendre soin. 1. De la jeunesse et des générations*, Flammarion, Paris, 2008; Id., *Qu'appelle-t-on panser? 2. La leçon de Greta Thunberg*, Éditions Les Liens qui Libèrent, Paris, 2020.

[7] In modi diversi, discuto la rilevanza di questo punto nei miei saggi: F.G. Menga, Climate Change *e giustizia intergenerazionale: la città, spartiacque fra smartness e incuria*, in G.F. Ferrari (a cura di), *Le smart cities al tempo della resilienza*, Mimesis, Milano-Udine, 2021, pp. 361-374; Id., *The Age of Neoliberal Capitalism and the Eclipse of Intergenerational Care: A Philosophical Reading at the Aftermath of the Pandemic*, in *Emancipations: A Journal of Critical Social Analysis*, 4, 1, 2025, pp. 1-11.

[8] Per un inquadramento di tale strategia si veda l'importante libro scritto recentemente da N. Fraser, *Cannibal Capitalism: How our System Is Devouring Democracy, Care and the Planet – and What We Can Do About It*, Verso, London, 2023. Altrettanto paradigmatiche al riguardo restano le riflessioni di W. Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution*, Zone Books, New York, 2015.

istituzionale internazionale del tema, atto a esplicitare la traiettoria entro cui la criticità dello stesso si ubica. In secondo luogo, intendo restituire l'elevata problematicità che il problema continua a detenere attraverso un'analisi – seppur cursoria – delle maggiori sfide concettuali che un genuino accoglimento della responsabilità intergenerazionale comporta nell'alveo del pensiero etico, politico e giuridico.

L'obiettivo di fondo che, in tal modo, si vuole raggiungere è rispecchiare tanto l'importanza che la questione riveste, quanto le difficoltà che la stessa, nonostante la sua urgenza, impone.

2. *Lo sviluppo politico-istituzionale del tema intergenerazionale*

Prendiamo le mosse da un generale orientamento sul tema della giustizia intergenerazionale ripercorrendo le principali tappe del suo sviluppo storico in sede politico-istituzionale.

In ambito internazionale, il primo importante riferimento a un qualcosa come una responsabilità diffusa nei confronti delle generazioni future è rintracciabile già negli anni '40 del secolo scorso: in effetti, il grande sconvolgimento e le imponenti devastazioni provocati dal secondo grande conflitto mondiale per mezzo del potenziale tecnologico-bellico utilizzato non potevano non imporre una profonda e preoccupata interrogazione sul futuro del genere umano. A motivo di questo si legge proprio nel Preambolo dello *Statuto delle Nazioni Unite* l'impegno «a salvare le future generazioni dal flagello della guerra» [9].

Come ben sappiamo, non più tardi di qualche mese dalla firma di tale Statuto, avvenuta il 26 giugno del 1945 a San Francisco, sarà proprio lo sgancio degli ordigni atomici a Hiroshima e Nagasaki a mettere di fronte agli occhi del mondo intero, in modo ancora più inesorabile, la preoccupazione per un futuro ormai minacciato dalla *hybris* tecnologica [10].

Di seguito, soprattutto a partire dagli anni '70 del XX secolo, l'apprensione rivolta ai destini futuri dell'umanità si sposterà sempre più dalla questione riguardante la possibile devastazione di matrice bellica a quella di stampo più spiccatamente ambientale [11]. Così, per la prima volta, sulla scia di quanto esprime

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[9] United Nations and International Court of Justice, *Charter of the United Nations and Statute of the International Court of Justice*, San Francisco, 26th June 1945, Preamble (testo consultabile online all'indirizzo: https://www.un.org/en/sections/un-charter/un-charter-full-text/; ultima consultazione: 22 luglio 2025).

[10] Cfr. K. Jaspers, *Die Atombombe und die Zukunft des Menschen. Politisches Bewußtsein in unserer Zeit*, Piper, München, 1958; G. Anders, *Die Antiquiertheit des Menschen*, Bd. 1: *Über die Seele im Zeitalter der zweiten industriellen Revolution*, Beck, München, 1956.

[11] Che, poi, la dislocazione di questa preoccupazione, alla luce degli eventi degli ultimi anni,

il § 6 del Preambolo della *Dichiarazione di Stoccolma* del 1972 della United Nations Conference on the Human Environment, si comincerà a riconoscere segnatamente la necessità di rispondere all'appello di una vera e propria responsabilità di carattere intergenerazionale tesa tanto al miglioramento dell'ambiente quanto a uno sviluppo socio-economico sostenibile [12].

La *Dichiarazione di Parigi* del 12 novembre 1997, da parte dell'UNESCO, condurrà poi la percezione di tale esigenza di riconoscere una responsabilità nei confronti delle generazioni future ad acquisire non soltanto un tono espressamente solenne, ma, per la prima volta, anche una chiara e completa perimetrazione di uno spettro di concreti obblighi di carattere etico e politico-giuridico [13]. In tal senso, una lettura trasversale del corposo preambolo di tale *Dichiarazione* non offre solo uno spaccato assai incisivo circa il modo in cui la problematica intergenerazionale, a partire dalla seconda metà del XX secolo, si guadagna un'attenzione sempre maggiore nei diversi consessi predisposti dalle organizzazioni internazionali, ma richiama altresì l'esigenza sempre più concreta di una risposta istituzionale adeguatamente equipaggiata a ogni livello dei discorsi e degli interventi che costituiscono l'ossatura degli apparati e degli interventi pubblici: dalla sfera etico-morale, a quella politico-giuridica, fino a toccare quella economico-produttiva.

Ulteriore esplicitazione e intensificazione di tale esigenza si troverà, poi, da ultimo ma non ultimo, nell'Accordo sul clima di Parigi del 2015, nel cui Preambolo, viene peraltro richiamata nuovamente la necessità di un'attenzione particolare all'«equità intergenerazionale» [14].

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dovesse subire una nuova inversione di direzione (ossia, il ritorno di una paura generalizzata di un conflitto atomico), è indice del fatto che nessuna conquista nella storia può dirsi acquisita una volta per tutte.

[12] Si legge: «difendere e migliorare l'ambiente umano per le generazioni presenti e future è diventato un obiettivo imperativo per l'umanità – un obiettivo da perseguire insieme e in armonia con gli obiettivi stabiliti e fondamentali della pace e dello sviluppo economico e sociale mondiale» (United Nations Environmental Programme, *Declaration of the United Nation Conference on the Human Environment*, Stockholm, 5th-16th June 1972, Preamble; testo consultabile online all'indirizzo: https://undocs.org/en/A/CONF.48/14/Rev.1; ultima consultazione: 26 luglio 2025).

[13] Cfr. UNESCO, *Declaration on the Responsibilities of the Present Generations Towards Future Generations*, Paris, 12th November 1997, Preamble (testo consultabile online all'indirizzo: http://portal.unesco.org/en/ev.php-URL_ID=13178&URL_DO=DO_TOPIC&URL_SECTION=201.html; ultima consultazione: 26 luglio 2025).

[14] *Paris Agreement*, 12th of December 2015, *United Nations Climate Change*, Preamble (testo consultabile online all'indirizzo: https://unfccc.int/sites/default/files/english_paris_agreement.pdf; ultima consultazione: 26 luglio 2025). Il documento è anche consultabile: in *Official Journal of the European Union*, 19 ottobre 2016, L 282/4 (all'indirizzo: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22016A1019(01)&from=IT; ultima consultazione: 26 luglio 2025).

Nel contesto di una tale presa di coscienza dell'ormai indifferibile problema concernente le sorti delle generazioni future, si capisce bene quanto l'altro grande capitolo del discorso istituzionale che si apre, a partire dagli ultimi decenni del secolo scorso, riguardi anche l'importante processo d'esplicita e incrementale integrazione del riconoscimento di obblighi intergenerazionali in seno ai disegni costituzionali interni a molti Stati. Processo, questo, di elevato rilievo, dacché accogliere la tematica intergenerazionale all'interno degli assetti costituzionali delle comunità nazionali implica né più né meno che l'espressa ammissione che i principi che le veicolano giungono a far parte ormai dei valori fondanti l'identità stessa del corpo politico-sociale.

Numerosi sono gli esempi che potrebbero essere menzionati in tal senso [15] e nella cui scia il recente processo di riforma dell'art. 9 della Costituzione italiana si colloca. Per significatività e vicinanza geografica e culturale mi preme qui soffermarmi soltanto su due occorrenze. Innanzitutto, c'è il caso del *Grundgesetz* della Repubblica federale tedesca che, sulla base delle integrazioni effettuate nel 1994 e 2002, accoglie ora, all'art. 20a, la seguente disposizione:

> Lo Stato, anche in considerazione della responsabilità nei confronti delle generazioni future, tutela, nell'ambito dell'ordinamento costituzionale, le basi fondamentali naturali della vita e gli animali, mediante l'esercizio del potere legislativo e dei poteri esecutivo e giudiziario, in conformità alla legge e al diritto [16].

Questo riferimento a un riconoscimento di un obbligo costituzionalmente sancito nei confronti delle generazioni future – che penetra nel cuore dell'impianto istituzionale dello Stato tedesco, sì da arricchirne, ma anche trasfigurarne l'unità identitaria collettiva che esso configura [17] –, ci conduce dritti all'altro grande esempio, che mi preme qui riportare, cioè quello della *Carta dei diritti fondamentali dell'Unione europea*, in cui, riprendendo sostanzialmente il medesimo dettato contenuto nel *draft* della Costituzione dell'Unione del 2004, tuttavia non ratificato, rispetto alla centralità delle generazioni future, dispone

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[15] In ambito si rivela utile la consultazione delle appendici al volume di E. Brown-Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*, United Nations University-Transnational Publishers, Tokyo-Dobbsferry NY, 1989 (appendici B e C), in cui sono raccolte le varie occorrenze nei testi costituzionali esplicitamente dedicate alla questione intergenerazionale. Per approfondimenti sul tema cfr. anche A. D'Aloia, *Generazioni future (dir. cost.)*, in *Enciclopedia del Diritto*, Annali, vol. IX, Giuffrè, Milano, 2016, pp. 331-390.

[16] *Grundgesetz für die Bundesrepublik Deutschland*, § 20a (testo consultabile online all'indirizzo: https://www.gesetze-im-internet.de/gg/BJNR000010949.html; ultima consultazione: 26 luglio 2025).

[17] Mi intratterrò sul punto in chiusura al presente contributo.

espressamente quanto segue: «Il godimento di questi diritti fa sorgere responsabilità e doveri nei confronti degli altri come pure della comunità umana e delle generazioni future» [18].

Per sottolineare la grande rilevanza che il tema intergenerazionale assume in seno a questo documento basti soltanto riferirsi al contesto in cui esso fa comparizione: ovvero il Preambolo stesso, in cui sono esposti i principi di fondo, che compongono la tessitura identitaria dell'Unione Europea e i principi ispiratori che trovano poi precipitato nei vari titoli dei diritti fondamentali ivi esplicitati.

Ci basti questa visione di sorvolo delle molteplici disposizioni internazionali e costituzionali per saggiare, in tutta la sua consistenza, il modo in cui la questione degli obblighi verso le generazioni future ha man mano acquisito rilievo sulla scena socio-politica contemporanea, fino a giungere a depositarsi anche nel tessuto della nostra Costituzione.

3. *Ostacoli alla giustizia verso le generazioni future: il presentismo etico, politico e giuridico*

Secondo quanto segnalato in apertura, la necessità di estendere una tutela nei confronti delle generazioni future, per quanto per un verso vada accolta senz'altro con favore, per l'altro non deve tuttavia distoglierci dalla consapevolezza di una serie di fattori problematici che riflettono, in qualche modo, quella che potremmo definire una vera e propria impreparazione strutturale al riguardo. Si tratta, nello specifico, di un'incapacità che segna tanto l'ambito di una teoria morale quanto quello di una sua traduzione politico-giuridica adeguata. In generale, un'incapacità del genere è causata dalla semantica "presentistica" stessa che sottende a tutti i maggiori impianti concettuali e istituzionali che attraversano i discorsi, gli assetti e le pratiche della nostra tradizione.

Partiamo dalle impostazioni etiche di fondo, le quali si riverberano poi tanto nei dispositivi politici quanto in quelli giuridici. Da quando è stata riconosciuta in tutta la sua portata e difficoltà teorica, la questione intergenerazionale, in

[18] *Charter of Fundamental Rights of the European Union*, in *Official Journal of the European Union*, C 326/391, 2012/C 326/02, Preamble (testo consultabile online all'indirizzo: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=IT; ultima consultazione: 26/07/2025). Per consultare il corrispondente testo del *draft* della Costituzione europea non ratificata, si veda il *Treaty Establishing a Constitution for Europe. Protocols and Annexes, Final Act*, in *Official Journal of the European Union*, C 310/1, Document C2004/310/01, Part II: *Charter of Fundamental Rights of the Union*, Preamble (testo consultabile online all'indirizzo: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2004.310.01.0001.01.ENG&toc=OJ%3AC%3A2004%3A310%3ATOC; ultima consultazione: 26 luglio 2025).

effetti, ha trovato il suo luogo di accoglienza e di elaborazione all'interno di impostazioni dominanti il cui baricentro è da rinvenirsi proprio in una filosofia della presenza. Per quanto siano multiprospettiche e plurali, tutte queste impostazioni sono riconducibili a tre prospettive predominanti: il contrattualismo, l'utilitarismo e la teoria metafisico-giusnaturalista.

L'impostazione contrattualista fa perno su alcuni presupposti che, nonostante tutte le varianti presenti nel dibattito, definisce un quadro chiaro e univoco: affinché sia possibile stipulare un accordo tra parti è necessaria l'esistenza di soggetti orientati al perseguimento dell'interesse personale, in un rapporto di reciprocità e compresenza [19]. Le generazioni future, tuttavia, si contraddistinguono proprio per il fatto di non esistere ancora e non poter cooperare [20]. Pertanto, la sfida teorica che si pone alla prospettiva contrattualista è che tali generazioni, a differenza di quanto accade in una situazione contrattuale vera e propria, sono per principio assenti e quindi impossibilitate a negoziare, ad accordarsi e a rivendicare diritti [21]. Questo primo dilemma teorico, che può essere definito ostacolo della non-esistenza dei soggetti futuri, è aggravato da un secondo e ulteriore problema: l'impedimento dell'asimmetria. In effetti, l'altro dilemma che attanaglia l'impostazione contrattualista in sede intergenerazionale è quello dell'evidente disparità fra il potere che la generazione attuale ha d'incidere sul destino delle generazioni future e l'inesistente, se non pressoché insignificante, capacità d'influenza di quest'ultime sulla prima. In che modo, di fatti, individui futuri assenti potrebbero mai avere la forza d'imporre alcunché ai contemporanei presenti? L'impossibilità di realizzare una condizione di reciprocità e simmetria tra soggetti lungo l'asse di un tempo lungo costituisce, dunque, un ulteriore ostacolo all'impostazione contrattualista [22].

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[19] Le riflessioni di carattere maggiormente paradigmatico all'interno dell'assai nutrito dibattito in tale ambito sono quelle riconducibili a J. Rawls, *A Theory of Justice*, The Belknap Press of Harvard University Press, Cambridge MA-London, 1971, §§ 24, 44; D. Gauthier, *Morals by Agreement*, Clarendon Press, Oxford, 1986. Mi intrattengo sulla questione nel mio volume: F.G. Menga, *Etica intergenerazionale*, Morcelliana, Brescia, 2021, pp. 62-87.

[20] Cfr. S. Gardiner, *A Contract on Future Generations?*, in A. Gosseries-L.H. Meyer (a cura di), *Intergenerational Justice*, Oxford University Press, Oxford-New York, 2009, pp. 81 ss.; Id., *A Perfect Moral Storm. The Ethical Tragedy of Climate Change*, Oxford University Press, Oxford, 2011, pp. 123, 170-4; R.P. Hiskes, *The Human Right to a Green Future. Environmental Rights and Intergenerational Justice*, Cambridge University Press, New York, 2009, p. 50 ss. Si veda anche B. Barry, *Circumstances of Justice and Future Generations*, in R.I. Sikora-B. Barry (a cura di), *Obligations to Future Generations*, Temple University Press, Philadelphia, 1978, pp. 204-248.

[21] Cfr. G. Pontara, *Etica e generazioni future. Una introduzione critica ai problemi filosofici*, Laterza, Roma-Bari, 1995, cap. 3; W. Beckerman, *The Impossibility of a Theory of Intergenerational Justice*, in J. Tremmel (a cura di), *Handbook of Intergenerational Justice*, Elgar, Cheltenham, 2006, pp. 53-71.

[22] Cfr. S. Gardiner, *A Contract on Future Generations?*, cit., p. 81 ss.; M. Kobayashi,

Non meno problematica è pure l'impostazione utilitarista nel momento in cui è chiamata a rispondere alla sfida teorica della responsabilità intergenerazionale, e ciò proprio in ragione dei caratteri d'universalità e d'irrilevanza temporale su cui essa fonda l'utilità o la felicità da massimizzare [23]. Certamente, tali caratteri trovano riscontro nel caso del calcolo di felicità totale o media in un contesto limitato al presente o al vicino futuro. Non altrettanto accade, però, allorquando si tratta di tenere conto di generazioni appartenenti a un lontano futuro [24]. Ne consegue che il dilemma di fondo che incontra la teoria utilitarista in sede di etica intergenerazionale, a prescindere dai molti altri punti critici e risvolti problematici, è quello della difficoltà di stimare adeguatamente a partire dalla conoscenza presente sia *ciò che* e sia anche *la misura di ciò che* può essere valutato come utilità o danno in un futuro lontano. Questa sfida può essere definita come ostacolo dell'indeterminatezza o ignoranza rispetto al futuro.

Solo apparente è la promessa di una via d'uscita da tali dilemmi per via metafisica. Difatti, anche l'impostazione giusnaturalista si trova avviluppata in difficoltà strutturali di enorme rilevanza nel momento in cui vuole affrontare la sfida di un'etica del futuro. In generale, gli approcci di diritto naturale cercano di fondare e giustificare una responsabilità intergenerazionale sulla base di presupposti di tipo sostanzialistico e, quindi, con pretesa universalista e meta-temporale. Scendendo maggiormente nel dettaglio, tali teorie, di cui Emmanuel Agius [25] e, in certa misura, Hans Jonas [26] offrono probabilmente le formulazioni più limpide, sostengono di derivare la responsabilità di esseri attuali nei confronti di esseri futuri a partire da una comunanza d'essenza o di genere. Il problema fondamentale collegato a queste impostazioni emerge, però, non appena si sottolinea il fatto che esse presuppongono la validità di una connessione motivazionale fra piano ontologico e piano etico che, a ben guardare, non risulta

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Atomistic Self and Future Generations: A Critical Review from an Eastern Perspective, in T.-Ch. Kim-R. Harrison (a cura di), *Self and Future Generations. An Intercultural Conversation*, The White Horse Press, Cambridge, 1999, p. 13 ss.

[23] Cfr. H. Sidgwick, *The Methods of Ethics* (1874), Macmillan, London-New York, 1907, p. 414.

[24] Cfr. J. Passmore, *Man's Responsibility for Nature*, Duckworth, London, 1980; A. de-Shalit, *Why Posterity Matters. Environmental Policies and Future Generations*, Routledge, London-New York, 1995, cap. 3.

[25] Cfr. E. Agius, *Obligations of Justice Towards Future Generations: A Revolution in Social and Legal Thought*, in E. Agius *et al.* (a cura di), *Future Generations and International Law*, Earthscan, London, 2006, pp. 3-12.

[26] Cfr. H. Jonas, *Das Prinzip Verantwortung. Versuch einer Ethik für die technologische Zivilisation*, Insel Verlag, Frankfurt a.M., 1979, cap. 4, §§ 4-7; Id., *Philosophische Untersuchungen und metaphysische Vermutungen*, Insel Verlag, Frankfurt a.M., 2011, pp. 128-146. Cfr. anche H.P. Visser 't Hooft, *Justice to Future Generations and the Environment*, Kluwer, Dordrecht, 1999, pp. 122, 133 ss., 149 ss.

per nulla evidente. Perché mai, in effetti, da una condivisione d'essenza con altri soggetti appartenenti alla medesima specie ne dovrebbe discendere necessariamente un obbligo morale nei loro confronti? La sottolineatura della mancanza di una congiunzione evidente di carattere derivativo fra essere e dover-essere, talché dall'ambito della "natura" possano essere desunti principi morali, è stata notoriamente sviluppata già da David Hume nei termini di quanto George E. Moore ha definito «fallacia naturalistica» [27]. Hume rileva, in effetti, che ogniqualvolta si procede da proposizioni sull'essere delle cose a quelle relative a un dover-essere, che ne deriverebbe, quanto si evidenzia è «un cambiamento impercettibile» [28], tale per cui non si mostra alcuna «spiega[zione]» [29] effettiva e cogente di tale «relazione» [30], ma piuttosto una surrettizia e, pertanto, retroattiva connessione delle seconde rispetto alle prime [31].

Tuttavia, le impostazioni giusnaturaliste non mostrano una carenza solo in sede di fondazione motivazionale. Detengono un altro deficit di fondo: per come sono strutturate, spingono necessariamente a una ferma preferenza dei presenti rispetto ai futuri, aggirando la questione della giustizia distributiva di carattere intergenerazionale [32]. Difatti, in base a tali teorie, non si riesce a evincere il perché non si dovrebbe adottare una soluzione tale per cui agli umani temporalmente lontani non si possano o non si debbano preferire quelli – o almeno quelli più indigenti – appartenenti al presente. Peraltro, una soluzione del genere, che assicura precedenza ai contemporanei – o meglio, ai presenti rispetto ai futuri –, sarebbe tanto più adeguata a un'impostazione metafisica, quanto più può dichiarare di seguirne l'argomentazione caratteristica secondo cui i titolari d'umanità contemporanei esprimono una realizzazione in atto dell'essenza umana, rispetto invece a una mera realizzazione in potenza attribuibile a esseri futuri [33].

In estrema sintesi, quindi, tutte le difficoltà relative al modo in cui le teorie etiche tradizionali hanno affrontato e affrontano il problema degli obblighi verso

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[27] G.E. Moore, *Principia Ethica* (1903), Cambridge University Press, Cambridge, 1922, § 10.

[28] D. Hume, *Treatise on Human Nature,* in *The Philosophical Works of David Hume*, vol. 2, Printed for Adam Black and William Tate and Charles Tate, London, 1826, book III, part I, section I, p. 236.

[29] *Ibidem.*

[30] *Ibidem.*

[31] *Ibidem.*

[32] Cfr. W. Jenkins, *The Future of Ethics. Sustainability, Social Justice, and Religious Creativity*, Georgetown University Press, Washington DC, 2013, pp. 286 s. Sulla centralità della questione distributiva in sede intergenerazionale è tornato di recente Axel Gosseries nel suo volume *What Is Intergenerational Justice?*, Polity Press, Cambridge UK-Oxford, 2023.

[33] Approfondisco questo punto in F.G. Menga, *When the Generational Overlap Is the Challenge Rather Than the Solution. On Some Problematic Versions of Transgeneratonal Justice*, in *The Monist*, 106, 2, 2023, p. 197.

le generazioni future risultano essere, nel loro complesso, tali da rispecchiare i limiti di un'impostazione fondamentalmente centrata sul primato di una temporalità della presenza [34]: primato di ciò che è empiricamente esistente solo al presente e di soggetti che sono sincronicamente presenti gli uni agli altri; primato di una causalità che conosce solo una rilevanza etica del presente verso il futuro, ma non il contrario; primato di una possibilità di determinare uno stato etico solo a partire da informazioni presenti. Volendo ricorrere a un'efficace formulazione di Stephen Gardiner, si può quindi ben definire questa impostazione nei termini di una vera e propria «tirannia dei contemporanei» [35].

Questa situazione problematica provocata dalla grammatica presentistica non può che acutizzarsi, non appena dal campo di un discorso etico sulle generazioni future si passa a quello di stampo prettamente politico e giuridico.

In effetti, come molte studiose e studiosi evidenziano, uno dei maggiori risvolti critici a cui il meccanismo democratico si espone è esattamente quello di non riuscire a fornire adeguata risposta all'emergenza ambientale e intergenerazionale a causa del "presentismo" che lo avviluppa [36] e che si radica tanto nelle progettualità politiche di corto respiro legate ai brevi cicli elettorali, quanto nella natura stessa del dispositivo della sovranità popolare e auto-determinazione collettiva, cioè quello di un esercizio del potere dei «cittadini presenti» che non può che essere fondamentalmente orientato «a beneficio dei presenti» [37] (o al massimo dei futuri più prossimi).

Non meno acuto è l'effetto della grammatica presentistica in ambito giuridico. Se si tiene conto, in effetti, che il discorso giuridico si rivela strutturalmente calibrato attorno al rapporto che i consociati intrattengono tra di loro in termini di diritti e correlativi obblighi, si può ben intuire come l'estensione di un'idea di giustizia che trasgredisca il primato del presente e si proietti verso i futuri palesi enormi problematicità [38].

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[34] Cfr. M. Kobayashi, *Atomistic Self and Future Generations*, cit., p. 13 ss.; R. Muers, *Living for the Future. Theological Ethics for Coming Generations*, T&T Clark, London, 2008, cap. 1.

[35] S. Gardiner, *A Perfect Moral Storm*, cit., p. 36.

[36] Cfr. ivi, p. 143 ss. e Id., *In Defense of Climate Ethics*, in Id., D.A. Weisbach, *Debating Climate Ethics*, Oxford University Press, Oxford, 2016, pp. 25 s.; D. Thompson, *Representing Future Generations: Political Presentism and Democratic Trusteeship*, in *Critical Review of International Social and Political Philosophy*, 13, 1, 2010, pp. 17-37; D. Jamieson, *Reason in a Dark Time. Why the Struggle against Climate Change Failed – and What It Means for our Future*, Oxford University Press, Oxford, 2014, p. 96 ss.; J. Boston, *Governing for the Future. Designing Democratic Institutions for a Better Tomorrow*, Emerald, Bingley, 2016, capp. 1-4.

[37] D. Thompson, *Representing Future Generations*, cit., p. 17.

[38] Difficoltà messe in evidenza sistematicamente, tanto sotto il profilo giusfilosofico che di diritto costituzionale, nell'istruttivo volume di R. Bifulco, *Diritto e generazioni future. Problemi giuridici della responsabilità intergenerazionale*, Franco Angeli, Milano, 2008, cap. 3.

Certamente non si vuole qui sottacere il fatto che negli ultimi decenni siano emersi numerosi e anche raffinati tentativi di ripensare e riconfigurare i concetti e meccanismi giuridici al fine di affrontare e accogliere la questione intergenerazionale [39]. Tuttavia, molte delle posizioni predominanti restano, in modi diversi, prevalentemente saldate a un'impalcatura che trova nel presente il terreno su cui getta i pilastri.

Ed è proprio da tale indiscusso ancoraggio che dipartono prospettive paradigmatiche come quella di Wilfred Beckerman, il quale ci propone un vero e proprio «sillogismo» a sostegno di un'«impossibilità» giuridica di abbracciare «una teoria della giustizia intergenerazionale» [40]. Si tratta di un sillogismo che quest'autore espone in questa forma:

> (1) Le generazioni future – le persone non ancora nate – non possono essere ritenute avere alcun diritto. (2) Qualsiasi teoria della giustizia, che voglia dirsi coerente, implica un conferimento di diritti a delle persone. Pertanto, (3) gli interessi delle generazioni future non possono essere protetti o promossi all'interno della cornice di qualsivoglia teoria della giustizia [41].

Presentata in questa veste, la posizione di Beckerman, a dire il vero, riprende punti di vista ben risalenti nel dibattito normativo di area transgenerazionale: tra tutti, quelli assai rappresentativi e influenti di Ruth Macklin [42] e Richard T. De George [43], che, già negli Ottanta, trovavano il loro centro di gravità nella prospettiva secondo cui gli individui futuri, in quanto soggetti non identificabili,

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[39] Al riguardo, oltre al lavoro appena citato di Bifulco, nei diversi ambiti della scienza giuridica, si vedano: E. Brown-Weiss, *In Fairness to Future Generations*, cit.; L. Westra, *Environmental Justice and the Rights of Unborn and Future Generations. Law, Environmental Harm and the Right to Health*, Earthscan, London-Sterling VA, 2006; A. D'Aloia, *Generazioni future (dir. cost.)*, cit.; É. Gaillard, *Générations futures et droit privé. Vers un droit des générations futures*, Lextenso Éditions, Paris, 2011; P. Lawrence, *Justice for Future Generations. Climate Change and International Law*, Elgar, Cheltenham, 2014; G. Zagrebelsky, *Senza adulti*, Einaudi, Torino, 2016; U. Pomarici, *Dignità a venire. La filosofia del diritto alla prova del futuro*, Editoriale Scientifica, Napoli, 2019. Per una presentazione generale del tema cfr. A. Pisanò, *Diritti deumanizzati. Animali, ambiente, generazioni future, specie umana*, Giuffrè, Milano, 2012, p. 162 ss. e, più di recente, M. Migliucci, *Prospettive attuali di giustizia intergenerazionale: rinuncia o ripresa prasseologica?*, in *Etica & Politica / Ethics & Politics*, 27, 1, 2025, pp. 155-184.

[40] W. Beckerman, *The Impossibility of a Theory of Intergenerational Justice*, cit., p. 53.

[41] Ivi, pp. 53-54.

[42] Cfr. R. Macklin, *Can Future Generations Correctly Be Said to Have Rights?*, in E. Partridge (a cura di), *Responsibility to Future Generations. Environmental Ethics*, Prometheus Books, Buffalo NY, 1981, p. 152.

[43] Cfr. R.T. De George, *The Environment, Rights, and Future Generations*, in E. Partridge (a cura di), *Responsibility to Future Generations*, cit., p. 160.

non possano essere ritenuti propriamente titolari di diritti e, in quanto indeterminati, non possano essere considerati propriamente avere interessi.

Implicazioni, queste, che – facendo un salto all'ambito italiano del dibattito più recente – ci conducono dritti alle conclusioni magistralmente racchiuse nelle analisi che Gustavo Zagrebelsky ha prospettato a più riprese sulla questione. Da parte sua, quest'autore individua, in effetti, la difficoltà di fondo dello svolgimento giuridico dei diritti delle generazioni future nel fatto che tale questione, in ultima analisi, comporta nient'altro che la «rottura della contemporaneità» [44], «base su cui finora si è presentata la vigenza delle norme […] del diritto» [45]. E, nella misura in cui, per funzionare, «il diritto […] presuppone un titolare presente» [46], subito affiora l'immancabile conseguenza che se ne deve trarre nell'alveo di un discorso intergenerazionale: parlare di «Diritti delle generazioni future» non è dotato di alcuna coerenza. Anzi, ogniqualvolta lo facciamo, finiamo per scivolare tra «quelle espressioni improprie che usiamo per nascondere la verità» [47]; una verità giuridica scottante, ma nondimeno tale da essere assunta in tutta la sua portata, di cui Zagrebelsky ci offre piena esplicitazione:

> le generazioni future, proprio perché future, non hanno alcun diritto da vantare nei confronti delle generazioni precedenti. Tutto il male che può essere loro inferto, perfino la privazione delle condizioni minime vitali, non è affatto violazione di un qualche loro "diritto" in senso giuridico. Quando (e se …) incominceranno a esistere, i loro predecessori, a loro volta, saranno scomparsi dalla faccia della terra, e non potranno essere portati in giudizio. I successori potranno provare riconoscenza o risentimento, ma in ogni caso avranno da compiacersi o da dolersi di meri e irreparabili "fatti compiuti" [48].

Dal che ne consegue una doppia alternativa, stando a quanto si desume da un'attenta lettura della prospettiva di Zagrebelsky: o ci arrestiamo all'assunzione di un'impossibilità di giustificare qualsivoglia tenuta di una giustizia intergenerazionale; oppure, l'unica via d'uscita per affrontare adeguatamente «il tema dei diritti delle generazioni future [che] non ha (e forse non può avere) svolgimenti sul piano del diritto» [49] è quella di convogliarlo su un altro piano: quello che, però, si basa sulla condizione di un'adesione preliminare alla

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[44] G. Zagrebelsky, *Senza adulti*, cit., p. 86.

[45] Ivi, p. 85.

[46] Ivi, p. 86.

[47] *Ibidem*.

[48] G. Zabrebelsky, *Diritto allo specchio*, Einaudi, Torino, 2018, p. 109.

[49] Id., *Senza adulti*, cit., p. 92.

«categoria del dovere» [50], la quale di per sé mette in gioco una dimensione valoriale. Si viene, in tal modo, riproiettati nell'ambito di un'interrogazione etica di fondo [51] e nella correlata difficoltà trasmessa dal primato di una temporalità presente e dei presenti che non riesce a fornire piena legittimazione di una responsabilità genuinamente votata agli abitanti del pianeta in un futuro lontano.

4. *Il Noi collettivo esposto al futuro: conclusioni politico-giuridiche*

Sennonché, il punto che vorrei qui evidenziare in chiusura è che, proprio in chiave intergenerazionale, il dispositivo democratico, se meglio osservato a partire da altra prospettiva, può ben lasciar affiorare un supplemento di senso, che integra lo svolgimento esclusivamente etico della questione. In effetti, se, da un lato, pare essere il principio di giustizia il migliore strumento per venire in soccorso ai futuri nel contesto di una prassi democratica preminentemente ripiegata sul primato del presente, salvo poi scoprire che questo stesso principio non trova, però, adeguato riscontro in teorie morali davvero all'altezza di svilupparlo in direzione intergenerazionale [52], dall'altro lato, è il riorientamento tutto politico a una maggiore inclusività democratica a esibire una feconda strategia per rispondere adeguatamente all'ingiunzione dei futuri, proprio quando suddetta carenza etica si lascia maggiormente avvertire [53].

In effetti, lo sforzo che nell'epoca attuale si sta profondendo a diversi livelli del dibattito pubblico e delle pratiche istituzionali mi pare vada esattamente in tale direzione. Potremmo definirlo nei termini di una genuina presa di coscienza per cui, al netto delle difficoltà di pensabilità e traducibilità concreta del principio di responsabilità intergenerazionale, nondimeno improcrastinabile si rivela l'esigenza di spendere ogni risorsa, per quanto labile e suscettibile di esiti problematici, al fine di accoglierne l'appello.

Si produce, in tal modo, nel Noi collettivo una vera e propria spinta a una

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[50] Ivi, p. 87.

[51] Cfr. S. Gardiner, *In Defense of Climate Ethics*, cit., p. 37.

[52] Cfr. F.G. Menga, *Lo scandalo del futuro. Per una giustizia intergenerazionale*, Edizioni di Storia e Letteratura, Roma, 2016, capp. 3-5.

[53] Questa considerazione viene approfondita da D. Zwarthoed, *Political Representation of Future Generations*, in M. Düwell-G. Bos-N. van Steenbergen (a cura di), *Towards the Ethics of a Green Future. The Theory and Practice of Human Rights for Future People*, Routledge, London-New York, 2018, p. 83 ss. Mi permetto di rinviare qui anche a un saggio in cui mi intrattengo sul punto: F.G. Menga, *Il futuro di cui dobbiamo rispondere. Ciò che la rappresentanza politica può ancora insegnarci sulla giustizia intergenerazionale*, in *Rivista di filosofia del diritto / Journal of Legal Philosophy*, 2, 10, 2021, p. 101 ss.

trasfigurazione di stampo transgenerazionale [54]. Né più né meno che questa spinta ha mosso, ad esempio, tanto la modifica dell'art. 9 della nostra Costituzione, quanto la recente sentenza sul caso *Neubauer* emessa dalla Corte costituzionale tedesca in materia di riformulazione della legge sul clima a beneficio delle generazioni future [55].

Nello specifico, il contenzioso *Neubauer et al. vs. Bundesrepublik Deutschland* è di estremo interesse, poiché ha visto protagonista proprio l'invocazione del principio di responsabilità intergenerazionale sancito dall'art. 20a del *Grundgesetz* tedesco sia dal basso che dall'alto, traducendosi in un processo di vera e propria trasformazione delle consolidate prerogative presentistiche dell'unità collettiva. Da un lato, i ricorrenti – come è noto, capeggiati da un gruppo di giovani attiviste e attivisti – hanno chiesto alla Corte di Karlsruhe l'effettivo riconoscimento di una tutela che non coinvolgesse più soltanto le giovani generazioni presenti, ma anche le generazioni future assenti. Questa ingiunzione si è espressa attraverso la richiesta da parte dei ricorrenti di porre un serio rimedio alle storture della legge sul clima del 2019, la quale si rendeva ancora colpevole di una pesante iniquità intergenerazionale attraverso misure di riduzione delle emissioni non sufficientemente incisive. Dall'altro lato, è stato però anche il *Bundesverfassungsgericht* stesso, per mezzo della succitata storica sentenza (del marzo 2021), ad aver realizzato un progetto innovativo e tendenzialmente rivoluzionario nella medesima direzione: difatti, pur accogliendo parzialmente i motivi dei ricorrenti, la corte nondimeno ha finito per intimare il legislatore tedesco a riformulare una legge sul clima dotata di un carattere meno iniquo in senso intergenerazionale, mettendo così in evidenza quanto il ricorso al sopra menzionato art. 20a, lungi dal commisurarsi soltanto a un semplice principio d'inclusione e ampliamento che dal presente si estende al futuro, imponga invece una radicale autolimitazione del Noi contemporaneo *a favore* del futuro. Autolimitazione che, così, mostra come un'identità collettiva possa essere chiamata a vivere il proprio presente non solo in funzione e in "rappresentanza" di un Noi dei presenti, bensì esposta a un "riconoscimento" di quelle che potremmo chiamare autentiche ingiunzioni che provengono da – e vanno a beneficio di – alterità venture [56].

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[54] Sul tema della transgenerazionalità quale elemento costitutivo del tessuto comunitario si veda T. Andina, *Transgenerazionalità. Una filosofia per le generazioni future*, Carocci, Roma, 2020.

[55] Cfr. *Bundesklimaschutzgesetz* BGBl. I, 2019, p. 2513 ss. Tutta la documentazione relativa alla petizione è consultabile online all'indirizzo: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200206_11817_complaint-2.pdf; ultima consultazione: 26 luglio 2025).

[56] Per una istruttiva e puntuale analisi del contezioso or ora citato nel contesto delle varie *climate litigations* europee si veda l'importante volume di A. Pisanò, *Il diritto al clima. Il ruolo dei diritti nei contenziosi climatici europei*, ESI, Napoli, 2022.

A ogni modo, al netto di tecnicalità e punti spinosi che emergono tanto nel caso italiano quanto in quello tedesco, nell'uno come nell'altro è la medesima esigenza di fondo a manifestarsi con forza: quella per cui istituzioni e comunità dell'oggi non possono più limitarsi ad attestare la loro dignità sulla base della capacità di riconoscere vulnerabilità, pretese, interessi e diritti a soggetti presenti. Qui ne va, invece, anche e concretamente di interpellanze di chi ancora non c'è – potremmo chiamarle «assenze che contano» [57].

Ed è tanto più per questo che, in chiusura del presente percorso di riflessione, proprio alla luce dell'intraprendenza e lungimiranza giuridiche appena rilevate, non possiamo esimerci dal registrare, al contempo e in chiave critica, anche esempi che vi si collocano in chiara controtendenza. Tra questi, spicca in particolar modo il celebre caso *Carvalho* [58], caso di *climate litigation* su cui si sono pronunciati, proprio in sede europea, prima il Tribunale [59] e poi, in seconda istanza, la Corte di Giustizia [60], asserendo entrambi l'inammissibilità della legittimità dei ricorrenti ad agire sulla base dell'interpretazione del requisito dell'interesse individuale basata sulla consolidata formula *Plaumann* [61]. Nel

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[57] Riprendo qui esplicitamente il titolo del mio saggio: F.G. Menga, *Absences that Matter. Phenomenological Insights into (the Predicaments) of Intergenerational Justice*, in M. Fritsch-F.G. Menga-R. van der Post (a cura di), *Phenomenology and Future Generations*, SUNY Press, Albany NY, 2024, pp. 109-132.

[58] Nel caso *Carvalho*, primo grande caso in ambito di giustizia climatica presentato al Tribunale, i 37 ricorrenti – residenti in diversi paesi membri dell'Unione europea e anche al di fuori del territorio dell'Unione – hanno cercato di dimostrare che essi non sarebbero stati interessati dagli eventi negativi collegati al fenomeno dei cambiamenti climatici alla medesima stregua di ogni cittadino, ma avrebbero invece subito danni specifici direttamente legati allo svolgimento delle attività agricole ed economiche da essi svolte.

[59] Cfr. l'ordinanza del Tribunale dell'8 maggio 2019, causa T-330/18, *Carvalho e a. contro Parlamento europeo e Consiglio dell'Unione europea*, ECLI:EU:T:2019:324 (accessibile a: https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:62018TN0330; ultimo accesso: 14 novembre 2025).

[60] Cfr. la sentenza della Corte del 25 marzo 2021, causa C-565/19 P, *Carvalho e a. contro Parlamento europeo e Consiglio dell'Unione europea*, ECLI:EU:C:2021:252 (accessibile a: https://eur-lex.europa.eu/legal-content/it/ALL/?uri=CELEX:62019CJ0565; ultimo accesso: 14 novembre 2025).

[61] Formula che, secondo la storica sentenza sul caso in questione (cfr. sentenza della Corte del 15 luglio 1963, causa 25/62, *Plaumann & Co. V. Commission of the European Economic Community*, ECLI:EU:C:1963:17; accessibile a: https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:61962CJ0025&qid=1763385912533; ultimo accesso: 14 novembre 2025), stabilisce che una decisione di portata generale può concernere direttamente e individualmente un soggetto non espressamente destinatario di essa, solo qualora quest'ultimo «può sostenere che questa […] lo tocchi a causa di determinate qualità personali, ovvero di particolari circostanze atte a distinguerlo dalla generalità, e quindi lo identifichi alla stessa stregua dei destinatari» (p. 220).

contesto tematico e problematico che qui ci interessa non è, però, particolarmente rilevante soffermarsi sugli aspetti strettamente tecnici che ruotano attorno all'esegesi di suddetta formula e che hanno condotto sia il Tribunale che la Corte al medesimo esito decisorio. Fondamentale, a mio avviso, è piuttosto rilevare quanto sia stata esattamente la preponderante concentrazione delle due corti su tale aspetto ad aver manifestato la loro indubbia e irriflessa impostazione presentistica; impostazione, questa, che, a differenza di quanto è avvenuto nel caso della Corte di Karlsruhe nel contenzioso *Neubauer*, non ha concesso spiraglio alcuno a una qualsivoglia sensibilità diacronica [62], ovvero a una sensibilità tale da aprire all'incidenza dei prevedibili danni a carico dei futuri quale possibile istanza per inaugurare una visione d'interesse differenziato in capo a soggetti peculiarmente vulnerabili [63].

Questo contrappunto finale, che ci precipita nuovamente nell'alveo delle tradizionali pratiche di un presentismo consolidato e resistente, non deve tuttavia condurci alla conclusione della natura velleitaria di ogni sforzo profuso in senso opposto. Al contrario, deve servirci semmai da monito per renderci più avvertiti delle reali difficoltà esistenti sul campo e, simultaneamente, dell'elevata posta in gioco istituzionale e culturale dell'impresa che ci si para davanti. Impresa che, ricorrendo nuovamente ai termini del rapporto Brundtland evocato in apertura, impone la realizzazione di un progetto tanto difficile quanto esistenzialmente destinale: quello di un abitare responsabile che, nella misura stessa in cui

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[62] Peraltro, in tale prospettiva, si noti come proprio la Corte di Giustizia non abbia riconosciuto nemmeno la validità della seconda parte del primo motivo d'appello presentato dai ricorrenti, laddove questi le chiedevano di riconsiderare in parte la sua interpretazione del concetto di interesse individuale, in considerazione del fatto che gli eventi climatici estremi fossero tali da detenere il potenziale d'interferire con il godimento dei diritti fondamentali tutelati dalla Carta dei diritti fondamentali dell'Unione europea. Alla luce di questo aspetto, pertanto, secondo i ricorrenti, si sarebbe dovuti giungere alla conclusione che gli eventi in questione avrebbero portato all'esistenza di un interesse individuale ad agire in giudizio davanti alla Corte. Nonostante tale argomento, la Corte ha tuttavia ritenuto infondato l'appello, ribadendo così, sempre in base alla consolidata interpretazione della formula *Plaumann*, la posizione già espressa in primo grado dal Tribunale, asserendo così l'impossibilità di sostenere l'applicabilità di una posizione peculiare e differenziata rispetto alla generalità di tutti gli individui. Sulla divaricazione d'impostazione tra il caso *Carvalho* e quella inerente al caso *Neubauer* si vedano le acute incursioni di M. Montini, *La giustizia climatica nell'Unione europea: il caso Carvalho e le prospettive future*, in *Ordine internazionale e diritti umani*, 2023, p. 658 (accessibile a: https://www.rivistaoidu.net/wp-content/uploads/2023/07/13_Montini.pdf; ultimo accesso: 14 novembre 2025).

[63] Sull'auspicabile, nonché prevedibile, cambio di stile e di sostanza da parte della Corte in materia di *climate litigations* non si può, qui, che condividere, dunque, l'opinione espressa, tra gli altri, da Luca Pantaleo, il quale, in effetti, ben mette in rilievo la «strategica» ristrettezza d'azione a cui rimette la semplice permanenza entro l'orbita d'ammissibilità del criterio di Plaumann (cfr. L. Pantaleo, *The Climate Crisis and the Separation of Powers in the EU. What Role for the Court of Justice?*, in *Diritto pubblico comparato ed europeo*, 3, 2024, pp. 654 s.).

vuole dirsi davvero sostenibile, non può che essere costantemente volto a una prassi di profonda *presa in cura* quale alleanza tra vulnerabili del presente e vulnerabili del futuro [64]. Sì, perché, come sosteneva profeticamente un raffinatissimo civilista francese d'inizio Novecento, René Demogue, semmai il diritto detiene qualcosa come una vocazione profonda, allora questa va rintracciata senza dubbio nella sua capacità di farsi punto di raccolta delle, e di risposta alle, fragilità d'ogni tempo – com'egli stesso asserisce: «immenso sindacato di lotte contro le sofferenze, fra tutti gli esseri che possono suscitare pietà» [65].

[64] Sulla piega paradigmatica di una prassi della cura in termini diacronici mi permetto di rinviare alle mie riflessioni: F.G. Menga, *Taking Care of Those Who Cannot Claim Rights. Intergenerational Responsibility as a Challenge in a Post-Pandemic Era*, in E. Gräb-Schmidt-F.G. Menga-C. Schlenker (a cura di), *Rethinking Responsibility*, Mohr Siebeck, Tübingen, 2023, pp. 177-194; Id., *Cura*, RCS-Corriere della Sera, Milano, 2023, p. 119 ss.

[65] R. Demogue, *La notion de sujet de droit*, cit., p. 10. Sul carattere profetico della teoria di Demogue in ambito di giustizia climatica e intergenerazionale mi permetto di rinviare al mio saggio: F.G. Menga, *René Demogue, l'intempestivo. Profilo teorico di un giurista* sui generis, Prefazione a R. Demogue, *Il soggetto di diritto*, ed. it. a cura di V. Conte, Pacini, Pisa, 2025, pp. 7-29.

L'INSOSTENIBILITÀ DELLO SVILUPPO SOSTENIBILE AI FINI DI UN'EFFICACE TUTELA DELL'AMBIENTE

Ivan Ingravallo[*]

SOMMARIO: 1. Premessa: un concetto di incerta definizione. – 2. L'evoluzione dello sviluppo sostenibile e il suo progressivo ampliamento oltre la dimensione ambientale. – 3. Lo sviluppo sostenibile dagli Obiettivi del millennio all'Agenda 2030: sempre più esteso, sempre meno focalizzato sulla dimensione ambientale. – 4. Superare lo sviluppo sostenibile per un'efficace tutela dell'ambiente? – 5. Conclusioni.

1. *Premessa: un concetto di incerta definizione*

Il presente contributo, dopo aver tentato di offrire una definizione di sviluppo sostenibile, ne esaminerà l'origine e l'evoluzione, mostrando come esso, apparso un po' defilato nella Dichiarazione finale della Conferenza di Stoccolma del 1972 [1], nei decenni successivi abbia progressivamente informato di sé non solo il diritto internazionale dell'ambiente [2], ma diversi altri ambiti di questo ordinamento. Ciò ha prodotto un paradosso, perché l'affermazione e l'estensione raggiunte dallo sviluppo sostenibile hanno portato a indebolirne la dimensione ambientale. Occorre allora riflettere su come valorizzarla e rilanciarla, arrivando, se necessario, a ripensare lo sviluppo sostenibile [3].

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[1] United Nations Conference on Human Environment, 5-16 giugno 1972.

[2] V., *ex multis*, S. Marchisio, *Il diritto internazionale dell'ambiente*, in G. Cordini-P. Fois-S. Marchisio, *Diritto ambientale. Profili internazionali, europei e comparati*, IV ed., Giappichelli, Torino, 2024, p. 1 ss.; nonché M.A. Drumbl-K. Uhlířová, *Actors and Law-making in International Environmental Law*, in M. Fitzmaurice-M. Brus-P. Merkouris (eds), *Research Handbook on International Environmental Law*, II ed., Edward Elgar, Cheltenham, 2021, p. 2 ss. Per una analisi che tiene conto anche della prassi precedente al 1972, v. N. Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*, in *Recueil des cours de l'Académie de droit international*, 2007, t. 329, p. 238 ss.

[3] Numerose delle riflessioni svolte riprendono e aggiornano quelle contenute in I. Ingravallo, *Lineamenti del nuovo diritto internazionale dello sviluppo sostenibile*, in A. Buonfrate-A.

Come noto, è difficile definire e qualificare lo sviluppo sostenibile, che è stato oggetto di numerosi approfondimenti in dottrina. Taluni lo ritengono una regola di diritto consuetudinario [4] o un principio generale del diritto internazionale [5], anche se non è agevole indicarne il contenuto in termini precisi, né ricavarne specifici diritti e obblighi per i soggetti internazionali. Una conferma – in termini di qualificazione dello sviluppo sostenibile quale principio – viene dal recente parere della Corte internazionale di giustizia del 23 luglio 2025 sugli *Obblighi degli Stati in relazione al cambiamento climatico*, che dedica uno specifico paragrafo allo sviluppo sostenibile, affermando che si tratta di un principio previsto da trattati e altri atti internazionali [6].

La gran parte degli studiosi si riferisce allo sviluppo sostenibile come a un

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Uricchio (a cura di), *Trattato breve di diritto dello sviluppo sostenibile*, Wolters Kluwer-Cedam, Milano, 2023, p. 275 ss.

[4] Per P. Sands-J. Peel, *Principles of International Environmental Law*, IV ed., CUP, Cambridge, 2018, p. 217 ss., lo sviluppo sostenibile «is established as an international legal concept» e «[t]here can be little doubt that the concept of "sustainable development" has entered the corpus of international customary law».

[5] M. Gervasi, *Prevention of Environmental Harm under General International Law*, ESI-Nomos, Napoli-Baden-Baden, 2021, p. 157, riconduce anche questi principi all'art. 38, par. 1, lett. c), dello Statuto della Corte internazionale di giustizia. Secondo l'opinione separata del giudice Weeramantry allegata alla sentenza della Corte internazionale di giustizia, 25 settembre 1997, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*: «The principle … of sustainable development … is an integral part of modern international law. It is clearly of the utmost importance, both in this case and more generally» (p. 86); v. anche quella del giudice Cançado Trindade allegata alla sentenza della stessa Corte, 20 aprile 2010, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, par. 139. In tema v., *ex multis*, R. Giuffrida, *Lo sviluppo sostenibile: i caratteri delle norme internazionali e il loro operare nella soluzione delle controversie*, in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz*, Editoriale Scientifica, Napoli, 2004, II, p. 1091 ss.; A. Fodella, *I principi generali*, in A. Fodella-L. Pineschi (a cura di), *La protezione dell'ambiente nel diritto internazionale*, Giappichelli, Torino, 2009, p. 118 ss., il quale richiama la sentenza del Tribunale arbitrale, *Iron Rhine Arbitration (Belgium/Netherlands)*, 24 maggio 2005; C. Voigt, *Sustainable Development as a Principle of International Law*, Brill-Nijhoff, Leiden-Boston, 2009; V. Barral, *Le développement durable en droit international. Essai sur les incidences juridiques d'une norme évolutive*, Bruylant, Bruxelles, 2015; M. Montini-F. Volpe, *Sustainable Development at a turning point*, in *federalismi.it*, 2016, n. 21, p. 9. L'International Law Association (ILA) nel 2012 ha approvato la risoluzione 7/2012, contenente i «2012 Sofia Guiding Statements on the Judicial Elaboration of the 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development». Il primo è così (cautamente) formulato: «Recourse to the concept of "sustainable development" in international case law may, over time, reflect a maturing of the concept into a principle of international law, despite a continued and genuine reluctance to formalise a distinctive legal status». Dal 2018 la Commissione del diritto internazionale ha inserito il tema dei «General principles of law» nel suo programma di lavoro, nominando un apposito Relatore speciale.

[6] Corte internazionale di giustizia, parere consultivo, 23 luglio 2025, *Obligations of States in respect of Climate Change*, par. 147.

obiettivo [7], un approccio, un concetto [8] o un processo, non avente un preciso contenuto, ma destinato ad assumere una diversa "forma" nel momento in cui entra in relazione con una determinata questione o uno specifico ambito [9] e che acquisisce giuridicità attraverso alcuni principi e istituzioni che lo rendono effettivo [10]. È una opinione convincente, poiché coglie un carattere proprio dello sviluppo sostenibile, che non ha un contenuto preciso e cristallizzato, ma «è lo

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[7] Così S. Marchisio, *Le Convenzioni internazionali ambientali e lo sviluppo sostenibile*, in P. Fois (a cura di), *Il principio dello sviluppo sostenibile nel diritto internazionale ed europeo dell'ambiente*, Editoriale Scientifica, Napoli, 2007, p. 184 s. e p. 199, ove afferma: «il concetto dello sviluppo sostenibile si configura quale obiettivo di lungo periodo, che può essere meglio realizzato attraverso l'applicazione diffusa dei principi e delle regole che ad esso fanno riferimento». Cfr. anche il preambolo dell'Accordo istitutivo dell'OMC e la decisione dell'Organo di appello dell'OMC, 12 ottobre 1998, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, doc. WT/DS58/AB/R. In senso dubitativo v. S. Di Benedetto, *Sovranità dello Stato sulle risorse naturali e tutela degli equilibri ecologici nel diritto internazionale generale*, Giappichelli, Torino, 2018, p. 157.

[8] Corte internazionale di giustizia, *Gabčíkovo-Nagymaros*, cit., par. 140: «Throughout the ages, mankind has … constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed ... . Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the *concept of sustainable development*» (corsivo aggiunto). In tema v. A.G. Koroma, *Law of Sustainable Development in the Jurisprudence of the International Court of Justice*, in AA.VV., *International Law and Changing Perceptions of Security. Liber Amicorum Said Mahmoudi*, Brill-Nijhoff, Leiden-Boston, 2014, p. 189 ss.; D. French, *An Overview of Sustainable Development Jurisprudence of the International Court of Justice*, in M.C. Cordonier Segger-C.G. Weeramantry (eds), *Sustainable Development Principles in the Decisions of International Courts and Tribunals. 1992-2012*, Routledge, Abingdon, 2017, p. 177 ss.

[9] Secondo F. Francioni, *Sviluppo sostenibile e principi di diritto internazionale dell'ambiente*, in P. Fois (a cura di), *op. cit.*, p. 43, lo sviluppo sostenibile «costituisce … un processo per integrare considerazioni ambientali nelle politiche dello sviluppo e della regolazione del mercato». Per R. Cadin, *Profili ricostruttivi e linee evolutive del diritto internazionale dello sviluppo*, Giappichelli, Torino, 2019, p. 180 ss., «quello che conta non è il risultato in sé (lo sviluppo economico, lo sviluppo sostenibile), ma la predisposizione, a livello nazionale ed internazionale, dei meccanismi e delle procedure idonee a conseguirlo».

[10] Così J. Juste Ruiz, *El principio del desarrollo sostenible en el derecho internacional y europeo del ambiente: algunas reflexiones conclusivas*, in P. Fois (a cura di), *op. cit.*, p. 337. V. anche C.M. Díaz Barrado, *Sustainable Development Goals: A Principle and Several Dimensions*, in P. Durán y Lalaguna-C.M. Díaz Barrado-C.R. Fernández Liesa (eds), *International Society and Sustainable Development Goals*, Thomson Reuters-Aranzadi, Cizur Menor, 2016, p. 49 ss., il quale peraltro si occupa di sviluppo sostenibile prevalentemente in una diversa prospettiva, quella del diritto allo sviluppo.

strumento che condiziona in modo trasversale la formazione e l'atteggiarsi di principi e regole eterogenee fra loro, nonché [coordina] regole consolidate talvolta in conflitto al fine di adattarle a esigenze nuove di tutela ambientale» [11].

Condivisibile è altresì l'osservazione (autorevolmente accolta anche nel richiamato parere della Corte internazionale di giustizia) secondo cui lo sviluppo sostenibile costituisce un efficace strumento interpretativo [12], volto, tra l'altro, «ad assicurare la coerenza e la compatibilità fra settori diversi del diritto internazionale» [13], nel solco dell'interpretazione sistematica dei trattati internazionali disciplinata dall'art. 31, par. 3, lett. c), della Convenzione di Vienna del 23 maggio 1969 [14]. Nel richiamato parere del 23 luglio 2025 la Corte internazionale di giustizia dichiara: «Given its continuous and uncontested universal recognition, the Court considers that the principle of sustainable development guides the interpretation of certain treaties and the determination of rules of customary international law, including the duty to prevent significant harm to the environment and the duty to co-operate for the protection of the environment» [15].

La dottrina più attenta ha da tempo individuato lo sviluppo sostenibile come un "contenitore" di numerosi principi in materia ambientale. Ciò è a dirsi sia sotto il profilo sostanziale (si pensi alle regole in tema di: prevenzione; responsabilità intergenerazionale; utilizzo sostenibile delle risorse naturali; "chi inquina paga"; equità intragenerazionale; precauzione; responsabilità comuni, ma differenziate; integrazione; equità nella ripartizione dei benefici derivanti dallo sfruttamento delle risorse naturali; ecc.), sia sotto quello procedurale (come la valutazione di impatto ambientale e l'informazione e partecipazione del pubblico alle scelte in materia ambientale) [16].

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[11] V. ancora F. Francioni, *op. cit.*, p. 43, che aggiunge: «esso configura un metodo di continuo adattamento del diritto internazionale alle esigenze di governo dei processi di sviluppo economico in un mondo di risorse limitate» (p. 61).

[12] Sul ruolo ermeneutico dello sviluppo sostenibile v., anche per ulteriori riferimenti, D. Pauciulo, *La portata giuridica del concetto di sviluppo sostenibile e la sua (possibile) inclusione tra gli scopi delle Nazioni Unite*, in P. Gargiulo-I. Ingravallo-P. Rossi (a cura di), *L'ONU nei nuovi assetti sistemici internazionali: le riforme necessarie*, Editoriale Scientifica, Napoli, 2023, p. 248 ss., che propone anche l'inserimento dello stesso nella Carta ONU.

[13] A. Fodella, *op. cit.*, p. 120, nonché R. Giuffrida, *op. cit.*, p. 1066 ss.

[14] In base a tale disposizione, nell'interpretazione di un trattato: «Verrà tenuto conto, oltre che del contesto: … c) di ogni norma di diritto internazionale pertinente, applicabile alle relazioni fra le parti».

[15] Corte internazionale di giustizia, *Obligations of States in respect of Climate Change*, cit., par. 147. Al par. 181 la Corte ribadisce: «As with the other principles, … the principle of sustainable development does not in itself create specific rights and obligations for States, but informs the interpretation of the obligations under the climate change treaties».

[16] Così, tra gli altri, R. Giuffrida, *op. cit.*, p. 1074 ss.; F. Francioni, *op. cit.*, p. 46 ss.; P. Sands-

2. *L'evoluzione dello sviluppo sostenibile e il suo progressivo ampliamento oltre la dimensione ambientale*

Come accennato, la Dichiarazione approvata al termine della Conferenza di Stoccolma del 1972 sull'ambiente umano non contiene l'espressione "sviluppo sostenibile", ma alcuni suoi principi includono elementi essenziali a esso riferibili in relazione alla tutela ambientale; per esempio, il principio 13, secondo il quale: «In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and coordinated approach to their development planning so as to ensure that *development is compatible with the need to protect and improve environment* for the benefit of their population»; e il principio 4, nella parte in cui afferma: «*Nature conservation*, including wildlife, must therefore receive importance in planning for *economic development*» [17].

A partire dalla Conferenza di Stoccolma, il diritto internazionale dell'ambiente è andato progressivamente rafforzandosi e, con esso, lo sviluppo sostenibile, che trova una prima compiuta formulazione nel c.d. Rapporto Bruntland del 1987 [18], contenente una sezione a esso dedicata. Di solito è richiamata la parte iniziale di questa sezione, secondo la quale: «Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs» [19], ma questa frase si riferisce piuttosto alla c.d. responsabilità intergenerazionale; andrebbe invece valorizzato un secondo passaggio della medesima sezione del Rapporto Bruntland, che contiene la seguente, amplissima definizione di sviluppo sostenibile: «In essence, sustainable development is a *process of change* in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations» [20].

A partire dagli anni '80 gli Stati hanno negoziato e concluso importanti convenzioni in materia ambientale, ampiamente ratificate e, nel 1992, ebbe luogo

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J. Peel, *op. cit*., p. 218 ss.; R. Cadin, *op. cit*., p. 181 ss.; M. Montini, *L'interazione tra gli SDGs ed il principio dello sviluppo sostenibile per l'attuazione del diritto internazionale dell'ambiente*, in *federalismi.it*, 2019, n. 9, p. 9 ss.; D. French, *Sustainable Development*, in M. Fitzmaurice-M. Brus-P. Merkouris (eds), *op. cit.*, p. 130 ss.

[17] Corsivi aggiunti.

[18] UN Doc. A/42/427, *Report of the World Commission on Environment and Development: Our Common Future*, 4 agosto 1987.

[19] V., *ex multis*, F. Francioni, *op. cit.*, p. 41 s.; S. Marchisio, *Le Convenzioni internazionali ambientali*, cit., p. 184 s.; N. Schrijver, *op. cit*., p. 231; A. Fodella, *op. cit.*, p. 117; P. Sands-J. Peel, *op. cit*., p. 217; R. Cadin, *op. cit*., p. 159.

[20] Corsivo aggiunto.

la seconda grande Conferenza internazionale in materia ambientale, svoltasi a Rio de Janeiro. Essa rappresentò, per molti aspetti, il momento più significativo dell'impegno ambientale della comunità internazionale. In tale occasione lo sviluppo sostenibile ha assunto primaria rilevanza [21]. Già dal titolo della Conferenza del 1992, infatti, ambiente e sviluppo furono abbinati [22] e, secondo il principio 1 della Dichiarazione finale: «Human beings are at the centre of concerns for sustainable development». Rilevanti sono anche i principi 3 e 4, i quali dispongono rispettivamente: «The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations»; «In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it» [23]. Diversi altri principi di questa Dichiarazione si riferiscono allo sviluppo sostenibile; in particolare l'ultimo, il 27, afferma: «States and people shall co-operate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and *in the further development of international law in the field of sustainable development*» [24].

Tra gli accordi in materia ambientale conclusi in quegli anni vi sono alcuni importanti "trattati cornice" (*framework conventions*) – come le due Convenzioni del 1992 dedicate al cambiamento climatico (New York, 9 maggio) e alla diversità biologica (Rio de Janeiro, 5 giugno) –, ampiamente ratificati e ai quali si sono progressivamente affiancati ulteriori accordi internazionali volti a disciplinare più in dettaglio determinate questioni, come il Protocollo di Kyoto [25]. In tutti è presente il riferimento allo sviluppo sostenibile, che, unitamente ad altri principi, è stato quindi utile al fine di offrire una progressiva unitarietà a una disciplina frammentata, com'è quella convenzionale in materia di tutela ambientale [26].

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[21] Secondo S. Marchisio, *Il diritto internazionale ambientale da Rio a Johannesburg*, in A. Del Vecchio-A. Dal Ri jr. (a cura di), *Il diritto internazionale dell'ambiente dopo il vertice di Johannesburg*, Editoriale Scientifica, Napoli, 2005, p. 184, dopo Rio «l'insieme delle regole giuridiche internazionali aventi come obiettivo la tutela dell'ambiente, si è consolidato e in parte adattato, nella *ratio* e nel contenuto, alla nuova impostazione dello sviluppo sostenibile». V. anche J.E. Viñuales, *The Rio Declaration on Environment and Development: Preliminary Study*, in J.E. Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary*, OUP, Oxford, 2015, p. 1 ss.

[22] United Nations Conference on Environment and Development, 3-14 giugno 1992.

[23] Secondo M. Montini, *L'interazione tra gli SDGs*, cit., p. 9: «Il concetto cardine del principio dello sviluppo sostenibile è quindi adesso rappresentato dal principio di integrazione, sancito dal Principio 4 della Dichiarazione di Rio».

[24] Corsivo aggiunto.

[25] V. *infra*.

[26] Per F. Francioni, *op. cit.*, p. 45, ciò serve anche a dare maggiore rilievo a norme contenute

La centralità dello sviluppo sostenibile è stata confermata dalle altre due grandi conferenze internazionali in materia ambientale, svoltesi nel 2002 a Johannesburg e nel 2012 nuovamente a Rio de Janeiro, entrambe caratterizzate dall'intento di consolidare quanto già previsto, piuttosto che di affermare nuovi principi in materia ambientale.

La Conferenza del 2002 fu specificamente dedicata allo sviluppo sostenibile [27], che venne ampliato al fine di includervi, accanto ai due tradizionali "pilastri", dedicati allo sviluppo economico e alla tutela dell'ambiente, anche un terzo "pilastro", quello dello sviluppo sociale [28]. Tra i soggetti internazionali che hanno assunto con maggiore serietà l'impegno a favore dello sviluppo sostenibile, adottando l'approccio tri-dimensionale emerso a Johannesburg e intendendo la sostenibilità ambientale come principale parametro da tenere in considerazione, va senz'altro inclusa l'Unione Europea [29]. A seguito del Trattato di Lisbona del 2007 lo sviluppo sostenibile trova maggiore spazio sin dal Trattato UE e dal Trattato FUE [30], caratterizzando sia l'azione interna dell'UE, sia quella esterna [31]. Sotto il primo profilo, oltre a un cenno presente già nel preambolo del TUE e in quello della Carta dei diritti fondamentali dell'Unione, rileva l'art. 3, par. 2, TUE, il quale dispone che l'Unione «[s]i adopera per lo sviluppo sostenibile dell'Europa, basato su una crescita economica equilibrata

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in «trattati che, per quanto importanti, rimangono inopponibili agli stati terzi». In tema v. l'analisi di S. Marchisio, *Le Convenzioni internazionali ambientali*, cit., p. 181 ss., nonché A.R. Harrington, *International Law and Global Governance: Treaty Regimes and Sustainable Development Goals Implementation*, Routledge, Abingdon, 2021.

[27] World Summit on Sustainable Development, 26 agosto-4 settembre 2002.

[28] Al punto che S. Marchisio, *L'ONU. Il diritto delle Nazioni Unite*, II ed., il Mulino, Bologna, 2012, p. 328, afferma: «Il principio dello sviluppo sostenibile fa riferimento non solo alla tutela ambientale e allo sviluppo economico, ma anche e soprattutto allo sviluppo sociale». In senso critico v. C.M. Díaz Barrado, *op. cit.*, p. 68.

[29] Sulla politica ambientale dell'UE la bibliografia è assai vasta. Mi limito a richiamare N. De Sadeleer, *Environnement et marché intérieur*, III ed., Bruylant, Bruxelles, 2010; S. Amadeo, *Titolo XX TFUE*, in A. Tizzano (a cura di), *Trattati dell'Unione europea*, II ed., Giuffrè, Milano, 2014, p. 1616 ss.; P.A. Pillitu, *Titolo XX TFUE*, in F. Pocar-M.C. Baruffi (a cura di), *Commentario breve ai Trattati dell'Unione europea*, II ed., Cedam, Padova, 2014, p. 1007 ss.; A. Rizzo, *L'affermazione di una politica ambientale dell'Unione europea. Dall'Atto Unico europeo al Trattato di Lisbona*, in R. Giuffrida-F. Amabili (a cura di), *La tutela dell'ambiente nel diritto internazionale ed europeo*, Giappichelli, Torino, 2018, p. 21 ss.; nonché i contributi raccolti in M. Peeters-M. Eliantonio (eds), *Research Handbook on EU Environmental Law*, Edward Elgar, Cheltenham, 2020.

[30] M. Alberton-M. Montini, *Le novità introdotte dal Trattato di Lisbona per la tutela dell'ambiente*, in *Rivista giuridica dell'ambiente*, 2008, p. 506 s.

[31] In tema v. da ultimo M. Montini, *L'azione esterna dell'Unione europea per l'attuazione dello sviluppo sostenibile*, Editoriale Scientifica, Napoli, 2025.

e sulla stabilità dei prezzi, su un'economia sociale di mercato fortemente competitiva, che mira alla piena occupazione e al progresso sociale, e su *un elevato livello di tutela e di miglioramento della qualità dell'ambiente*» [32]. Nell'azione esterna dell'UE rilevano invece il par. 5 dell'art. 3 TUE, secondo il quale essa «[c]ontribuisce … allo sviluppo sostenibile della Terra», l'art. 21, par. 2, lett. d), TUE, che assegna all'Unione l'obiettivo di «favorire lo sviluppo sostenibile dei paesi in via di sviluppo sul piano economico, sociale e ambientale …» e la lett. f) della stessa disposizione, che la invita a «contribuire all'elaborazione di misure internazionali volte a preservare e migliorare la qualità dell'ambiente e la gestione sostenibile delle risorse naturali mondiali, al fine di assicurare lo sviluppo sostenibile».

La Conferenza di Johannesburg del 2002, come accennato, si svolse in un contesto meno orientato a rafforzare la normativa internazionale ambientale [33]. La Dichiarazione finale approvata in questa occasione non è una dichiarazione di principi (come quelle di Stoccolma 1972 e di Rio 1992), ma una mera dichiarazione politica. Va peraltro messo in luce che, anche se si tratta di atti non aventi natura convenzionale e che quindi non sono vincolanti per i soggetti internazionali che li approvano, il loro carattere raccomandatorio (di *soft law*) non rende queste dichiarazioni prive di effetti giuridici. Sono, infatti, atti capaci di erodere la *domestic jurisdiction* di chi li approva e, specie quando votati a larga maggioranza o adottati per *consensus*, possono costituire il primo passo verso la formazione di norme giuridiche obbligatorie [34]. È anche possibile, tramite una

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[32] Corsivo aggiunto. Lo sviluppo sostenibile, pur se non indicato espressamente, sottende altresì gli artt. 191-193 TFUE, dedicati alla politica ambientale. Peraltro, in virtù del c.d. principio di integrazione, la tutela dell'ambiente e lo sviluppo sostenibile caratterizzano l'insieme delle competenze dell'Unione (art. 11 TFUE: «Le esigenze connesse con la tutela dell'ambiente devono essere integrate nella definizione e nell'attuazione delle politiche e azioni dell'Unione, in particolare nella prospettiva di promuovere lo sviluppo sostenibile»; lo stesso principio è espresso ancor più nitidamente nell'art. 37 della Carta dei diritti fondamentali: «Un livello elevato di tutela dell'ambiente e il miglioramento della sua qualità devono essere integrati nelle politiche dell'Unione e garantiti conformemente al principio dello sviluppo sostenibile»).

[33] S. Marchisio, *Il diritto internazionale ambientale*, cit., p. 193: «la questione ambientale ha perso quella posizione centrale che aveva acquisito nel corso dell'ultimo trentennio del secolo scorso». V. anche F. Munari, *La protezione dell'ambiente: iniziative internazionali per lo sviluppo sostenibile*, in AA.VV., *Sicurezza internazionale, sviluppo sostenibile, diritti umani*, Editoriale Scientifica, Napoli, 2006, p. 89 ss.; M. Montini, *Investimenti internazionali, protezione dell'ambiente e sviluppo sostenibile*, Giuffrè, Milano, 2015, p. 27 s.

[34] S. Marchisio, *Le Convenzioni internazionali ambientali*, cit., p. 199: «i principi dello sviluppo sostenibile sono stati largamente recepiti dai trattati ambientali, quali criteri ispiratori della disciplina pattizia e, talvolta, norme vincolanti del diritto internazionale». V. anche C.R. Fernández Liesa, *Sustainable Development in International Law: General Issues*, in P. Durán y Lalaguna-C.M. Díaz Barrado-C.R. Fernández Liesa (eds), *op. cit.*, p. 95: «Soft law is important

scelta unilaterale, rendere giuridicamente vincolanti le norme di *soft law*, dando loro attuazione negli ordinamenti giuridici interni [35].

La Dichiarazione di Johannesburg esordisce enfaticamente [36] con: «We, the representatives of the peoples of the world, assembled at the World Summit on Sustainable Development ..., reaffirm our commitment to sustainable development»; e si chiude con: «From the African continent, the cradle of humankind, we solemnly pledge to the peoples of the world and the generations that will surely inherit this Earth that we are determined to ensure that our collective hope for sustainable development is realized». Nel mezzo, include una parte dedicata a «Our committment to sustainable development» (parr. 16-30), che risulta poco efficace e di compromesso.

L'ultima importante Conferenza universale in materia ambientale, svoltasi a Rio de Janeiro nel 2012 [37] (c.d. "Rio+20"), ha confermato la centralità dello sviluppo sostenibile, pur in un clima di cooperazione internazionale alquanto "stagnante". Anche la Dichiarazione finale di questa Conferenza, intitolata "The Future We Want", lungi dal lanciare nuove e ambiziose parole d'ordine o principi e impegni in materia di tutela ambientale, si è limitata a riproporre le note formule del passato, a partire dallo sviluppo sostenibile, accompagnandole con un lunghissimo documento (comprendente ben 283 paragrafi), pieno di buoni – ma poco incisivi – propositi [38]. Come efficacemente, e criticamente, rilevato in dottrina, lo «sviluppo sostenibile, accettato dalla comunità internazionale nel suo complesso, ma dal significato oscuro nel suo esatto contenuto e di natura giuridica controversa, non trova negli Stati riuniti a Rio+20 lo slancio, la lungimiranza e la volontà politica che sono necessari per concordare, a livello mondiale, un modello di crescita sostenuto da un nuovo sistema di governo ambientale» [39].

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because it evidences the constant transformation of international law and its growth. In the gradual development of international sustainable law, the transformation of *soft law* into *hard law* is also important» (corsivi nell'originale).

[35] Lo stesso C.R. Fernández Liesa, *op. cit.*, p. 96, rileva come «progress is being achieved with *new instruments*, such as national and international strategies and national plans. These instruments are different to classic international Treaties and more in line with *soft law*, however they generate international practice that gradually changes the legal system» (corsivi nell'originale).

[36] R. Cadin, *op. cit.*, p. 178, descrive efficacemente i documenti approvati a Johannesburg come «inutilmente enfatici e privi di quella visione unitaria che aveva caratterizzato gli atti di Rio».

[37] United Nations Conference on Sustainable Development, 13-22 giugno 2012.

[38] A. Di Stasi, *The Normative Force of the Outcome Document "The Future We Want": Brief Remarks*, in M. Fitzmaurice-S. Maljean-Dubois-S. Negri (eds), *Environmental Protection and Sustainable Development from Rio to Rio+20*, Brill-Nijhoff, Leiden-Boston, 2014, p. 7 ss.

[39] L. Pineschi, *La Conferenza di Rio 2012: dallo* Zero Draft *a* The Future We Want. *Rio+20 o vent'anni trascorsi inutilmente?*, in *Rivista giuridica dell'ambiente*, 2012, spec. p. 812 s.

Una nitida conferma del ridotto interesse degli Stati ad assumere nuovi impegni in materia ambientale è offerta dal cinquantesimo anniversario della Conferenza (e della Dichiarazione) di Stoccolma, in occasione del quale il 2-3 giugno 2022 si è svolta, nuovamente in quella città, una ulteriore Conferenza internazionale (c.d. "Stoccolma+50"). Essa non ha portato all'approvazione di alcun documento conclusivo condiviso, ma solo di poche e generiche osservazioni finali proposte dai Governi di Kenya e Svezia, che assieme all'Assemblea generale dell'ONU hanno convocato la Conferenza [40].

3. *Lo sviluppo sostenibile dagli Obiettivi del millennio all'Agenda 2030: sempre più esteso, sempre meno focalizzato sulla dimensione ambientale*

Grazie alla sua capacità di adattarsi alle esigenze (e agli interessi) dei vari gruppi di Stati e al suo carattere essenzialmente compromissorio [41], nel corso dei decenni lo sviluppo sostenibile è riuscito a mettere d'accordo tutti ma, quando dalla formula astratta si passa alla sua concreta applicazione, ognuno può valorizzare uno dei suoi tre "pilastri" (sviluppo economico; sostenibilità ambientale; sviluppo sociale), conformandolo così ai propri interessi [42].

Il successo dello sviluppo sostenibile è evidente se si considerano i due principali programmi d'azione approvati dall'Assemblea generale dell'ONU negli ultimi decenni: gli Obiettivi del millennio (*Millenium Developments Goals*, MDGs) e l'Agenda 2030.

I primi derivano dalla Dichiarazione del millennio, approvata per *consensus* dall'Assemblea generale con la risoluzione 55/2 dell'8 settembre 2000 [43]. Essa

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[40] V. Presidents' Final Remarks to Plenary, *Key Recommendations for Accelerating Action towards a Healthy Planet for the Prosperity of All*. Cfr. anche la dichiarazione politica della prima sessione speciale dell'Assemblea dell'UNEP (United Nations Environment Programme), convocata per commemorare il 50° anniversario dell'UNEP, UN Doc. UNEP/EA.SS.1/4 dell'8 marzo 2022.

[41] R. Cadin, *op. cit.*, p. 159, parla di «natura contraddittoria» del concetto di sviluppo sostenibile. In tema v. ampiamente D. French, *Sustainable Development*, cit., p. 130 ss.

[42] Con specifico riguardo ai profili ambientali, C. Voigt, *How a 'Global Pact for the Environment' Could Add Value to International Environmental Law*, in *Review of European, Comparative and International Environmental Law*, 2019, p. 15, rileva: «Without … compromises and (often *intended*) constructive ambiguities and gaps … the likelihood of States agreeing to international environmental accords would be significantly diminished, which in turn would undermine the success of creating global playing fields and cooperation on urgent, global environmental issues» (corsivo nell'originale).

[43] Cfr. UN Doc. A/RES/55/2.

include il rispetto della natura tra i valori fondamentali della comunità internazionale [44]. Attraverso questa Dichiarazione gli Stati membri dell'ONU hanno proclamato otto Obiettivi da raggiungere entro il 2015, articolati in ventuno ambiti specifici e sessanta indicatori ufficiali, volti in particolare a favorire i Paesi meno sviluppati. Oltre a quelli finalizzati alla riduzione della povertà, all'incremento dei livelli di istruzione e di accesso alle cure mediche, all'eliminazione della disparità di genere, l'Obiettivo 7 era specificatamente dedicato ad assicurare la sostenibilità ambientale [45]. I quattro ambiti specifici di questo Obiettivo – a loro volta articolati in dieci indicatori ufficiali di monitoraggio dei risultati da raggiungere – erano volti a: integrare i principi dello sviluppo sostenibile nelle politiche e nei programmi nazionali e invertire la perdita di risorse ambientali; ridurre la perdita di biodiversità, raggiungendo, entro il 2010, una riduzione significativa del tasso di perdita; dimezzare, entro il 2015, la percentuale di persone senza accesso sostenibile all'acqua potabile e ai servizi igienico-sanitari di base; ottenere, entro il 2020, un miglioramento significativo nella vita di almeno 100 milioni di abitanti dei bassifondi (*slums*).

Il quadro dei risultati ottenuti nel perseguimento dei MDGs è in chiaroscuro [46]. Per quanto riguarda gli ambiti inclusi nell'Obiettivo 7, il rapporto finale dell'ONU segnala alcuni miglioramenti (tra cui quelli relativi alla situazione della fascia di ozono, all'aumento delle aree marine e terrestri protette, alla percentuale di individui che hanno accesso all'acqua potabile, alla diminuzione delle persone costrette a vivere negli *slums*), ma anche il permanere di significative criticità (come la deforestazione, l'aumento delle emissioni di gas a effetto serra, l'eccessivo sfruttamento delle risorse biologiche del mare, il permanere di significative differenze nella qualità della vita tra coloro che vivono nelle città e chi vive nelle aree rurali). Il rapporto finale, con riferimento all'Obiettivo 7, conclude affermando che «it is crucial to ensure that the development agenda for the future reflects the links between socioeconomic and environmental sustainability and protects and reinforces the environmental pillar» [47].

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[44] Cfr. il par. 6 della Dichiarazione del millennio: «Prudence must be shown in the management of all living species and natural resources, in accordance with the precepts of sustainable development. Only in this way can the immeasurable riches provided to us by nature be preserved and passed on to our descendants. The current unsustainable patterns of production and consumption must be changed in the interest of our future welfare and that of our descendants».

[45] P. Sands-J. Peel, *op. cit*., p. 224: «The linkage of environmental and development issues was made explicit in the UN Millennium Declaration, which declared as one of the Millennium Development Goals to be achieved by 2015, integration of the principles of sustainable development into country policies ...».

[46] Cfr. United Nations, *The Millennium Development Goals Report 2015*, 2015.

[47] *Ivi*, p. 61.

Nel 2015, data fissata dalla Dichiarazione del millennio come orizzonte temporale per realizzare gli otto Obiettivi decisi nel 2000, la stessa Assemblea generale dell'ONU, considerato che essi sono stati raggiunti solo in parte e anche sulla spinta della Conferenza di Rio+20 del 2012, ha deciso di rilanciare l'impegno della comunità internazionale [48]. Il 25 settembre 2015 essa ha approvato, nuovamente per *consensus*, la risoluzione 70/1, intitolata *Transforming Our World: the 2030 Agenda for Sustainable Development* [49], che fissa 17 Obiettivi per lo sviluppo sostenibile (SDGs), a loro volta associati a 169 traguardi (*targets*), interconnessi e indivisibili [50].

Replicando sotto questo profilo il modello della Dichiarazione del millennio, l'orizzonte temporale è quello del 2030, anche se nel merito l'Agenda 2030 si discosta da quella Dichiarazione, sia perché i SDGs sono rivolti a tutti gli Stati, non solo a quelli meno sviluppati, sia perché l'attenzione è focalizzata sullo sviluppo sostenibile [51]. Questo, ancora una volta, non viene definito [52], ma utilizzato come formula "inclusiva", non più collegata alla sola dimensione ambientale [53]. Sia gli Obiettivi, sia i traguardi contenuti nell'Agenda 2030, infatti,

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[48] Il legame istituzionale tra la Conferenza di Rio+20 e l'Agenda 2030 è rappresentato dall'High-level Political Forum on Sustainable Development (HLPF) dell'ONU, creato con la Dichiarazione del 2012 e al quale l'Assemblea generale dell'ONU ha successivamente affidato il compito di seguire gli sviluppo dell'Agenda 2030. L'HLPF si riunisce annualmente sotto gli auspici del Consiglio economico e sociale dell'ONU.

[49] UN Doc. A/RES/70/1. M. Montini-F. Volpe, *op. cit*., hanno indicato il 2015 come un possibile punto di svolta nella tutela internazionale dell'ambiente e nell'approccio allo sviluppo sostenibile, poiché in quell'anno si sono affiancate all'Agenda 2030 l'Enciclica *Laudato si'* di Papa Francesco (pubblicata il 18 giugno 2015) e l'Accordo di Parigi sul clima (concluso il 21 dicembre 2015).

[50] Per una visione d'insieme v. i contributi raccolti in P. Durán y Lalaguna-C.M. Díaz Barrado-C.R. Fernández Liesa (eds), *op. cit.*; nonché in J. Ebbesson-E. Hey (eds), *The Cambridge Handbook on the Sustainable Development Goals and International Law*, CUP, Cambridge, 2022.

[51] L. Chiussi, *The UN 2030 Agenda on Sustainable Development: Talking the Talk, Walking the Walk?*, in *La Comunità Internazionale*, 2016, p. 49 ss., indica una ulteriore differenza tra MDGs e SDGs, consistente nel metodo di negoziazione *top-down* dei primi, contrapposto a quello *bottom-up* dei secondi. Secondo S. Nespor, *La lunga marcia per un accordo globale sul clima: dal Protocollo di Kyoto all'Accordo di Parigi*, in *Rivista trimestrale di diritto pubblico*, 2016, p. 110, il medesimo metodo differenzia l'Accordo di Parigi del 2015 dal Protocollo di Kyoto del 1997.

[52] Secondo C.M. Díaz Barrado, *op. cit*., p. 69: «The SDGs are the last step towards the assertion and consecration of sustainable development as a *structural principle of current international law* and States would be well advised to begin extracting consequences from the enormous number of commitments contained in the New 2030 Agenda» (corsivo nell'originale).

[53] D. French-L. Kotzé (eds), *Governing through Goals: Sustainable Development Goals as Governance Innovation*, Edward Elgar, Cheltenham, 2018. Secondo M. Montini, *L'interazione tra gli SDGs*, cit., p. 14, il legame tra SDGs e sviluppo sostenibile attua il principio del "mutuo

riguardano numerosi ambiti in qualche misura connessi alla sostenibilità, articolata nei suoi diversi "pilastri" (dalla lotta alla povertà e alla fame alla crescita economica duratura e alle città sostenibili) [54].

Per quanto riguarda più da vicino il pilastro ambientale dello sviluppo sostenibile, rilevano gli Obiettivi 6, 13 – in particolare il *target* 13.2 (Integrare, nelle politiche, nelle strategie e nei piani nazionali le misure di contrasto ai cambiamenti climatici) –, 14 e 15, che sono riconducibili alle principali convenzioni in materia di tutela dell'ambiente. Peraltro, gli unici riferimenti espressi sono contenuti nell'Obiettivo 13, che richiama la Convezione quadro sui cambiamenti climatici, e nel *target* 14.c, che menziona la Convenzione delle Nazioni Unite sul diritto del mare nel contesto del miglioramento della conservazione e dell'uso sostenibile degli oceani e delle loro risorse tramite l'applicazione del diritto internazionale. È invece assente qualsivoglia riferimento a norme a tutela dei diritti umani [55].

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supporto", poiché «gli SDGs hanno come punto di riferimento centrale il principio dello sviluppo sostenibile e … quest'ultimo può trovare nel percorso di implementazione degli SDGs un'opportunità per un più pieno e corretto riconoscimento del suo ruolo nel diritto internazionale contemporaneo»; ma mette in luce la «essenziale matrice ecologica» dello sviluppo sostenibile (*ivi*, p. 15 ss.).

[54] Un mero elenco degli Obiettivi mostra il carattere multiforme che lo sviluppo sostenibile ha acquisito. Essi includono sradicare la povertà in tutte le sue forme e ovunque nel mondo (Obiettivo 1), porre fine alla fame, raggiungere la sicurezza alimentare, migliorare l'alimentazione e promuovere l'agricoltura sostenibile (Obiettivo 2), garantire una vita sana e promuovere il benessere di tutti a tutte le età, nonché un'istruzione di qualità inclusiva ed equa e promuovere opportunità di apprendimento continuo per tutti (Obiettivi 3 e 4), raggiungere l'uguaglianza di genere e l'autodeterminazione di tutte le donne e ragazze (Obiettivo 5), garantire la disponibilità e la gestione sostenibile di acqua e servizi igienici per tutti (Obiettivo 6), garantire l'accesso all'energia a prezzo accessibile, affidabile, sostenibile e moderna per tutti (Obiettivo 7), promuovere una crescita economica duratura, inclusiva e sostenibile, la piena occupazione e il lavoro dignitoso per tutti (Obiettivo 8), costruire un'infrastruttura resiliente, promuovere l'industrializzazione inclusiva e sostenibile e sostenere l'innovazione (Obiettivo 9), ridurre le disuguaglianze all'interno dei e fra i Paesi (Obiettivo 10), rendere le città e gli insediamenti umani inclusivi, sicuri, resilienti e sostenibili (Obiettivo 11), garantire modelli di consumo e produzione sostenibili (Obiettivo 12), adottare misure urgenti per combattere i cambiamenti climatici e le loro conseguenze (Obiettivo 13), conservare e utilizzare in modo sostenibile gli oceani, i mari e le risorse marine, nonché proteggere, ripristinare e promuovere l'uso sostenibile degli ecosistemi terrestri, gestire in modo sostenibile le foreste, contrastare la desertificazione, arrestare e invertire il degrado dei suoli e fermare la perdita di biodiversità (Obiettivi 14 e 15), promuovere società pacifiche e inclusive orientate allo sviluppo sostenibile, garantire a tutti l'accesso alla giustizia e costruire istituzioni efficaci, responsabili e inclusive a tutti i livelli (Obiettivo 16). L'ultimo Obiettivo ha un carattere trasversale, dedicato com'è a rafforzare le modalità di attuazione e rilanciare il partenariato globale per lo sviluppo sostenibile, al fine di favorire e sostenere la realizzazione di questi Obiettivi e traguardi.

[55] In tema v. L. Chiussi, *op. cit.*, p. 55, che critica la scelta di formulare espressamente come

La natura giuridica degli SDGs è dibattuta [56], ma un dato certo riguarda la circostanza che, affinché non abbiano un carattere meramente dichiarativo, occorre rafforzare i livelli di *accountability* [57] nei confronti dei soggetti internazionali cui si rivolgono, anche incentivandone l'attuazione a livello nazionale [58].

4. *Superare lo sviluppo sostenibile per un'efficace tutela dell'ambiente?*

L'analisi svolta mostra come nel corso dei decenni lo sviluppo sostenibile si sia affermato come elemento centrale del diritto internazionale dell'ambiente, ma si sia al contempo anche trasformato. Inizialmente la sostenibilità coniugava sviluppo economico e tutela ambientale, laddove a seconda degli interessi dei soggetti coinvolti l'accento era posto sul primo profilo, ovvero sul secondo [59], mentre con il passare del tempo è stata estesa a numerosi altri ambiti, tanto che già oltre un decennio addietro autorevole dottrina affermava che «il concetto di sostenibilità dello sviluppo è andato oltre gli aspetti originariamente legati alla gestione e protezione delle risorse naturali, per divenire un contenitore più ampio nel quale confluiscono i temi della salute, dell'educazione, della riduzione del debito, della diffusione e del trasferimento delle tecnologie, del commercio, della lotta alla fame e, ancora più in generale, della lotta alla povertà» [60].

La nozione di sviluppo sostenibile è quindi divenuta così generica che ad essa possono di fatto venire ricondotte varie tematiche, tra le quali la tutela dell'ambiente, alla quale però esso non è (più) esclusivamente ricollegabile. Il "successo" dello sviluppo sostenibile ha finito per fargli perdere la sua iniziale connotazione che, seppur di compromesso, aveva confini abbastanza delimitati [61]. Da elemento propulsore del diritto internazionale dell'ambiente, esso è

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diritto umano nell'Agenda 2030 solo l'accesso all'acqua, aggiungendo (a p. 58): «A human rights approach to SDGs would allow a mutual reinforcement of the implementation of the Agenda, on the one hand, and of the established human rights mechanism, on the other».

[56] In argomento v. M. Montini, *L'interazione tra gli SDGs*, cit., p. 4 ss., nonché l'ampia analisi di C. Tomuschat, *The 2030 Sustainable Development Goals. The Quest for a Perfect World Order*, in *International Community Law Review*, 2021, p. 507 ss.

[57] L. Chiussi, *op. cit.*, p. 59.

[58] E. Doussis, *Does International Environmental Law Matter in Sustainable Development?*, in *Yearbook of International Environmental Law*, 2017, p. 3 ss.

[59] Come affermato da F. Munari-L. Schiano di Pepe, *Tutela transnazionale dell'ambiente*, il Mulino, Bologna, 2012, p. 49, «la stessa formulazione del principio (sviluppo sostenibile) è tale da porre comunque l'accento sullo "sviluppo" rispetto alla "sostenibilità", e cioè alla tutela ambientale». In senso diverso v. R. Giuffrida, *op. cit.*, p. 1074 ss.

[60] S. Marchisio, *Le Convenzioni internazionali ambientali*, cit., p. 185.

[61] M. Montini-F. Volpe, *op. cit.*, p. 5, parlano di «evolutionary involution» dello sviluppo

divenuto un freno, trasformandosi in una formula utile in ogni circostanza e per ogni atteggiamento statale (oltre che a riempire innumerevoli documenti).

Un concetto forgiato agli inizi degli anni '70 come punto di equilibrio tra le contrapposte esigenze di gruppi di Stati aventi approcci assai diversi alla questione ambientale è andato progressivamente affermandosi, allargandosi, ma anche snaturandosi [62]. Il che, per le ragioni esposte, non è positivo per una efficace normativa internazionale a tutela dell'ambiente, che in esso non trova più, oggigiorno, uno stimolo verso un ulteriore rafforzamento [63].

La crisi del diritto internazionale dell'ambiente [64], infatti, è dovuta anche a un "abuso" dello sviluppo sostenibile, che è stato ampliato al punto da rendere meno significativo il pilastro ambientale [65]. Di conseguenza, al fine di rilanciarlo occorre sciogliere il nodo che frena la sostenibilità e riconoscere la prevalenza delle esigenze di tutela ambientale, presupposto indispensabile e con carattere di preminenza rispetto alle altre, in particolare a quelle di sviluppo [66]. Si tratta di un impegno che devono assumere i Paesi economicamente più avanzati, che la loro crescita l'hanno spesso ottenuta senza tener conto dell'impatto

sostenibile. V. anche K. Bosselmann, *The Principle of Sustainability: Transforming Law and Governance*, II ed., Routledge, London-New York, 2017.

[62] Per riprendere le efficaci parole di A. Fodella, *op. cit.*, p. 122, «a tale espansione potrebbe corrispondere una proporzionale "diluizione" del contenuto del principio, che diventerebbe sempre più ampio, vago e indeterminato, perdendo sempre maggior legittimità sul piano della valenza normativa, rendendo così sempre più difficile anche una sua realizzazione concreta». In senso critico, v. già S. Marchisio, *Il diritto internazionale ambientale*, cit., p. 203: «Il rischio concreto è che la questione ambientale internazionale si diluisca in un contesto più ampio ed omnicomprensivo, ostacolando di fatto l'attuazione degli obiettivi più specifici determinati dalla maggioranza degli strumenti internazionali relativi alla protezione dell'ambiente»; nonché M. Montini-F. Volpe, *op. cit.*, p. 19.

[63] Ancora più radicale è la critica di L. Kotzé, *A Global Environmental Constitution for the Anthropocene?*, in *Transnational Environmental Law*, 2019, p. 11 ss., al diritto internazionale dell'ambiente, ritenuto incapace di rispondere efficacemente alla crisi ambientale.

[64] In tema restano utili le riflessioni di F. Francioni, *Realism, Utopia and the Future of International Environmental Law*, in *EUI Working Papers*, Law 2012/11.

[65] V. il recente Commento generale n. 27 del Comitato sui diritti economici, sociali e culturali, «on economic, social and cultural rights and the environmental dimension of sustainable development», Doc. E/C.12/GC/27 del 6 novembre 2025.

[66] Come efficacemente osservato da M. Gervasi, *op. cit.*, p. 377, «under sustainable development, economic development qualifies as the driving force. Therefore protection of the environment cannot be pursued separately from development, whereas the opposite does not appear to be equally true»; ne consegue l'erosione del principio di prevenzione del danno ambientale e della tutela dell'ambiente, progressivamente sostituiti dal concetto di sviluppo sostenibile (p. 381 ss.). In senso diverso v. C.M. Díaz Barrado, *op. cit.*, p. 61: «Neither international protection of the environment nor sustainable development have become fundamental principles of international order».

sui loro territori e su quelli altrui, le cui risorse hanno utilizzato (per non dire saccheggiato) in passato e che attualmente, pur con modalità diverse, continuano a utilizzare intensamente. Gli Stati più sviluppati, nonché la stessa UE, dovrebbero scegliere, ambiziosamente, di preferire la tutela dell'ambiente all'(ulteriore) sviluppo [67]. È prevedibile che nel breve periodo questo porti a tensioni, a livello sia nazionale, sia internazionale [68], ma la situazione è giunta a un punto tale che non sembra ci siano altre opzioni percorribili [69]. La rapidità con cui sta avendo luogo il cambiamento climatico, i danni che esso sta producendo, richiedono risposte immediate, che stridono con i tempi lenti del diritto internazionale.

La sempre maggiore emersione di un diritto umano all'ambiente, favorita dalle risoluzioni approvate a larga maggioranza dal Consiglio dei diritti umani [70] e dall'Assemblea generale dell'ONU [71], nonché da quello che è noto

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[67] Per richiamare ancora M. Gervasi, *op. cit.*, p. 399: «The capacity of protection of the environment to impose limits on economic growth rests on its conception as an interest in and of itself, which may even prevail over conflicting economic interests». V. anche L. Kotzé, *op. cit.*, p. 11 ss., che propone un «global environmental constitutionalism paradigm» che si imponga sulla sovranità statale. Simile l'opinione di J. Juste Ruiz, *The Process towards a Global Pact for the Environment at the United Nations: From Legal Ambition to Political Dilution*, in *Review of European, Comparative and International Environmental Law*, 2020, p. 486.

[68] Secondo J. Juste Ruiz, *The Process towards*, cit., p. 489: «in contexts such as the one at hand, consensus may act as a *de facto* power of veto since it enables States with enough diplomatic strength to block any initiative that goes beyond the legal *status quo*».

[69] S. Cassotta, *The Development of Environmental Law within a Changing Environmental Governance Context: Towards a New Paradigm Shift in the Anthropocene Era*, in *Yearbook of International Environmental Law*, 2019, p. 54 ss., conclude la sua analisi con le seguenti considerazioni, ampiamente convincenti: «Instead of focusing on transforming environmental law, we should rather focus on the need to transform our actions. … The cusp of 'non-return' is a new concept that could be reflected in future environmental law as a successor of the concept of sustainable development and as motivation for our future actions». V. anche D. French-L. Kotzé, *'Towards a Global Pact for the Environment': International Environmental Law's Factual, Technical and (Unmentionable) Normative Gaps*, in *Review of European, Comparative and International Environmental Law*, 2019, p. 30: «The Anthropocene arguably demands a level of normative ambition, or a global environmental constitutional moment, similar to the one last seen with the creation of the United Nations in 1945 and the adoption of the Universal Declaration of Human Rights in 1948».

[70] L'8 ottobre 2021 il Consiglio dei diritti umani ha approvato la risoluzione 48/13 (UN Doc. A/HRC/RES/48/13), con 43 voti a favore e le astensioni di Cina, Giappone, India e Russia. In questa risoluzione il Consiglio ha riconosciuto il diritto a un ambiente pulito, sano e sostenibile come diritto umano «that is important for the enjoyment of human rights» e ha affermato che la promozione di tale diritto richiede «the full implementation of the multilateral environmental agreements under the principles of international environmental law».

[71] Con la risoluzione 76/300 del 28 luglio 2022 (UN Doc. A/RES/76/300), approvata con 161 voti a favore e le astensioni di Bielorussia, Cambogia, Cina, Etiopia, Iran, Kirghizistan, Russia

come il contenzioso climatico – che include sia la giurisprudenza nazionale, sia quella internazionale, da ultimo con il già richiamato parere della Corte internazionale di giustizia del 23 luglio 2025 (emanato su richiesta dalla stessa Assemblea generale) e con il Commento generale n. 27 del Comitato sui diritti economici, sociali e culturali [72] –, va nella direzione indicata ed è pienamente condivisibile [73].

5. *Conclusioni*

Un'ultima riflessione riguarda la società civile [74]. Per invertire il processo di progressivo inquinamento del pianeta non è sufficiente un cambio di rotta, immediato e radicale, dei governi di alcuni Stati, che auspicabilmente dovrebbe essere seguito da altri. Per ottenere risultati efficaci, infatti, non bastano soluzioni calate "dall'alto", in norme internazionali, europee o statali, ma occorre un deciso e convinto cambio di approccio e di mentalità "dal basso", che includa in primo luogo le imprese [75], ma coinvolga anche gli individui, attraverso scelte ambientalmente sostenibili nell'agire quotidiano.

Una delle caratteristiche principali del diritto internazionale dell'ambiente è il ruolo che in esso svolgono, accanto ai tradizionali soggetti che compongono la comunità internazionale – principalmente gli Stati e le organizzazioni intergovernative –, diversi altri attori, come le organizzazioni non governative e i popoli indigeni, che svolgono sia un ruolo di pungolo all'assunzione di impegni da parte degli Stati, sia di controllo all'effettivo adempimento di quegli impegni.

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e Siria, l'Assemblea generale ha ribadito quanto già affermato dal Consiglio dei diritti umani e ha altresì invitato «States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all». In tema v., *ex multis*, D. Pauciulo, *Il diritto umano ad un ambiente salubre nella risoluzione 76/300 dell'Assemblea generale delle Nazioni Unite*, in *Rivista di diritto internazionale*, 2022, p. 1124 ss.

[72] Commento generale n. 27, cit., par. 6: «The Committee recognizes that the right to a clean, healthy and sustainable environment is an autonomous human right, indispensable for the effective enjoyment of all rights enshrined in the Covenant».

[73] Già nel 2007 l'Institut de droit international approvò una risoluzione dedicata all'ambiente, in cui affermava, tra l'altro, che «[e]very human being has the right to live in a healthy environment» (art. 2) e che «[t]he effective realization of the right to live in a healthy environment should be integrated into the objectives of sustainable development» (art. 3).

[74] V. le considerazioni di C.R. Fernández Liesa, *op. cit.*, p. 73 ss., il quale sostiene altresì che «the institutional framework for the governance of sustainable development is not capable of meeting the challenge» (p. 84 s.).

[75] In tema v. S. Cassotta, *op. cit.*, p. 59 ss.

La tutela ambientale coinvolge quindi direttamente anche la società civile e richiede, oggi più che in passato, una assunzione di responsabilità a tutti i livelli. Occorre, in ultima analisi, rifuggire da un approccio di deresponsabilizzazione, che guarda agli Stati – alle loro autorità di governo – come gli unici che debbono farsi carico delle scelte, scomode, che è necessario compiere per ottenere un efficace cambio di rotta. Le autorità di governo sono, specie nei Paesi democratici, manifestazione della società civile e a essa sono chiamate a dare risposte. Il cambiamento, in definitiva, è anche prodotto da una maggiore consapevolezza degli individui, coniugata a una loro concreta azione, singolarmente e nei gruppi organizzati, al fine di modificare il loro agire quotidiano e spingere le rispettive autorità di governo a scelte ecologicamente orientate.

HUMAN RIGHTS: INTEGRAL COMPONENT OF INTERNATIONAL SUSTAINABLE DEVELOPMENT LAW AT A CROSSROADS

Karin Arts [*]

SUMMARY: 1. Introduction. – 2. Sustainable Development and Human Rights in International Law: The Evolution of a Normative Framework. – 3. Integrating Sustainable Development and Human Rights in International Law: Three International Practice Examples. – 4. Prospects for Deepening an Integral Notion of Sustainable Development and Human Rights in International Law: Final Remarks.

1. *Introduction*

Over the years, the concept and term 'sustainable development' have gradually been incorporated into many relevant international legal frameworks. This is helpful from the point of view of creating normative frameworks around the pursuit of sustainable development, clarifying rights and duties in this realm, and/or creating international consultation, monitoring or other procedural options. Partly as a result of these developments, at present, international law is increasingly mobilized to support the realization of sustainable development. This is evident, for instance, in the worldwide wave of climate change litigation cases, which often draw from international environmental, human rights, and sustainable development law. The International Court of Justice's Advisory Opinion on state obligations on climate change, delivered in July 2025, [1] is an interesting recent example. On that occasion, the Court found the "principle of

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[1] International Court of Justice (ICJ), Advisory Opinion on the 'Obligations of States in Respect of Climate Change', 23 July 2025, https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf. This Opinion will be briefly discussed further in section 3 of this chapter.

sustainable development" applicable as a guiding principle "for the interpretation and application of the most directly relevant legal rules". [2]

The notion of sustainable development has made key contributions to public international law, especially by emphasizing the importance of integrating the economic, social and environmental dimensions of development processes, including human rights-based and participatory approaches. [3] However, for a long time, the environmental and to a lesser extent the economic aspects of sustainable development tended to receive more attention than the social aspects, including human rights. The adoption of the '2030 Agenda for Sustainable Development' [4] in 2015 presented a watershed in this regard, at least on paper, as this universally applicable and widely embraced United Nations vision on sustainable development contains various firm references to human rights, [5] women's and children's rights and the right to development included. Agenda 2030 is also "grounded" in the Universal Declaration of Human Rights and international human rights treaties, and "informed by other instruments such as the Declaration on the Right to Development". [6]

In this chapter I explore some aspects of the current state of play concerning human rights goals and perspectives in international law relevant to sustainable development and vice versa. This will be done first by a brief review of normative developments over the years, with emphasis on defining sustainable development and its implications under international law. In the process, I will highlight relevant manifestations of the term sustainable development in selected soft and hard international legal instruments.

Thereafter, I review three recent international practice examples relating to sustainable development and human rights: the previously mentioned ICJ Advisory Opinion on climate change; relevant developments in the work of the UN Committee on the Rights of the Child; and the KidsRights Index. The latter is a civil society effort to monitor and assess state performance on children's rights and climate change, respectively. The Index is a tool to measure and rank that performance, and to communicate information about that performance to relevant professional and other audiences. It has been available since 2013 and was updated annually since, in terms of scores and rankings, countries covered,

[2] *Idem*, para. 161, see also para. 147.

[3] For an elaborate substantiation of this position, see K. Arts, *Inclusive Sustainable Development: A Human Rights Perspective*, in *Current Opinion in Environmental Sustainability*, vol. 24, 2017, pp. 58-62.

[4] Hereafter referred to as Agenda 2030.

[5] United Nations General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, UN doc. A/RES/70/1, 21 October 2015, paras. 7, 10, 29 and 35.

[6] *Idem*, para. 10.

and various methodological aspects. Currently, the Index is in the process of being expanded with a (yet experimental) domain on climate change, based on the perspective that climate change is an ultimate challenge to the realization of children's rights. The Index thus seeks to do justice to all three dimensions of sustainable development and contributes to evidence-based monitoring of state performance on (a universal standard of) children's rights.

In the concluding section of this chapter, I reflect on the prospects for a further evolution of international law relevant to sustainable development and human rights. Past normative developments aside, currently many challenges surround state action to sophisticate further and implement the internationally agreed normative frameworks. These challenges hamper progress in coming to a (yet more) meaningful integration of human rights concerns in international law relevant to sustainable development, on paper and in practice. They create a crossroads and a situation where a further integration of human rights in international sustainable development law, and perhaps that law at large, is not a given, might stagnate or even regress. These challenges include most notably the current geopolitical circumstances that decrease space for effective multilateralism, including the setting and implementation of global standards on accountability and burden-sharing in the realm of sustainable development.

All of this serves the purpose of substantiating that the concept of sustainable development needs further development in international law. [7] This includes clarifying the interrelationship between human rights and sustainable development and finding ways to entice more states at least to act upon the existing normative framework. After all, development encompasses human rights and itself is a human right. And, according to international law, the realization of the right to development requires economic, environmental, and social (including human rights) action. [8] That is exactly what a deeper integration of sustainable development in international law could help bring about.

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[7] For a nuanced other perspective in light of recent developments, see the chapter written by I. Ingravallo, *L'insostenibilità Dello Sviluppo Sostenibile Ai Fini Di Un'efficace Tutela Dell'ambiente*, in this book.

[8] K. Arts, *Inclusive Sustainable Development: A Human Rights Perspective*, in *Current Opinion in Environmental Sustainability*, vol. 24, 2017, pp. 58-62 and K. Arts-A. Tamo, *The Right to Development in International Law: New Momentum Thirty Years Down the Line?*, in *Netherlands International Law Review*, vol. 63, No. 3, 2016, pp. 221-249.

2. *Sustainable Development and Human Rights in International Law: The Evolution of a Normative Framework*

Over the years, many definitions of 'development' have been circulating at local, national and international levels. The persistent development deficits all over the world and the lack of blueprints for overcoming these deficits have clarified that 'development' is a highly contextual notion and thus means and implies different things in different places and for different people. This is the case in terms of content, needs and aspirations, and appropriate interventions. In addition, most understandings of the notion of 'development' nowadays highlight it being a − possibly long, complex and arduous − process rather than a single goal. Aspects of long-term, structural, economic, social, political, and environmental and ecological transformation and justice are emphasized as well. [9]

A well-known early definition of 'sustainable development' was provided by the World Commission on Environment and Development, often referred to as the Brundlandt Commission, as far back as 1987: "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". [10] The Commission's work helped to pave the way for the United Nations World Conference on Environment and Development, meeting in Rio de Janeiro in Brazil in June 1992, to further elaborate the meaning and implications of sustainable development in international relations. The Conference resulted in the Rio Declaration on Environment and Development which made explicit that sustainable development requires, among other things, environmental protection, the eradication of poverty, pursuing a higher quality of life, and the participation of women and indigenous peoples. [11] Interestingly,

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[9] For thorough analyses of the gradual integration of sustainable development in international law, see e.g. D. French, *International Law and Policy of Sustainable Development*, Juris Publishing, Manchester, 2005; N. Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*, in *Recueil des Cours 329 (2007)*, Hage Academy of International Law, Martinus Nijhoff Publishers, Leiden-Boston, 2008, pp. 217-412; S. Khair-S. Alam-M.E. Haque (eds), *Implementation of Sustainable Development in the Global South: Strategies, Innovations, and Challenges*, Hart Publishing, Oxford, 2024; M.-C. Cordonier Segger-D. Olawuyi, *Sustainable Development Law: Principles, Practices, and Prospects*, (2nd ed) Oxford University Press, Oxford, 2025; or E. Techera, *The Sustainable Development Goals in International Law and Policy*, Routledge, London-New York, 2025.

[10] World Commission on Environment and Development, *Our Common Future*, Oxford University Press, Oxford, 1987, p. 8.

[11] United Nations General Assembly, *Report of the United Nations Conference on Environment and Development*, UN doc. A/CONF.151/26 (Vol. I), 12 August 1992, Annex I: Rio Declaration on Environment and Development, Principles, 4, 5, 8, 20 and 22, respectively.

long before youth would claim such an articulate role, nationally and internationally, in demanding attention for climate change and action to curb this phenomenon, [12] the Rio Declaration already articulated that the "creativity, ideals and courage of the youth of the world should be mobilized". [13] Thus, the underlying understanding firmly was that sustainable development has environmental, economic, and social dimensions and thus requires action in all those domains.

While the inter-generational aspect of the Brundtland Commission's definition of sustainable development was not included as such in the Rio Declaration, the latter did achieve another important breakthrough by embracing the notion of "common but differentiated responsibilities". This established firmly that developed and developing states have different positions and responsibilities in relation to realizing sustainable development globally, in the following terms:

> In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command. [14]

In 2015, the 2030 Agenda for Sustainable Development laid down the global consensus at the time on a large array of aspects of sustainable development. While Agenda 2030 does not provide a general comprehensive definition of the term either, it plainly emphasizes that sustainable development extends to larger freedom, human rights, gender equality and the empowerment of all women and girls. [15] The Sustainable Development Goals (SDGs) and their connected targets are "integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental". [16] According to Agenda

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[12] See e.g. K. Dozsa, *Children as Climate Citizens: A Sociolegal Approach to Public Participation*, Routledge, London-New York, 2024; A. Daly, *Climate Competence: Youth Climate Activism and Its Impact on International Human Rights Law*, in *Human Rights Law Review*, vol. 22, No. 2, 2022, pp. 1-24; K. Zhanda-M.A. Dzvimbo-L. Chitongo, *Children Climate Change Activism and Protests in Africa: Reflections and Lessons From Greta Thunberg*, in *Bulletin of Science, Technology & Society*, vol. 41, No. 4, 2021, pp. 87-98; L. Rodrigues Gonçales, *Youth Protagonism in Latin American Climate Litigation*, in *The International Journal of Children's Rights*, vol. 33, No. 3, 2025, pp. 646-674.

[13] Rio Declaration, Principle 22.

[14] *Idem*, Principle 7.

[15] United Nations General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, UN doc. A/RES/70/1, 21 October 2015, Preamble, p. 1.

[16] *Idem*, p. 1.

2030, pursuing sustainable development extends to: eradicating poverty and hunger; healing and securing the planet and the environment; realizing human rights and gender equality; and achieving "peaceful, just and inclusive societies which are free from fear and violence". [17]

Somewhat disappointingly for some proponents of human rights, [18] the more specific Sustainable Development Goals and their related targets are hardly expressed in explicit human rights terms. However, various others have pointed out that, despite the absence of explicit human rights language, the substantive overlap between the SDGs and human rights makes "two sides of the same coin: [p]rogress towards one will unequivocally yield progress towards the other". [19] In an earlier publication I have pointed out that the ample references to children and youth in Agenda 2030 and the SDGs make a welcome difference with earlier generic sustainable development documents of this nature and, at least in theory, provide starting points for putting into effect child rights-based approaches to sustainable development. [20]

A prominent more recent example of a soft law regulatory effort to integrate human rights into international sustainable development law is the "Pact for the Future, Global Digital Compact, and Declaration on Future Generations". This document contains the latest comprehensive vision on sustainable development as adopted by the member states of the United Nations in September 2024. [21]

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[17] *Idem*, pp. 1-2.

[18] See e.g. N. Hicks, *The SDGs' Missed Opportunity on Human Rights*, in *Huffpost*, 23 September 2015, https://www.huffpost.com/entry/the-sdgs-missed-opportunity-on-human-rights_b_8164384; C. Williams-A. Blaiklock, *With SDGs Now Adopted, Human Rights Must Inform Implementation and Accountability*, in *Health and Human Rights*, SDG Series, 29 September 2015, https://www.hhrjournal.org/2015/09/29/sdg-series-with-sdgs-now-adopted-human-rights-must-inform-implementation-and-accountability/; I.T. Winkler-C. Williams, *The Sustainable Development Goals and Human Rights: A Critical Early Review*, in *The International Journal of Human Rights*, vol. 21, No. 8, 2017, pp. 1023-1028.

[19] B. Migowe-C. Shelton-S. Rattray, *Human Rights and SDG Systems Integration: Beyond Linkages, Data and Efficiency to Leave No One Behind*, in *Global Policy Network Brief*, United Nations Development Programme, January 2024, p. 1. See also M. Wernham, *Mapping the Global Goals for Sustainable Development and the Convention on the Rights of the Child*, UNICEF, New York, 2016; N. Filskov-B. Feiring-E. Grambye, *Human Rights and the 2030 Agenda for Sustainable Development: Lessons Learned and Next Steps*, The Danish Institute for Human Rights, Copenhagen, 2018; M. Bexell-T. Hickmann-A. Schapper, *Strengthening the Sustainable Development Goals through Integration with Human Rights*, in *International Environmental Agreements: Politics, Law and Economics*, vol. 23, No. 2, 2023, pp. 133-139.

[20] K. Arts, *Children's Rights and the Sustainable Development Goals*, in U. Kilkelly-T. Liefaard (eds), *International Human Rights of Children*, Springer Nature, Singapore, 2019, pp. 537-561 at 545 and 550.

[21] United Nations General Assembly, UN doc. A/RES/79/1, 22 September 2024.

According to the designated UN webpage, the Pact is "the most wide-ranging international agreement in decades, designed to make the international system more inclusive, effective and fit for 21st-century challenges". [22] The UN member states pledged in the Pact "a new beginning in multilateralism" for which "sustainable development in all its three dimensions is a central goal in itself and that its achievement, leaving no one behind, is and will be a central objective (…)". [23] In their view, the realization of Agenda 2030 and the SDGs remains imperative for achieving this and has their full commitment. [24] The UN member states reaffirmed:

> that the three pillars of the United Nations – sustainable development, peace and security, and human rights – are equally important, interlinked and mutually reinforcing. We cannot have one without the others. [25]

The importance of the rule of international law was explicitly recognized in the statement that: "Every commitment in this Pact is fully consistent and aligned with international law, including human rights law. We affirm the Universal Declaration of Human Rights" and "will respect, protect, promote and fulfill all human rights, recognizing their universality, indivisibility, interdependence and interrelatedness …". [26] The Pact for the Future is a document of 61 pages and contains no less than 96 meaningful references to human rights, including many in the concrete Actions presented. [27] At least on paper, this is a strong example of the integration of human rights into (soft) sustainable development law.

The above evolution in soft international law instruments, or documents of a recommendatory character, represents major steps forward in integrating sustainable development and human rights concerns in international policy and law. From the perspective of international law, it obviously also is important to consider developments in hard, in the sense of fully legally binding, international legal instruments. Along the way, sustainable development and human rights as a component thereof also found their place in various treaties as the following selected examples reveal. In the realm of environmental protection, the Desertification Convention (adopted in 1994 and having 197 states

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[22] United Nations, *Pact for the Future: A Once-in-a-Generation Opportunity to Shape our Common Future*, no date, https://www.un.org/pact-for-the-future/en.

[23] *Idem*, paras. 7 and 10.

[24] See e.g. *idem*, para. 19 and 20.

[25] *Idem*, para. 9.

[26] *Idem*, para. 13. See also para. 12.

[27] This is the number of substantive references only, e.g. instances in the table of contents have not been counted.

parties)[28] refers ten times to sustainable development, and its Annexes do so eleven times. The Preamble notes that desertification has a negative effect on sustainable development.[29] In addition, various articles refer to sustainable development as a framework for addressing desertification and drought.[30] Human rights are not mentioned. The Paris Agreement (adopted in 2015 and having 195 states parties)[31] complementing the UN Framework Convention on Climate Change refers twelve times to sustainable development. The Preamble emphasizes "the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty".[32] Substantive articles position sustainable development as the context for responses to climate change[33] and as national and international policy goals.[34] Human rights are addressed in a preambular paragraph, as follows:

> Acknowledging that climate change is a common concern of humankind,
> Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity (…).[35]

In the realm of human rights, the Preamble to the Convention on the Rights of Persons with Disabilities (2006), a treaty with 193 states parties,[36] emphasizes "the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development".[37] At the regional level, the Maputo

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[28] As on 1 November 2025, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-10&chapter=27&clang=_en.

[29] United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification Particularly in Africa, adopted 14 October 1994, *United Nations Treaty Series*, vol. 1954, p. 3 ff.

[30] *Idem*, Preamble and articles 1(b), 2, 4(b), 5(b), 9(1), 10(2a), 17(f), and 18(1).

[31] As on 1 November 2025, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en.

[32] Paris Agreement, adopted 2 December 2015, *United Nations Treaty Series*, vol. 3156, p. 79 ff., Preamble. See also articles 6(1, 2, 4, 8 and 9), 7(1), 8 and 10(5).

[33] *Idem*, See e.g. articles 2(1), 4(1), and 6(8).

[34] *Idem*, See e.g. articles 6(1, 2, 4, 4a), 7(1) and 10(5).

[35] *Idem*, Preamble.

[36] As on 1 November 2025, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en.

[37] Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, *United Nations Treaty Series*, vol. 2515, p. 3 ff.

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, [38] ratified by 44 African states, [39] even formulates a right to sustainable development. According to Article XIX: "Women shall have the right to fully enjoy their right to sustainable development". Accordingly, states parties must do no less than the following:

> take all appropriate measures to: a) Introduce the gender perspective in the national development planning procedures; b) Ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes; c) Promote women's access to and control over productive resources such as land and guarantee their right to property; d) Promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women; e) Take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and f) Ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women. [40]

In the domain of international economic relations, the following two treaties provide interesting examples of how sustainable development has been incorporated in binding international legal instruments. Firstly, there is the Marrakesh Agreement by which the World Trade Organization was established in 1994. [41] This treaty has 166 states parties and is a core legal foundation for international trade relations. [42] In the opening paragraph of the Preamble, the states parties present the objectives of their trade relations, including: "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services". [43] However, these should be pursued "while

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[38] Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, adopted 11 July 2003, https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf.

[39] Status according to African Union, 6 November 2025. For updates see: https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLES_RIGHTS_ON_THE_RIGHTS_OF_WOMEN_IN_AFRICA.pdf.

[40] Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, adopted 11 July 2003, *idem*.

[41] Marrakesh Agreement Establishing the World Trade Organization, adopted 15 April 1994, https://www.wto.org/english/docs_e/legal_e/marag_e.htm.

[42] Status on 7 November 2025, as per https://www.wto.org/english/res_e/publications_e/wto_legal_instruments_e.htm.

[43] *Idem*, Preamble.

allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so …". [44] Human rights do not appear in the Marrakesh Agreement. Secondly, sustainable development has also been a long-standing objective of the treaties underpinning the relations between the member states of the European Union and the Organisation of African, Caribbean and Pacific States. The Cotonou Partnership Agreement (2000) emphasized this unequivocally in its Preamble and Article 1. Article 9 connected sustainable development and human rights and specified that EU-ACP cooperation:

> shall be directed towards sustainable development centred on the human person, who is the main protagonist and beneficiary of development; this entails respect for and promotion of all human rights. Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development. [45]

Overall, the Cotonou Agreement contained eight references to sustainable development and twenty references to human rights. Like its predecessor, the currently applicable Samoa Partnership Agreement (2023) brings together more than a hundred states in Europe, Africa, the Caribbean and the Pacific. It contains about ten times as many substantive references to sustainable development as the Cotonou Agreement did, that is about eighty. [46] The notion is used for example in provisions relating to the objectives of the Partnership; human rights, democracy and governance; peace and security; and trade. [47] But, like before, its scope also extends to many, widely diverging other aspects such as statistics, culture and development, or migration. [48] The Samoa Partnership Agreement also refers amply to human rights, both in the generally applicable part of the text and in the three regional protocols.

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[44] *Idem*.

[45] Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, *Official Journal of the European Communities*, vol. 43 L317, 15 December 2000, p. 8.

[46] Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of African, Caribbean and Pacific States, of the other part, signed in Samoa on 15 November 2023, *Official Journal of the European Union*, L Series 2023/2862, 28 December 2023.

[47] *Idem*, articles 1(2); 8; 16; and 49.

[48] *Idem*, articles 14, 37, and 62.

Thus, international treaties amply refer to sustainable development and, to a lesser extent, to human rights as a component thereof. This goes much beyond the above, limited set of selected examples. [49] The widespread referencing of the term sustainable development, as a goal, context or otherwise, makes it even more striking that explicit definitions of the term are so scarce. None of the selected treaties presented above include such a definition. This could possibly be explained by the common understanding of sustainable development as highly contextual and a process rather than a single goal, referred to at the start of this section already. However, the absence of a definition does not weaken one of the key innovations and functions the concept of sustainable development has introduced in international law and that is omnipresent across many soft and hard international legal instruments: that of connecting the economic, social and environmental dimensions of development processes.

After this sketch of the evolution of normative frameworks, in the next section, I review three recent international legal practice examples to gain insight into whether the normative developments involved have brought about changes at the level of application, or even implementation, of integrated notions of sustainable development and human rights.

3. *Integrating Sustainable Development and Human Rights in International Law: Three International Practice Examples*

There are various encouraging international practice examples focusing on integrating sustainable development, environment and human rights. In this section I briefly present three of them: an Advisory Opinion adopted by the International Court of Justice, the environmental practice of the UN Committee on the Rights of the Child, and the KidsRights Index. All three relate to climate change, (one of) the greatest sustainable development problem(s) of our times.

The ICJ Advisory Opinion on Climate Change (2025)

The first international practice example consists of a judicial intervention. As mentioned in the introduction to this chapter, in July 2025 the International

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[49] For examples see e.g. M. Chi, *Sustainable Development Provisions in Investment Treaties: An Empirical Exploration of the Sustainable Development Provisions in BITs of Asia-Pacific LDCs and LLDCs*, Economic and Social Commission for Asia and the Pacific (ESCAP), United Nations, Bangkok, 2018; T.F. Khumalo, *Sustainable Development and International Economic Law in Africa*, in *Journal of Law Democracy and Development*, vol. 24, 2020, pp. 133-157; X.F. Pons, *Sustainable Development and Trade Treaties*, in *Review of International and European Economic Law*, vol. 1, No. 1, 2022, pp. 68-83.

Court of Justice delivered an Advisory Opinion on the obligations of states in respect of climate change. It did so at the request of the General Assembly of the United Nations, submitted in April 2023. The pressing nature of the topic of climate change and the felt need to clarify the duties of states in this regard was underlined by the impressive level of participation in the case. By spring 2024, no less than 83 states and 13 international organizations submitted written statements.[50] In total 96 states and 11 international organizations delivered oral statements. After the hearings, 67 replies[51] were still received to the questions posed by four of the judges at the end of the oral proceedings.[52]

This Advisory Opinion provided a golden opportunity for the International Court of Justice to fill the above-sketched lack of a comprehensive definition of sustainable development, in line with the progressive development of international law in this field. On the one hand, the ICJ has been very clear about the multifaceted nature of sustainable development issues, such as (in this Advisory Opinion) climate change and the requirement to review all potentially relevant international law in order to determine the international legal obligations of states. According to the ICJ, the relevant law certainly includes international human rights law. This is in line with the UN General Assembly's request for the Advisory Opinion, which referred to the importance of the UN Charter, the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the two Human Rights Covenants), the Convention on the Rights of the Child and, among other sources of public international law, various global international treaties on climate, the environment and the law of the sea.[53] On the other hand, this has not led the Court to review its own earlier attempt, in 1997, to define the nature and/or content of sustainable development.

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[50] International Court of Justice, Advisory Opinion on the 'Obligations of States in Respect of Climate Change', 23 July 2025, https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf, paras. 17 and 19.

[51] *Idem*, para. 35 and 36.

[52] These raised: the specific obligations under international law of States within whose jurisdiction fossil fuels are produced; the interpretation of Art. 4 of the Paris Agreement; the right to a clean, healthy and sustainable environment; and the significance of state declarations made upon ratification of the UN Framework Convention on Climate Change and the Paris Agreement stating that "no provision in these agreements may be interpreted as derogating from principles of general international law or any claims or rights concerning compensation or liability due to the adverse effects of climate change". See International Court of Justice, Verbatim Record Public Sitting held on Friday 13 December 2024, CR 2024/54, pp. 39-40.

[53] International Court of Justice, Advisory Opinion on the 'Obligations of States in Respect of Climate Change', 23 July 2025, https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf, pp. 7 and 8, and para. 172. More specifically on international human rights law, see paras. 369-404.

Simply repeating the wording used in the Gabčikovo-Nagymaros Project Judgement of 1997, the Court still sees sustainable development as a principle concerning the "need to reconcile economic development with protection of the environment". [54] Accordingly, the social/human rights dimensions of sustainable development are neglected.

In my view, this is a missed opportunity to reflect the progressive development of international sustainable development law over the years. This is especially surprising in light of the law deemed applicable by the Court, as stated above. In my understanding, this omission is also disappointing from the point of view of the significant function that the ICJ attributes to "the principle of sustainable development" which "does not in itself create specific rights and obligations for States, but informs the interpretation of the obligations under the climate change treaties". Given the importance the Court attaches to the human rights dimensions of climate change, it would have been logical to extend the scope of the principle of sustainable development to reconciling economic development, environment and human rights. [55] Nevertheless, the Advisory Opinion on climate change makes significant contributions to greater legal clarity concerning the content and implications of international law relevant to climate change and as such is an important step ahead.

The Environmental Work of the UN Committee on the Rights of the Child

A second striking international practice example is one of feeding environmental concerns into human rights law and United Nations treaty body procedures. While the core UN human rights treaties only scarcely contain explicit references to environmental matters, the UN human rights treaty bodies are increasingly active in this realm. The UN Committee on the Rights of the Child is an enlightening example. Gradually the Committee recognized that environmental issues, and especially climate change, disproportionally affect children and their rights, [56] and thus require attention and action, even though climate change as such is not even mentioned in the CRC. The Committee elaborated this position and its implications in its General Comment number 26 on "child rights and the environment, with special emphasis on climate change" adopted

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[54] International Court of Justice, Judgement in the 'Gabčikovo-Nagymaros Project' case (Hungary/Slovakia), *I.C.J. Reports 1997*, p. 78, para. 140 as referred to in idem, para. 147.

[55] None of the Opinions and Declarations accompanying the Advisory Opinion pay attention to this aspect either.

[56] For substantiation of the disproportional effects on children, see e.g. K. Arts, *Children's Rights and Climate Change*, in C. Fenton-Glynn (ed.), *Children's Rights and Sustainable Development: Interpreting the UNCRC for Future Generations*, Cambridge University Press, Cambridge, 2019, pp. 216-235.

in 2023.[57] While climate change has been the direct reason for this General Comment, according to the Committee on the Rights of the Child:

> its application should not be limited to any particular environmental issue. New environmental challenges may arise in the future, for example, those linked to technological and economic development and social change.[58]

After an elaborate presentation of the main children's rights potentially jeopardized by environmental harm, the Committee shared its take on the state obligations in this realm, in the following comprehensive, and far-reaching, formulation:

> States must ensure a clean, healthy and sustainable environment in order to respect, protect and fulfil children's rights. The obligation to respect children's rights requires States to refrain from violating them by causing environmental harm. They shall protect children against environmental damage from other sources and third parties, including by regulating business enterprises. States parties are also under the obligation to prevent and remediate the impacts of environmental hazards on children's rights, even where such threats are beyond human control, for example, by establishing inclusive early warning systems.[59]

The Committee also clarified that this entails taking both mitigation and adaptation measures in response to climate change.[60]

Under articles 44 and 45 of the Convention on the Rights of the Child, the child rights performance of all states parties is reviewed periodically, ideally every five years but in practice in most cases at longer intervals. As Table 1 (below) shows, in the state reporting procedure under the Convention on the Rights of the Child too, climate change gradually became a standard subject. Whereas in 2015 only 17% of the Concluding Observations adopted by the UN Committee on the Rights of the Child explicitly raised climate change, in 2024 this had risen to 100%.

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[57] United Nations Committee on the Rights of the Child, UN doc. CRC/C/GC/26, 22 August 2023.

[58] *Idem*, para. 5.

[59] *Idem*, para. 68.

[60] *Idem*, para. 95-103.

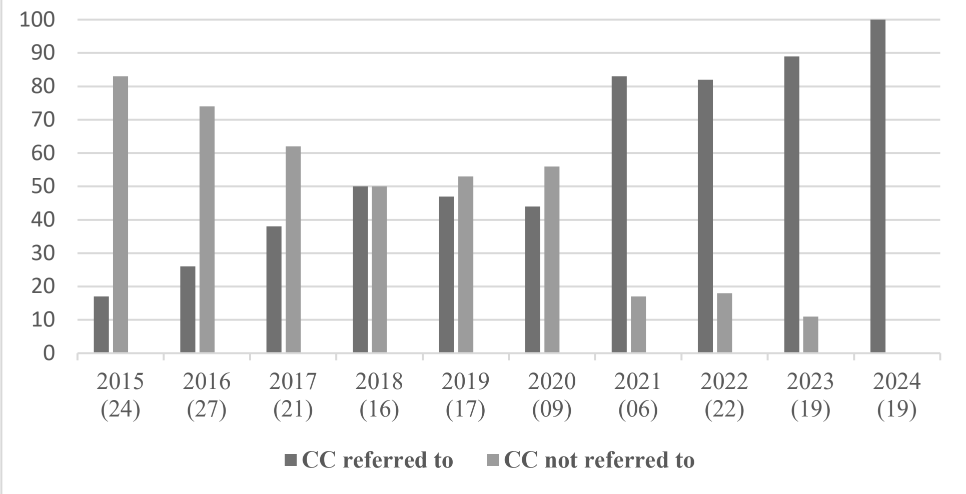

Table 1
Concluding Observations CRC Committee Referring to Climate Change
(in % of total addopted, 2015-2024)

Source Table 1: compiled by author

And finally, under the Optional Protocol on a Communications Procedure, the Committee on the Rights of the Child entertained a highly publicized complaint [61] filed by children against Argentina, Brazil, France, Germany and Turkey. While the Committee in the end rejected the complaint for technical procedural reasons (the requirement to exhaust domestic remedies first), its decision [62] and the explanatory letter sent to the complainants [63] still are important (quasi-

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[61] Chiara Sacchi (Argentina) et al. v. Argentina, Brazil, France, Germany and Turkey, *Communication to the Committee on the Rights of the Child Submitted under Article 5 of the Third Optional Protocol to the United Nations Convention on the Rights of the Child*, 23 September 2019, e.g. available at the website of the legal representatives of the complainants https://earthjustice.org/wp-content/uploads/2019.09.23-crccommunication-sacchi-et-al-v.-argentina-et-al-redacted.pdf.

[62] UN Committee on the Rights of the Child, *Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 104/2019*, UN Doc. CRC/C/88/D/104/2019, 11 November 2021. This document contains the decision on the complaint against Argentina. Four other, largely similar decisions were published for the other four states against which the complaint was filed.

[63] UN Committee on the Rights of the Child, *Open Letter on Climate Change*, https://www.ohchr.org/sites/default/files/2021-12/Open_letter_on_climate_change.pdf, Geneva, no date.

legal) precedents. While in a technical legal sense the work of UN treaty bodies is 'only' recommendatory, in practice their General Comments, Concluding Observations, Decisions and other authoritative expressions can have considerable influence and provide guidance to the judiciary, state authorities and others on how to interpret a particular UN human rights treaty. A recent instance of this is found in the Advisory Opinion on climate change in which the International Court of Justice draws from a Decision and a General Comment adopted by the UN Human Rights Committee, a General Comment of the UN Committee on Economic, Social and Cultural Rights, a joint statement by five UN treaty bodies, and a General Recommendation of the Committee on the Elimination of Discrimination against Women. [64] The recent work of the UN Committee on the Rights of the Child on environment, climate change and children's rights is likely to fulfil a similar role in various other fora in the near and longer future.

The KidsRights Index

The third practice example is that of the KidsRights Index. This Index was developed in a project for which I am co-responsible that has been jointly conceived and executed by the Dutch NGO KidsRights [65] and two faculties of Erasmus University Rotterdam: the International Institute of Social Studies and Erasmus School of Economics. The Index was inspired by a wish to contribute to efforts to hold governments to account for their record in realizing children's rights as per the United Nations Convention on the Rights of the Child (CRC). This resulted in the annual publication of the Index since 2013, compiled on the basis of a thorough, child rights-based methodology. [66] Through the years, the KidsRights Index has received enormous media attention and has become a respected tool for measuring children's rights among national and international policy-makers, child rights practitioners and other relevant professionals, politicians, academics, and the media. Besides triggering general media coverage

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[64] International Court of Justice, Advisory Opinion on the 'Obligations of States in Respect of Climate Change', 23 July 2025, https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf, paras. 377-378 and 397, 379, 382, and 383.

[65] KidsRights is based in Amsterdam. As explained in https://www.kidsrights.org/about-kidsrights/organization/, KidsRights was founded in 2003 to "work with children to create a world in which their rights are guaranteed and they are enabled to realize their great potential. Since then, KidsRights provides grass root support to vulnerable children and gives them a voice". A major tool used to achieve the latter is the annually awarded Children's Peace Prize. See https://www.kidsrights.org/advocacy/ for further details.

[66] For a brief sketch of the first decade of work on the KidsRights Index, see K. Arts, *A Decade of Monitoring Children's Rights: The KidsRights Index at 10*, in *DevISSues*, vol. 24 No. 2, 2022, pp. 17-19, https://www.devissues.nl/decade-monitoring-childrens-rights-kidsrights-index-10.

in an ever-larger number of countries all over the world (55 in 2025), the Index has given rise to various parliamentary debates on the state of children's rights and to exchanges with government officials, NGOs, educators, international organizations and others.

The Index measures child rights aspects for which quality and comparative data are available for as many state parties to the CRC as possible. The information used comprises quantitative data by UNICEF, education data from UNDP's human development work, and qualitative data drawn from the Concluding Observations by the UN Committee on the Rights of the Child. [67] In 2025, in total 13 quantitative and 7 qualitative indicators charted state performance on children's rights in six domains: life, health, education, protection, and the enabling environment for children's rights. The latter refers to the general conditions that a state must have in place to live up to the requirements of the CRC. These consist of three general principles of the Convention (non-discrimination, the best interests of the child, and child participation) and four concrete facilitators of respect for children's rights in practice (legislation, budget, disaggregated data, and state-civil society cooperation).

Only states that have ratified the CRC and for which sufficient data are available can be covered. While in 2013 this was the case for 168 countries, in 2025 this number had risen to 194. In recent years, data availability for Andorra, the Cook Islands, Dominica, Liechtenstein, the Marshall Islands, Monaco, Somalia, South Sudan, and Tuvalu improved such that these countries could be incorporated. Therefore, at present merely two states parties to the CRC are still not included in the KidsRights Index because of insufficient data. These are the Holy Sea and the small island state Niue. Two states that have not yet ratified the CRC cannot be included in the Index either, among other reasons because their non-ratification entails that they do not report to the CRC Committee and thus lack all data for Domain 5 of the Index. This is the case for the United States of America (USA) and Taiwan. [68]

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[67] These data are derived from, https://data.unicef.org/, http://www.hdr.undp.org/data and https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx?Lang=en, respectively. For more details on methodology, see the KidsRights Index methodology note available at https://www.kidsrights.org/kidsrights-index/methodology/.

[68] While the USA could ratify the CRC but for substantive reasons deliberately decided not to, Taiwan is unable to do so because of the controversy over its international status including membership of the UN. Nevertheless, Taiwan passed an "Implementation Act of the Convention on the Rights of the Child" in June 2014, which entered into force in November 2014. In 2016 it prepared a first state report on the CRC which was reviewed by an international panel of renowned child rights experts in 2017. See National Human Rights Commission Taiwan, *Convention on the Rights of the Child*, https://nhrc.cy.gov.tw/en-US/cp.aspx?n=8696 and A. Huey-Ling Shee, *Local Images of Global Child Rights: CRC in Taiwan*, in J.A. Cohen et al. (eds), *Taiwan*

The KidsRights Index team gradually gained progressive insights into the relevance of considering climate change action when assessing the child rights performance of states. This stems from the understanding that climate change is widely seen as an ultimate challenge to the realization of children's rights, for instance because children are disproportionally affected by climate change. [69] If this phenomenon will not be not curbed adequately, minimally adaptation efforts will require an enormous lot of effort and resources [70] at the cost of other policy priorities such as children's rights. In the darkest of scenarios, climate change could even result in an uninhabitable world. Clearly, climate change directly jeopardizes the prospects for realizing the child right to survival and development [71] and many other concrete rights elaborated in the Convention on the Rights of the Child (such as the rights to health, education, or an adequate standard of living), [72] at present already and even more so in the future. Combined with the fact that article 4 of the CRC requires states parties to the CRC to "undertake *all appropriate* legislative, administrative, and *other measures* for the implementation of the rights recognized in the present Convention" (emphasis added), this implies that states parties to the CRC are obliged to take measures against climate change.

In recognition of this position, the KidsRights Index team has started to explore how a solid, legally correct, and fair Domain 6 on climate change measures could be developed and integrated into the Index. Progress has been reported in the annual KidsRights Index Reports since 2022. Developing a Domain 6 on climate change is especially complex given, for example, the enormous difficulties in assigning and measuring concrete state responsibility for a

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and International Human Rights: A Story of Transformation, Springer Nature, Singapore, 2019, pp. 625-641. This exercise was repeated in 2022, based on the second self-initiated state report by Taiwan. See https://www.mohw.gov.tw/cp-115-72399-2.html.

[69] For a substantiation of the disproportional effects on children, see e.g. K. Arts, *Children's Rights and Climate Change*, in C. Fenton-Glynn (ed.), *Children's Rights and Sustainable Development: Interpreting the UNCRC for Future Generations*, Cambridge University Press, Cambridge, 2019, pp. 216-235; UNICEF, *The Climate Crisis is a Child Rights Crisis: Introducing the Children's Climate Risk Index*, New York, August 2021; or C. Colon-M. Nanavati, *Why is Climate Security Important for Children?*, UNICEF Innocenti, Florence, July 2025.

[70] See e.g. H. Neufeldt et al., *Running on Empty: The World is Gearing Up for Climate Resilience — Without the Money to Get There*, Adaptation Gap Report 2025, UNEP, Nairobi, 2025. This report (see pp. xiii-xv and 40) establishes that the estimated future costs of climate change adaptation by developing countries are approximately 12 to 14 times as high as current international public adaptation finance flows.

[71] Art. 6 CRC and *idem*.

[72] Articles 24, 27 and 28 CRC, respectively. See also the UN Committee's *General Comment on Child Rights and the Environment, with Special Emphasis on Climate Change*, General Comment No. 26, UN doc. CRC/C/GC/26, 22 August 2023.

particular contribution to the progress of climate change. For this and other reasons, scoring a state in this realm according to the same logic as is used in the other domains of the KidsRights Index is an issue too. At present, there is not necessarily a single, straightforward, quality, sufficiently comprehensive, and regularly updated data source that could become the backbone of the new Domain 6. As was established earlier on in this section, over the years the UN Committee on the Rights of the Child has started to take up the subject of climate change in its Concluding Observations, the overall assessment document issued at the end of a state-reporting procedure. However, in these Concluding Observations the Committee hardly presents judgements on the (in)adequacy of the climate policies and actual measures taken by particular states. Even if this were to change, how to weigh such a judgement, considering the influence that activities deployed in other states and in areas outside of national jurisdiction (such as shipping on the high seas) [73] have on climate change? And how to account best for the reality that those best placed to address the matter, and carrying a major responsibility for the causes of the problem, are often least inclined to act? According to UNICEF, in its pathbreaking report *The Climate Crisis is a Child Rights Crisis* published in 2021, while at the time 33 extremely high-risk countries collectively emitted 9% of the global CO2 emissions, the 10 highest emitters together were responsible for a staggering 70% of global emissions. And only one of the latter (India) was at extremely high risk itself. How to account for this in an index?

Given the global and interdependent nature of the climate change problem, it is hard to find appropriate answers, but not impossible. The Environmental Performance Index [74] published by the Yale Center for Environmental Law & Policy has turned out to be a promising data source for assessing the climate change efforts of states. Data produced as part of monitoring compliance with the Paris Agreement are also looked into, [75] as well as developments in the content of the remarks made by the UN Committee on the Rights of the Child in its Concluding Observations. Together, these or other yet to be discovered sources could grow into a steady and reliable basis for a structural climate change Domain in the KidsRights Index.

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[73] According to Y. Li et al., *The Climate Impact of High Seas Shipping*, in *National Science Review* 10: nwac279, 2023, p. 1, there are indications that the annual emissions of carbon dioxide equivalent (CO2-e) in shipping on the high seas amount to “about one-third of all shipping emissions globally” and “exceed annual GHG emissions of countries such as Spain.

[74] https://epi.yale.edu/about-epi.

[75] See e.g. D.A. Brown, *Using the Paris Agreement’s Ambition Ratcheting Mechanisms to Expose Insufficient Protection of Human Rights in Formulating National Climate Policies*, in S. Duyck-S. Jodoin-A. Johl (eds), *Routledge Handbook of Human Rights and Climate Governance*, Routledge, London, 2018, chap. 15, pp. 222-235.

4. *Prospects for Deepening an Integral Notion of Sustainable Development and Human Rights in International Law: Final Remarks*

The material presented in this chapter shows that over time a reasonable level of progress has been achieved with the inclusion of sustainable development and human rights concerns in soft and hard international normative frameworks. The three featured international practice examples demonstrate that, in general terms, this progressive development of international law has inspired various useful application efforts by the International Court of Justice, the UN Committee on the Rights of the Child, and civil society parties. However, when considering the prospects for further lawmaking and especially actual implementation by states as the primary duty bearers, the record is bleaker.

While in the Pact for the Future states still formulated welcome steps connecting sustainable development and human rights more strongly than in Agenda 2030, it looks like under the current constellation it is becoming ever harder to achieve further normative breakthroughs. Reaching consensus on firmer steps in the climate change regime is utterly difficult. [76] In August 2025, the negotiations on a global treaty on plastic pollution were adjourned until an undetermined date for lack of consensus. [77] This leaves the compelling worldwide issue of plastic pollution unattended by a specific legal instrument. At the regional level, a long-prepared European Union proposal to impose sustainability reporting on corporations is likely to become significantly watered down because of resistance in the European Parliament. [78]

In terms of the actual implementation of already existing international obligations, overall, a downward trend seems in the making. In the past, at times normative developments created significant momentum for forging greater state

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[76] See e.g. R. Clémençon, *How Important are International Climate Negotiations*, in S.R. Brechin-S. Lee (eds), *Routledge Handbook of Climate Change and Society*, Routledge, 2nd ed., London, 1994, pp. 411-425; L. Mai, *Navigating Transformations: Climate Change and International Law*, in *Leiden Journal of International Law*, vol. 37 No. 3, 2024, pp. 535-556; L. Bently, *What Did COP30 in Brazil Achieve?*, in *Royal Meteorological Society*, 24 November 2025, https://www.rmets.org/news/what-did-cop30-brazil-achieve.

[77] Intergovernmental Negotiating Committee, *Talks on Global Plastic Pollution Treaty Adjourn Without Consensus*, press release, UN Environment Programme, Geneva, 15 August 2025, https://www.unep.org/inc-plastic-pollution/media#PressRelease15Aug.

[78] European Parliament, *Sustainability Reporting and Due Diligence: MEPs Back Simplification Changes*, Press Release, 13 November 2025, https://www.europarl.europa.eu/news/en/press-room/20251106IPR31296/sustainability-reporting-and-due-diligence-meps-back-simplification-changes. See also M. Segal, *EU Parliament Votes to Slash Corporate Sustainability Reporting, Due Diligence Requirements*, 13 November 2025, https://www.esgtoday.com/eu-parliament-votes-to-slash-corporate-sustainability-reporting-due-diligence-requirements/.

commitment to sustainable development agendas and action. This was most notably the case for Agenda 2030 and the Sustainable Development Goals which, at least initially, generated a lot of momentum. Unfortunately, the COVID-19 pandemic of March 2020 to May 2023 turned out to be a seriously negative trend-breaker. [79] This prompted UN Secretary-General Guttierez, in his foreword to a 2025 UN progress report on the SDGs, to refer to the "scarring effects" of the pandemic, [80] which are indeed still felt strongly across the world. [81] Guttierez also correctly pointed out that, since the pandemic "escalating conflicts, geopolitical tensions, and growing climate chaos are hitting SDG progress hard" as well. [82] The year before, the UN member states had already acknowledged this worrying state of play in the Pact of the Future:

> Progress on most of the Goals is either moving too slowly or has regressed below the 2015 baseline. Years of sustainable development gains are being reversed. Poverty, hunger and inequality have increased. Human rights are under threat, and we run the risk of leaving millions of people behind. Climate change, biodiversity loss, desertification and sand and dust storms, pollution and other environmental challenges pose serious risks to our natural environment and our prospects for development. [83]

However, these serious sustainable development pressures have not yet triggered those states that can make a difference in the world to step up their efforts to realize sustainable development and human rights globally in practice. On the contrary, currently for instance the Trump administration's trade policy measures are disrupting many long-standing trade relations. Under the pressure of unilaterally imposed steep trade tariff increases, new trade deals are forced upon US trade partners, including developing countries. [84] The speed and

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[79] United Nations Department of Economic and Social Affairs, *Impact of COVID-19 on SDG Progress: A Statistical Perspective*, in *Policy Brief* No. 81, August 2020.

[80] United Nations Department of Economic and Social Affairs, *The Sustainable Development Goals Report 2025*, United Nations, New York, 2025, p. 2.

[81] See e.g. British Academy, *The COVID Decade: Understanding the Long-term Societal Impacts of COVID-19*, The British Academy, London, 2021, https://www.thebritishacademy.ac.uk/documents/3238/COVID-decade-understanding-long-term-societal-impacts-COVID-19.pdf or, for accounts of the long-lasting impact on informal workers: M. Chen-M. Rogan,-K. Sen (eds), *COVID-19 and the Informal Economy*, Oxford University Press, Oxford, 2024.

[82] United Nations Department of Economic and Social Affairs, *The Sustainable Development Goals Report 2025*, United Nations, New York, 2025, p. 2.

[83] United Nations General Assembly, UN doc. A/RES/79/1, 22 September 2024, para. 18.

[84] See e.g. R. Bergan, *We Must Get Trade Right for Sustainable Development*, 1 July 2025, https://sdg-action.org/we-must-get-trade-right-for-sustainable-development/; I. Mia, *The United States vs Brazil: Tariffs and Punishment*, in *Survival*: *Global Politics and Strategy*, vol. 67 No.

political pressure surrounding these deals makes it impossible to consider sustainable development and equity concerns. The Russian Federation is still pursuing its fierce war on Ukraine and is increasingly displaying aggressive behavior towards various other European states. The jury is still out on the balance between the beneficial and harmful effects of China's economic activities in Africa. [85] Thus far, neither the European Union nor the BRICS have been able to provide effective alternative leadership. Contrary to the pledge of "a new beginning in multilateralism" in paragraph 7 of the Pact for the Future, increasingly states seem to challenge and withdraw from multilateralism. And lack of investments in sustainable development endeavors and omni-present government budget cuts affect people living in vulnerable situations disproportionately. This is the case at national level, [86] but also internationally when leading to a decline of foreign assistance or international cooperation. [87] At present, the UN human rights system is in crisis too, among other causes because of: the systematic and large arrears in payment of membership fees by important member states (including the USA, China and the Russian Federation); general underfunding if set against the broad and important mandates of the human rights bodies involved; and announced further budget cuts. [88]

5, 2025, pp. 57-65; and the International Trade Centre's monthly briefs on 'The Global State of Trade' https://tradebriefs.intracen.org/2025/10.

[85] See e.g. J. Heaven Mik, *China's Investment in Africa: Exploring the Human Rights Dimensions*, in *China Quarterly of International Strategic Studies*, vol. 10, No. 1, 2024, pp. 27-64 and X. Chen-V. Tawiah-A. Zakari (eds), *Sustainable Development in Africa: The Contribution of Chinese Investment and Trade to Environmental Goods*, in *Sustainable Development*, vol. 33, No. 3, 2025, pp. 3478-3494.

[86] See e.g. M.G. Marcondes Smith, *Equality Restricted: The Problematic Compatibility Between Austerity Measures and Human Rights Law*, in *Health and Human Rights Journal*, vol. 25, No. 2, pp. 177-189; Action Aid International, *The Human Cost of Public Sector Cuts in Africa*, Johannesburg, May 2025, https://actionaid.org/sites/default/files/publications/The%20Human%20Cost%20of%20Public%20Cuts%20May%202025.pdf.

[87] See e.g. United Nations Office of the High Commissioner for Human Rights, *Report: Foreign Aid Cuts Threaten Global Human Rights Ecosystem*, https://www.ohchr.org/en/stories/2025/09/report-foreign-aid-cuts-threaten-global-human-rights-ecosystem, 26 September 2025, referring to Human Rights Funders Network, *Funding at A Crossroads: Foreign Aid Cuts and Implications for Global Human Rights*, September 2025, https://www.hrfn.org/wp-content/uploads/2025/09/Funding-at-a-Crossroads-HRFN-Sept-2025.pdf, Amnesty International, *Rescuing the SDGs: Plenty of Resources, Lack of Will*, Public Statement, IOR 40/9272/2025, 25 April 2025.

[88] See e.g. *idem*; A. Skelton, *Cash Strapped! Can the Multi-lateral Human Rights System Survive the UN Financial Crisis?*, in *Netherlands Human Rights Quarterly*, vol. 43 No. 4, pp. 209-216, 2025; R.V. David, *UN 80 Initiative: Proposed Budget Cuts Disproportionately Hit the Human Rights Pillar*, in *International Service for Human Rights*, 18 September 2025, https://ishr.ch/latest-updates/un80-initiative-proposed-budget-cuts-disproportionately-hit-the-human-

I am aware that one of the inherent weaknesses of the international legal system is that opportunities to uphold and enforce international law are scarce and thus double standards abound. However, the pursuit of sustainable development everywhere without leaving anyone behind, is too important to let slide along the lines sketched earlier in this section. Without being naïve about the role of international law in times of geopolitical landslides and powerplay it is my view that, especially in those circumstances, it is crucial to remind states and their leaders of their international obligations to respect and act upon them and of their long-term interest in doing so. A powerful example [89] of such a reminder is found in one of the practice examples presented in section 3 above: the UN General Assembly decision to request the International Court of Justice an Advisory Opinion on climate change, one of the most urgent sustainable development problems of our times. The high level of participation by states in this legal procedure, described briefly in section 3 of this chapter, increases the chances of states being aware of the outcomes in the first place and, in second instance, provides above-average hope for them to consider implementation. In that Advisory Opinion, the Court has already provided a useful argument relating to the requirement to progress rather than tone down or even undo earlier efforts. The Court discussed this matter in view of the Paris Agreement's provision that each state party's "successive nationally determined contribution [NDC] will represent a progression beyond the [p]arty's then current nationally determined contribution and reflect its highest possible ambition". [90] It concluded that this means that a state's NDCs "must become more demanding over time" and "must be capable of making an adequate contribution to the achievement of the temperature goal" of the Paris Agreement. [91] In addition, as specified in Article 14(9) of the Paris Agreement, the NDCs must be informed by the outcomes of the prescribed "global stocktake". The latter clarifies whether the states parties collectively are on track towards realizing the Paris Agreement. While the International Court of Justice did not pull through the argument, in my interpretation it would be logical to go one step further and conclude explicitly that, for as long as no significant progress has been made on reaching the goals involved collectively, and the comparative circumstances of states remain more or less the same, states would not be allowed to regress their individual efforts.

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rights-pillar/; and the 'UN80 Initiative' home page in the UN website: https://www.un.org/un80-initiative/en.

[89] See also D. Uribe Terán, *The Role of Advisory Opinions in Shaping International Climate Change Law*, in *Climate Policy Brief*, No. 30, South Centre, Geneva, 13 November 2025.

[90] *Idem*, para. 240. See also paras. 241-249.

[91] *Idem*, paras. 241 and 242.

This argument on the requirement to progress rather than regress would gain yet greater traction if it could be extended to the realization of sustainable development at large, including its economic, environmental and social/human rights dimensions, and the duties to engage in international cooperation and to mobilize the maximum extent of the resources available to states. While in general terms the latter has already been codified, for instance in the UN Convention on the Rights of the Child and the (soft law) UN declaration on the Right to Development, [92] the specifications provided for climate change in the Paris Agreement which allowed the ICJ to come to its findings on progression, are lacking in this broader sense. If ways could be found to close this gap and upgrade the requirement to progress to become generically applicable to sustainable development measures of the kind referred to in this chapter, then an important legal hurdle would be taken. This requirement could then become a focal point of lobby, strategic litigation and broader legal mobilization activities (both nationally and internationally). Ultimately, this would contribute to taking up the task of finding ways to safely pass the risky crossroads at which sustainable development and human rights find themselves at present.

[92] For elaborations, see K. Arts-A. Tamo, *The Right to Development in International Law: New Momentum Thirty Years Down the Line?*, in *Netherlands International Law Review*, vol. 63 No. 3, 2016, pp. 221-249 at 233-235 and 239-242; and K. Arts, *Twenty-Five Years of the United Nations Convention on the Rights of the Child: Achievements and Challenges*, in *Netherlands International Law Review*, vol. 61, No. 3, 2014, pp. 267-303 at 81 and 300.

THE EFFECTS OF EU ENVIRONMENTAL POLICY ON THE UNION'S EXTERNAL ACTION

Flavia Rolando[*]

1. *Introduction*

The EU's action in environmental law has evolved over time and represents one of the domains in which the EU institutions have initiated an internal policy that has necessarily evolved alongside consistent external action. To achieve maximum effectiveness, environmental actions must be carried out by the largest number of actors in a consistent manner. Otherwise, every individual effort will no longer achieve the desired result, even if it can certainly serve as an example and, in any case, contribute to improving environmental protection.

The EU internal policy has emerged even in the absence of any explicit reference in the Treaties. The strong intention of the European institutions to adopt legislation in this area, together with the close link to the functioning of the internal market, has led to the introduction of a broad legal framework. Today, EU environmental policy encompasses a wide spectrum of legal acts. Therefore, the analysis of the EU environmental law can be approached from various perspectives: the type of natural element protected, the different legal bases used, or the type of regulatory instrument.

In this paper, the evolution and the current legal framework of EU environmental policy will be outlined (par. 2), with the aim to put the premises to analyse the relationship and the consistency between the EU environmental policy

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and the definition of Union's external action (par. 3). The last section will be dedicated to recent EU action in the international arena (par. 4).

2. *A brief premise on the evolution of EU environmental law*

When the European Economic Community was established, the 1957 Treaty contained no reference to environmental protection, nor did it establish any provision conferring competence in this field. This lack was probably due to the absence of imminent environmental concern in public opinion.

Article 2 of the Treaty of European Economic Community (TEC) broadly stated that the Community's objective should be to promote, through the establishment of a common market, «a harmonious development of economic activities throughout the Community, a continuous and balanced expansion, increased stability in the ever-improving standard of living, and closer relations among the states participating therein». This general formula was interpreted as encompassing the environmental dimension and enabled the European Community to take action even without explicit references to the environment.

In 1973, the Council began to elaborate action in this area by issuing the first Environmental Action Program, setting a policy aimed at linking economic development with environmental protection. According to this first program, the aim of the Community environmental policy was to improve the living environment and quality of life, and it «must help to bring expansion into the service of man by procuring for him an environment providing the best conditions of life, and reconcile this expansion with the increasingly imperative need to preserve the natural environment». [1]

This program included a detailed description of the action to be undertaken at Community level over the next two years, especially to reduce pollution and nuisance. In this first phase, the Council focused on the development of the internal market, and in the absence of a specific legal basis, EU institutions supported their actions on the basis of Articles 100 TEC, concerning the approximation of laws for the functioning of the internal market, and 235 TEC, the so-called flexibility clause. [2]

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[1] Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, OJ C 112, 20 December 1973, p. 1.

[2] According to Article 100 TEC, corresponding in part to the current Article 115 TFEU, «directives for the approximation of the provisions laid down by law, regulation, or administrative action in Member States which directly affect the establishment and functioning of the common market» are to be decided unanimously by the Council. Thus, measures to safeguard natural resources did not

The founding treaties have been modified, over time, to allow the development of an EU environmental policy. To this end, the Single European Act introduced a new title dedicated specifically to the environment, enabling the European Community to take concrete action in the environmental field. Then, the Maastricht Treaty brought relevant modifications to the provisions concerning environmental protection: the Community's "action" in environmental matters, introduced by the Single European Act, formally became a "policy" in the field of the environment.

Moreover, according to the new letter of Article 2 TEC [3] – currently Article 3 TEU – environmental protection was placed for the first time on the same level as economic objectives. Furthermore, in consequence to the introduction of the principle of integration by the Amsterdam Treaty, requirements related to the protection of the environment must be integrated into the definition and implementation of all Community policies and actions. This horizontal clause means that European institutions must consider environmental protection requirements not only when acting in environmental policy but also in all EU policies. [4]

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have an autonomous purpose but were linked to the need to approximate national legislation to ensure the proper functioning of the common market. The Treaty of Amsterdam amended Article 100 TEC, specifying that the Commission, in proposals for approximation in the fields of health, safety, environmental protection, and consumer protection, should be based on «a high level of protection, taking account in particular of any new developments based on scientific findings». The wording of this provision has remained unchanged under the current Article 114 TFEU, the legal basis for acts pursuing approximation in matters aimed at the establishment or functioning of the internal market.

Article 235 of the Treaty (currently Article 352 TFEU) gave the Council the power, after acting unanimously on a proposal from the Commission and approval by the European Parliament, to make appropriate provisions when Community action was necessary to attain one of the objectives of the Community, and the Treaty had not provided the powers of action required for that purpose. This so-called flexibility clause has been used extensively in Community practice, although criticized for effectively extending the Union's powers beyond what is provided for in the Treaties.

[3] According to Article 2 TEC as modified by the Maastricht Treaty «The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities […], to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States».

[4] According to the Environmental integration principle, as established currently by Article 11 TFEU, «Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development». About the integration principle, see, among others, J.H. Jans, *Stop the integration principle?*, in *Fordham International Law Journal*, 2010, p. 1533; M Montini, *The Principle of Integration*, in L. Kramer-E. Orlando, *Principles of Environmental Law*, Edward Elgar Publishing, Cheltenham, 2018, p. 139; M. Montini, *The European Green Deal from an environmental protection perspective: the missing role of the environmental integration principle*, in B.M. K.J. de Graaf-B. Marseille-S. Prechal-R. Widdershoven-H. Winter (eds),

After the introduction of a specific legal basis, the adoption of acts primarily concerning environmental policy is governed primarily by the provisions of the title dedicated to the environment, currently consisting of Articles 191, 192 and 193 TFEU. The directive on reducing the impact of certain plastic products on the environment, [5] for instance, is based solely on Article 192 TFEU, even though the provisions contained therein have a significant impact on the internal market. Article 114 TFEU is still the most suitable legal basis for all legislative acts primarily aimed at ensuring the functioning of the internal market. One example is the regulation on emission limits for gaseous pollutants from engines or the directive on GMO. [6] Several acts have been adopted using a combination of the above-mentioned legal bases, such as the rules on batteries and accumulators [7] or those on the eco-design of energy-related products. [8]

It is particularly challenging to systematise the whole legal framework of environmental protection. A first criterion leads us to differentiate, first of all, the so-called sectoral disciplines, namely those adopted to protect natural elements as air, water and the environment as a whole comprising fauna, flora, land and marine territory. It is not possible to enumerate here the entire corpus of EU environmental legislation; we will only recall some legal acts as examples of the different areas.

Grensoverstijgende rechtsbeoefening: Liber amicorum Jan Jans, Uitgeverij Paris, 2021; F. Rolando, *L'integrazione delle esigenze ambientali nelle altre politiche dell'Unione europea*, Editoriale Scientifica, Napoli, 2020, and F. Rolando, *L'attuazione del principio di integrazione ambientale nel diritto dell'Unione europea*, in *DPCE Online*, 58(Sp-2), 2023. p. 58; B. Sjåfjell-A. Wiesbrock, *The Greening of European Business under EU Law Taking Article 11 TFEU Seriously*, Routledge, Abingdon, 2017; B. Sjåfjell, *The Environmental Integration Principle: A Necessary Step Towards Policy Coherence for Sustainability*, in F. Ippolito-M.E. Bartoloni-M. Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty*, Routledge, Abingdon, 2019; M. Wasmeier, *The integration of environmental protection as a general rule for interpreting community law*, in *Common Market Law Review*, 1, 2001, p. 159.

[5] Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment.

[6] Regulation (EU) 2016/1628 of the European Parliament and of the Council of 14 September 2016 on requirements relating to gaseous and particulate pollutant emission limits and type-approval for internal combustion engines for non-road mobile machinery. See also Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms.

[7] Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators.

[8] Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products.

More in general, about the choice on the legal basis of EU legal act related to environmental law, see N. De Sadeleer, *Environnement et marché interieur*, Éditions de l'Université de Bruxelles, Bruxelles, 2010, p. 75.

Various legal acts have been adopted to protect the air and limit the spread of pollutants. This includes regulations aimed at preserving air quality *stricto sensu*, through the introduction of emission limits for twelve pollutants [9] and the imposition of national emission limits for the main transboundary air pollutants. [10] Water is another natural element that deserves adequate protection and a specific management policy. European policy for the protection of water has been developed through directives that have introduced quality standards that must be guaranteed for certain categories of use. [11] There are also general and specific regulations relating to pollutant emissions from industrial and agricultural activities, [12] as well as directives introducing more general regulations, such as Directive 2000/60/EC, which establishes a framework for Community action in the field of water policy. [13] Specific regulations have been introduced to protect marine environments, [14] natural habitats and wild flora and fauna, [15] and biodiversity. [16]

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[9] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, and Directive 2004/107/EC of the European Parliament and of the Council of 15 December 2004 relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air. Currently the following are covered by legislation: sulphur dioxide, nitrogen dioxide and nitrogen oxides, particulate matter (PM10 and PM2.5), ozone, benzene, lead, carbon monoxide, arsenic, cadmium, nickel and benzo[a]pyrene.

[10] Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants. This directive requires Member States to establish programmes for the progressive reduction of emissions, specifying the policies and measures adopted and quantitative estimates of the expected effects.

[11] Among the normative acts adopted for the protection of water, see Directive (EU) 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the quality of water intended for human consumption, and Directive 2006/7/EC of the European Parliament and of the Council of 15 February 2006 concerning the management of bathing water.

[12] A specific regulation for certain pollutants concerns nitrates from agricultural sources. Nitrates are one of the main causes of pollution from diffuse sources affecting the waters of the European Union. See Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources.

[13] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy. See also Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment.

[14] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive.

[15] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

[16] Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration. Some of these regulations also impose obligations on individuals, as in the case of the regulation prohibiting various forms of transport and breeding of invasive alien species. See Article 7 of Regulation 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species.

In addition to establishing a regulatory framework to protect the natural elements mentioned above, the development of the Union's environmental policy has led to the introduction of regulations on pollutants as waste [17] or batteries and accumulators. [18] The former is an example of a directive that defines obligations for natural persons as well: every producer or other holder of waste must personally arrange for its treatment or deliver it to a dealer, body or company that can treat it appropriately. [19]

European environmental legislation consists not only of the body of rules defining the obligations of Member States, businesses and, in some cases, individuals, as described above, but also of a significant set of policies aimed at encouraging environmentally friendly behaviours. In this regard, we can cite here only the most prominent examples, represented by the regulatory framework for State aid in the environmental field, under which national administrations may grant economic aid to companies aimed at improving their environmental performance, [20] and several voluntary schemes promoting goods and services that clearly demonstrate environmental excellence, based on standardised processes and scientific evidence as the Ecolabel or EMAS.

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[17] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste.

[18] Directive 2006/66/EC, cit.

[19] See Article 15 of the Directive 2008/98/CE, cit. The same directive also states that Member States may adopt legislative or non-legislative measures to ensure that any natural or legal person who professionally develops, manufactures, processes, treats, sells or imports products (product manufacturer) is subject to a form of extended liability. In this case, the liability of the producer is extended beyond the production process to include the consequences of the use of the product they sell, both during and after use. Member States may therefore require the acceptance of returned products and waste remaining after the use of such products, as well as the subsequent management of waste and financial responsibility for such activities. In this regard, the European Union intervened directly to define the responsibility and costs of managing certain types of products when they become waste. This policy is a more precise application of the "polluter pays" principle and has affected packaging manufacturers and manufacturers of electrical and electronic equipment.

Moreover, by the new directive on the protection of the environment through criminal law, the legislator has introduced a new instrument aimed at ensuring effective protection, laying down minimum rules for the definition of offences and penalties for both natural and legal persons. In addition to introducing a series of specific prohibited behaviours, it has more generally defined as unlawful any behaviour that violates EU legislation adopted to contribute to one of the objectives of European environmental policy referred to in Article 191(1) TFEU or the national acts implementing it. See Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law.

[20] See, Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022, C/2022/481, OJ C 80, 18 February 2022.

In 2019, the European Green Deal launched a new phase in EU environmental policy, introducing a growth strategy aimed at developing a modern, resource-efficient, and competitive economy in which economic progress is decoupled from resource use. In this sense, the European Green Deal was an essential part of the Commission's strategy to implement the 2030 Agenda and the United Nations Sustainable Development Goals.

3. *An outline of the EU external action in the environmental field*

3.1. *An overview of the origins and the evolution of the EU international environmental policy*

Since the very beginning of the publication of Environmental Action Programmes, the Council has also specified a line of action for the Union's environmental external policy. [21] The focus of the EU institutions was placed, from the outset, on the position to be taken within international organisations. The Council called for an «endeavour to adopt a common attitude within the international organizations and conferences» without prejudice to Community actions in respect of subjects falling under its competence or to joint action which Member States may take. Moreover, special attention was devoted to the activities of international bodies concerned with various aspects of environmental problems, since many of the measures proposed and the procedures being implemented could have repercussions on the functioning of the common market and on the economic interests of the Community. [22]

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[21] About EU external relations, see among others: K.A. Armstrong-J. Scott-A. Thies (eds), *EU External Relations and the Power of Law. Liber Amicorum in Honour of Marise Cremona*, Hart, Oxford, 2024; M.E. Bartoloni-S. Poli (a cura di), *L'azione esterna dell'Unione europea*, Editoriale Scientifica, Napoli, 2021; G. Butler-R. A. Wessel, (eds), *EU External Relations Law*, Hart, Oxford, 2022; M. Cremona-A. Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges*, Hart, Oxford, 2014; W. TH. Douma-C. Eckes-P. Van Elsuwege-E. Kassoti-A. Ott-R.A. Wessel (eds), *The Evolving Nature of EU External Relations Law*, TMC Asser Press, The Hague, 2021; P. Eeckhout, *EU External Relations Law*, II ed. Oxford University Press, Oxford, 2011; P. Koutrakos, *EU International Relations Law*, II ed, Hart, Oxford, 2015; R.A. Wessel-J. Larik (eds), *EU External Relations Law. Text, Cases and Materials*, II ed., Hart, Oxford, 2020; J. Wouters-F. Hoffmeister, G. De Baere-T. Ramopoulos (eds), *The Law of EU External Relations. Cases, Materials, and Commentary on the EU as an International Legal Actor*, III ed., Oxford University Press, Oxford, 2021.

[22] Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, OJ C 112, 20 December 1973, p. 1.

In the following years, after the Stockholm conference on the human environment and the evolution of the cooperation in the environmental field in international fora, such as the United Nations or the OECD, the EU institutions highlighted the reciprocal interactions and interdependence between the growth processes of industrialized countries and those of developing countries. Therefore, the Council affirmed, in its second program, the principle according to which «an all-embracing environmental policy is possible only on the basis of new, more effective forms of international cooperation which take into account both ecological inter-relationships on a world scale and the interdependence of the world economy». [23]

Progressively, environmental action programmes have specified external action with increasing precision, also devoting greater attention to the consistency between internal and external policy in this area. [24] Starting from the fifth program and its revision in 1998, the definition of the international dimension of EU action was no longer confined to the final section of the program but was integrated throughout the text and within the context of the entire document. [25] EU action at the international level began to take shape, also through the specification of the Union's objectives within various international agreements and conventions.

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[23] Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting within the Council of 17 May 1977 on the continuation and implementation of a European Community policy and action programme on the environment, OJ C 139, 13 June 1977, p. 1, spec point 259 ff.

[24] See Resolution of the Council of the European Communities and of the representatives of the Governments of the Member States, meeting within the Council, of 7 February 1983 on the continuation and implementation of a European Community policy and action programme on the environment (1982 to 1986), OJ C 46, 17 February 1983, p. 1, spec. p. 15 f. and the Resolution of the Council of the European Communities and of the representatives of the Governments of the Member States, meeting within the Council of 19 October 1987 on the continuation and implementation of a European Community policy and action programme on the environment (1987-1992), OJ C 328, 7 December 1987, p. 1.

[25] Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 February 1993 on a Community programme of policy and action in relation to the environment and sustainable development – A European Community programme of policy and action in relation to the environment and sustainable development, OJ C 138, 17 May 1993, p. 1. See also the Decision No 2179/98/EC of the European Parliament and of the Council of 24 September 1998 on the review of the European Community programme of policy and action in relation to the environment and sustainable development "Towards sustainability", OJ L 275, 10 October 1998, p. 1, especially Article 6.

About the evolution of the Environmental Programmes and on the application of the integration principles in these acts, see among others, K. Inglis, *EU environmental law and its green footprints in the world*, in A. Dashwood-M. Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, Cambridge University Press, Cambridge, 2008, p. 429, spec. p. 431 f.

In particular the EU has played a relevant role in the context of the United Nations Environment Programme (UNEP) since its creation in 1972. Therefore, the EU is a Party to many multilateral environmental agreements (MEAs), [26] at international, regional and subregional level. This paper will only outline the role of the EU in the MEAs and in the recent negotiations in the related Conferences of Parties (COPs).

Undoubtedly, the European Union has taken a prominent role in the United Nations Framework Convention on Climate Change and its Protocol [27] as well as in the Convention on Biological Diversity, [28] in the Convention to Combat the Desertification [29] and in the negotiation for the adoption of a Global Plastic Treaty. Climate change response and mitigation is an example of a policy in which the internal and the international actions must necessarily run parallel or at least hand in hand. Climate change, in fact, requires coordinated global action to be effective. The EU has played a relevant role in the definition of the content of several protocols that over time have specified targets to reduce CO_2 emissions and halt global warming. The adoption of ambitious internal standards has pushed the EU in a leading role in the international stage.

At the same time, as we will see hereinafter, the EU has established some legal tools that also have extraterritorial effects such as the EU Emission Trading System (ETS) [30] system, and legal instruments that aim to protect the EU

[26] See the full list of the MEAs ratified by the EU in https://environment.ec.europa.eu/international-cooperation/multilateral-environmental-agreements-meas_en. See also https://www.informea.org/en.

For an acknowledgement of the participationi of the EU in the International environmental treaties, see L. Schiano di Pepe, *Le relazioni esterne dell'Unione europea in materia ambientale ed energetica*, in M.E. Bartoloni-S. Poli, *L'azione esterna dell'Unione europea*, cit., spec. p. 212 ff.

[27] The United Nations Framework Convention on Climate Change – UNFCCC, is one of the three conventions that were adopted at the Rio Earth Summit in 1992. The EU is also part of the Kyoto Protocol (1997) and of the Paris Agreement (2015).

[28] The Convention on Biological Diversity (CBD) entered into force on 29 December 1993. This Convention is also accompanied by three protocols: the Nagoya Protocol on Access and Benefit-sharing; the Cartagena Protocol on Biosafety; the Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety. See the Convention website www.cbd.int.

[29] The United Nations Convention to Combat Desertification (UNCCD) was established in 1994 to protect and restore our land and ensure a safer, just, and more sustainable future, see the website https://www.unccd.int/convention/overview. The UNCCD is the only legally binding framework set up to address desertification and the effects of drought; There are 197 Parties to the Convention, including 196 country Parties and the European Union.

[30] See the Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community, especially the modification done by Directive (EU) 2023/958 of the European Parliament

from company relocation and to prevent the circumvention of costs associated with environmental protection regulations as the Carbon Border Adjustment Mechanism (CBAM). [31]

In more recent years, the Lisbon Treaty did not make significant innovations to the structure of the EU's competence in environmental matters. [32] However, according to Article 3, par. 5, TEU, one of the key objectives of the EU policy is to contribute to the sustainable development and, according to Article 21 (2) (d) and (f), TEU, the EU action on the international stage shall foster sustainable development of developing countries and, more in general, «help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development». [33] Moreover, Article 191 TFEU explicitly states that the EU shall promote the combating of climate change through measures at the international level. Read together, these provisions highlight the role the European Union has come to assume on the international stage in the field of environmental protection.

3.2. *The coherence between the EU internal and external policy in the last action program*

As mentioned above, in 2019 the European Commission adopted a Communication setting out the European Green Deal [34], a strategy aimed at tackling

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and of the Council of 10 May 2023 amending Directive 2003/87/EC as regards aviation's contribution to the Union's economy-wide emission reduction target and the appropriate implementation of a global market-based measure.

[31] See Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism.

[32] As it is established in Article 4, par. 2 (e) and (i), TFEU, the EU competence in environmental field and in the energy sector is a shared competence. These competences are specifically defined in Articles 191 – 194 TFEU.

[33] About the interpretation of Article 3, par. 5, and Article 21 (2) (d) and (f), TEU, see among others M. Cremona, *Coherence and EU External Environmental Policy*, in E. Morgera (ed.), *The External Environmental Policy of the European Union: EU and international law perspectives*, Cambridge University Press, Cambridge, 2012, p. 54; M. Montini, *L'azione esterna dell'Unione europea per l'attuazione dello sviluppo sostenibile*, Editoriale Scientifica, Napoli, 2025; L. Schiano di Pepe, *Le relazioni esterne dell'Unione europea in materia ambientale ed energetica*, cit.

[34] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – The European Green Deal, COM/2019/640. About the European Green Deal, see L. Scholz-C. True (eds), *The Eu Green Deal and Its Implementation*, Nomos, Baden-Baden, 2023; M. Campins Eritja-X. Fernández-Pons (eds), *Deploying the European Green Deal Protecting the Environment Beyond the EU Borders*, 2024.

environmental issues through a series of actions. In her candidacy statement [35], the future President of the European Commission placed the European Green Deal at the top of her political agenda. Ursula von der Leyen started from the premise that the European Union currently had record high employment and sustained economic growth. The EU was portrayed as the world's trading superpower, capable of setting standards that others follow. On the basis of this strength, the candidate for Commission Presidency argued that it was necessary to be ambitious also with regard to new political objectives, in particular by taking the lead in the transition towards a healthy planet and a new digital world.

The EU's action under the European Green Deal focuses on a few pillars, which constitute its political priorities. These include the goal of climate neutrality, a clean energy supply and the circular economy. [36] These are areas in which the EU has adopted binding legal acts that have often pushed Member States to comply with standards higher than those previously established at the national level. A precise roadmap was outlined to respond effectively to the urgent need to protect the environment. As mentioned above, the European Green Deal aims to transform the European Union «into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use». [37] This strategy was also considered functional to the implementation of the 2030 Agenda and the United Nations Sustainable Development Goals.

At the internal level, a wide range of legislative acts has been adopted to implement the objectives set out in the Green Deal. All these acts have been undertaken with the belief that the EU has the collective capacity to transform its economy and society so as to place them on a more sustainable path. The EU is thus considered capable of launching such initiatives in its role as a global leader in climate and environmental measures. This confidence is rooted in the EU's influence, expertise, and financial resources, which it can leverage to mobilize its neighbours and partners to join this process of sustainable transition.

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[35] A Union that strives for more. My agenda for Europe, available at https://commission.europa.eu/document/download/063d44e9-04ed-4033-acf9-639ecb187e87_en?filename=political-guidelines-next-commission_en.pdf.

[36] About the circular economy, among several actions to reduce the use of natural resources, we can point out two legal acts that have a relevant incidence on the productive process, regardless of where this is done: the new regulations to set ecodesign requirements for sustainable products, Regulation (EU) 2024/1781 establishing a framework for the setting of ecodesign requirements for sustainable products, cit., and the new directive aimed at promoting the reparation of goods, Directive (EU) 2024/1799 of the European Parliament and of the Council of 13 June 2024 on common rules promoting the repair of goods.

[37] See the European Green Deal, cit.

However, there is a risk in pursuing these objectives alone. On the one hand, we can see the apparent ineffectiveness of taking ambitious action on climate change, which is also very costly, without other countries doing the same. This is one of the main concerns in combating climate change. [38]

On the other hand, the risk is offshoring: firms currently based in the EU move to a third country to reduce the burden of environmental taxes. In this regard, among the main tools for reducing greenhouse gas emissions, particular attention must be paid to Directive 2003/87/EC (ETS Directive) establishing a scheme for greenhouse gas emission allowance trading, which introduced a cap-and-trade system based on emission allowances allocated to each company: each allowance gives the right to emit one tonne of CO_2. [39] This system therefore sets limits on the amount of emissions that each industrial installation can emit in a given calendar year and also introduces a system for trading emission reduction units, both between themselves and with actors outside the system through a genuine emissions market. [40]

In case of carbon leakage (either because production is transferred from the EU to other countries with lower ambition for emission reduction, or because EU products are replaced by more carbon-intensive imports) there would be no reduction in global emissions, thereby frustrating the efforts of the EU and its industries. For this reason, if common rules at the international level are not set, internal action needs to be supported by measures such as the carbon border adjustment mechanism to reduce this risk. [41] In this context, the CBAM mechanism

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[38] As an example, we can consider Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality. This legal act has thus introduced binding obligations on Member States that are much more ambitious than those of other countries.

It is interesting underline that the European Green Deal reaffirmed and evolved the commitment established in the communication A Clean Planet for All – A European strategic long-term vision for a prosperous, modern, competitive and climate-neutral economy (COM(2018) 773).

An interim target has been set to reduce net greenhouse gas emissions by at least 55% compared to 1990 levels by 2030 and net zero greenhouse gas (GHG) emissions by 2050. However, the target for 2035 and 2040 are under negotiation, following the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2021/1119 establishing the framework for achieving climate neutrality, COM/2025/524. See F. Eroico, *La legge europea sul clima: effettivo passo in avanti o opportunità mancata?*, in www.aisdue.eu.

[39] Cit.

[40] About the ETS System and the extension of effects even outside the territory of the European Union, see among other M. Montini, *L'azione esterna dell'Unione europea per l'attuazione dello sviluppo sostenibile*, cit., spec. p. 226.

[41] Cit.

is an expression of the Union's climate policy in its external action, which is implemented in close connection with the application of the EU ETS within the European internal market. It may therefore be argued that this mechanism produces a sort of export of European standards beyond its customs territory. [42]

A whole section of the Green Deal was dedicated to the external action, emphatically named "The EU as a global leader". The strategy traced by the European Commission is primarily based on the construction of a "green deal diplomacy" focused on convincing and supporting other parties to assume their share of responsibility for promoting sustainable development. This ability to influence the actions of other states is based primarily on the EU's success in implementing the roadmap set out in the European Green Deal. Indeed, more broadly, it is well known that many EU actions have produced the so-called Brussels effect. [43]

Shortly afterwards, however, the European Union, like the rest of the world, faced the challenge of addressing the effects of the COVID-19 pandemic. Although the management of the emergency situation initially absorbed most of the resources of the Member States and the Union, it is worth noting that environmental issues were not overshadowed by other priorities. On the contrary, green reform and digitalisation were considered the best tools for overcoming the economic crisis.

In this perspective, the achievement of the environmental and climate objectives defined under the United Nation's 2030 Agenda and its Sustainable Development Goals, as well as the goals of the Paris Agreement, the Rio Conventions, and the other existing multilateral environmental agreements, constituted the core objectives of the 8th Environment Action Programme. [44] In this programmatic document as well, the EU institutions highlighted the relevance of ensuring coherence between internal and external approaches and coordinated action. [45] Especially regarding the climate action, the European Parliament and the Council call for the encouraging and supporting the third countries to adopt and implement rules in those areas that are at least as ambitious as those of the Union. The consistency with the EU standards already acquired is pursued

[42] See M. Montini, *L'azione esterna dell'Unione europea per l'attuazione dello sviluppo sostenibile*, cit., spec. p. 229 and 237.

[43] This according to the famous formula minted by A. Braford, *The Brussels Effect*, Oxford University Press, New York, 2020.

[44] Decision (EU) 2022/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030, OJ L 114, 12 April 2022, p. 22 ss.

[45] See Article 3(ah) and the six interlinked thematic priority objectives for the period up to 31 December 2030 explained in Article 2.

ensuring that all products placed on the Union market fully comply with relevant Union requirements in line with the Union's international commitments, including halting deforestation and land degradation.

However, in recent years there has been a noticeable setback in domestic environmental policy, largely driven by the emergence of several destabilizing contingencies. Among these, the Russian invasion of Ukraine has played a central role, triggering a significant increase in energy costs and prompting many States to prioritise issues of national security and military rearmament. These developments have diverted political attention and resources away from environmental commitments, thereby slowing the pace of ecological transition.

The following sections will examine how the EU institutions are managing the need to simultaneously pursue environmental action, respond to the energy crisis and bear the costs of the strengthening the EU defence.

4. *The recent action of the EU in the international scene and new scenarios in the evolution of the internal and external environmental action*

Over the years, the European Union has refined both the objectives that it seeks to pursue in its external environmental action and the means by which it aims to achieve them. The consistency the EU strives for is not only between EU internal and external action, as reflected in policy documents, but also in the positions adopted by the Union and its Member States in international negotiations.

It is interesting to observe that the negotiations in which the failure of the results achieved to meet expectations was most evident, such as COP 15 in Copenhagen, are those in which the EU negotiating position was not unitary, as the declaration of the EU was different from that of the Member States of Central and Eastern Europe, and in particular from Germany. This internal fragmentation undermined the EU's ability to act as a coherent and credible global climate leader. This divergence made the Union appear weak as a whole due to the lack of unity among Member States in pursuing a common vision, illustrating how the absence of an internally coordinated and consistent negotiating strategy can significantly diminish the effectiveness of its external climate diplomacy. [46]

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[46] The 2009 United Nations Climate Change Conference, commonly known as the Copenhagen Summit, was held in Copenhagen, Denmark, between 7 and 18 December. The conference included the 15th session of the Conference of the Parties (COP 15) to the United Nations Framework Convention on Climate Change (UNFCCC) and the 5th session of the Conference of the Parties serving as the Meeting of the Parties (CMP 5) to the Kyoto Protocol.

About the role of the EU in the international negotiations see among others; S. Oberthür-F.

However, since this *débâcle*, the European Union has refined its strategy and, in addition to requiring unity among Member States, in accordance with the principle of loyal cooperation, has set its position considering a more realistic and pragmatic approach. [47]

In this regard, the Court of Justice of the European Union (CJEU) stated, in the infringement procedure brought against Sweden, that Member States have a duty of close cooperation with one another and with the Community institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of their action and of the Union's international representation. Therefore, the principle of unity in the international representation of the Union and its Member States requires that Member States do not weaken the EU's negotiating power by making a unilateral proposal that dissociates the Member State in question from a concerted common strategy. [48] This

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Rabitz, *On the EU's performance and leadership in global environmental governance: the case of the Nagoya Protocol*, in *Journal of European Public Policy*, 3, 2014, p. 39; S. Oberthür-L. Groen, *The European Union and the Paris Agreement: Leader, Mediator, or Bystander?*, in *WIREs Climate Change*, 2017, 8, e445; S. Schunz-C. Damro-S. Gstöhl, *Analytical Framework: Understanding and Explaining EU External Engagement*, in C. Damro-S. Gstöhl-S. Schunz (eds), *The European Union's Evolving External Engagement: Towards New Sectoral Diplomacies*, Routledge, Abingdon, p. 15; K. Kulovesi, *Climate change In EU external relations: please follow my example (or I might force you to)*, in E. Morgera (ed.), *The external environmental policy of the European Union*, cit., p. 115, spec. p. 148.

[47] C.F. Parker-C. Karlsson-M. Hjerpe, *Assessing the European Union's Global Climate Change Leadership: From Copenhagen to the Paris Agreement*, in *Journal of European Integration*, 2, 2017, p. 239. According to the Authors, «As we showed, the EU became more flexible and realistic to how a deal could be designed, agreeing to sign on to a hybrid set up with bottom-up reduction pledges combined with a top-down review of performance. In the run-up to the meeting, the EU and China agreed to enhance cooperation on carbon trading and released a joint statement calling for a legally binding deal in Paris. The US and the EU teamed up to support a strong reporting and transparency measures as well as a regular review process», see p. 249.

[48] Court of justice, 20 April 2010, *European Commission vs. Kingdom of Sweden*, C-246/07, spec. points 75 and 104. In the cited case Sweden, within the framework of the Stockholm Convention, unilaterally proposed to add a new group of persistent organic pollutants (POPs) perfluoroctane sulfonates (PFOS) to those already covered by the Convention, thereby dissociating itself from a concerted common strategy within the Council. The ECJ, in the point 94 of the judgement, clarified that in such a case «The submission of a proposal for the listing of a substance under the Convention of Stockholm by a Member State could therefore give rise to a situation where either the Union voted against that proposal, thus depriving the Member State making the proposal of the possibility of defending its own proposal at the level of the Conference of the Parties, or that Member State exercised its right to vote in favour of its own proposal, thus depriving the Union of the possibility of exercising its right to vote with a number of votes equal to the number of its Member States and leaving the other Member States free to vote for or against the proposal».

For a comment see M. Cremona, *Case C-246/07, Commission v. Sweden (PFOS), Judgment* highlights the political relevance of the acts adopted by the EU institutions before the negotiations in international fora, such as the Council decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community, and even the proposal submitted to the Council, as it represents the starting point for concerted Community action.

The need for consistency in external action requires Member States to comply with the agreed position in institutional contexts. It is necessary both because of the indirect effects caused by divergent voting behaviour between Member States and the European Union, and for the very effectiveness of the Union's unified action in conducting negotiations. Indeed, the limitation that Member States have in determining their own position autonomously in international negotiations has been considered as a price to be paid for solidarity. [49]

It has been established, over time, a service properly devoted to the definition of the green diplomacy in the European External Action Service (EEAS), [50] a functionally autonomous body of the Union under the authority of the High Representative, strictly involved in the development of external relations in order to reach an ever-increasing leading role of the EU in the negotiation of the international agreements. To this end, the EEAS supports the High Representative in its capacity as President of the Foreign Affairs Council. This is considering that the central role in establishing the goals in the international fora, according to Article 218 TFEU, is up to the Council. This latter Institution establishes the mandate for the negotiator, which is usually the European Commission.

Moreover, the EU's strategy in negotiations has evolved from a one-sided leadership to a combination of unilateral concessions with careful coalition-building and bridge-building activities. This approach has been defined as 'leadiator' (leader-cum-mediator). [51]

At the same time, the European Union enhances dialogue and cooperation with specific partners in order to promote alignment with the EU climate legislation acquis and achieve its ambitious goals in the negotiations in multilateral agreements.

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of the Court of Justice (Grand Chamber) of 20 April 2010, in *Common Market Law Review*, 5, 2011, p. 1639 and R. Schiano di Pepe, *op. cit.*, p. 218.

[49] See M. Cremona, *Coherence and EU External Environmental Policy*, in E. Morgera (ed.), *The External Environmental Policy of the European Union: EU and international law perspectives*, cit., p. 54.

[50] See Council decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ 3.8.2010. About the EEAS see, among others, L. Paladini, *Il Servizio europeo per l'azione esterna. Aspetti giuridici e prospettive di sviluppo*, Cacucci, Bari, 2017.

[51] K. Bäckstrand-O. Elgström, *The EU's role in climate change negotiations: from leader to 'leadiator'*, in *Journal of European Public Policy*, 2013, 10, 2023, p. 1369, spec. p. 1370.

As highlighted, there are some slight differences across the fora: the EU is seen to be more ambitious and more influential in the United Nations Environment Assembly (UNEA) compared to its ambition and influence in specific contexts as in the Convention on Biological Diversity (CBD). [52] Moreover, it is interesting to underline that today the G20 is considered as one of the more relevant fora for dialogue, as it is responsible for 80% of global greenhouse gas emissions. However, the external action is also focused on put emphasis on supporting its immediate neighbours, especially the Southern Neighbourhood and the Eastern Partnership with the Western Balkans. [53]

In 2024, the European Commission obtained an ambitious mandate to negotiate the COP29 Climate Conference, the COP16 Biodiversity Conference, and the COP16 Desertification Conference, [54] as well as for the preparation for the final fifth negotiating session for the Global Plastics Treaty.

As for the COP16 in the context of the CBD, the Council highlighted the importance of taking robust decisions, inter alia, to finalise a solid framework for planning, monitoring, reporting and review as well as foster the accelerated implementation of nature-based solutions, also adopting a strong programme of work for matters concerning Indigenous Peoples and local communities.

In the internal dimension, the EU has adopted the comprehensive Nature Restoration Law, [55] establishing binding targets to restore degraded ecosystems.

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[52] See T. Delreux-F. Pipart, *Ego versus Alter: Internal and External Perceptions of the EU's Role in Global Environmental Negotiations*, in *Journal of common Market Studies*, 5, 2021, p. 1284.

[53] About the role of the European Union in international relations see also O. Elgström, *The European Union as a Leader in International Multilateral Negotiations – A Problematic Aspiration?*, in *International Relations*, 4, 2004, p. 445; T. Delreux, *EU Actorness, Cohesiveness and Effectiveness in Environmental Affairs*, in *Journal of European Public Policy*, 7, 2024, p. 1017; C.F. Parker-C. Karlsson-M. Hjerpe, *Assessing the European Union's Global Climate Change Leadership: From Copenhagen to the Paris Agreement*, in *Journal of European Integration*, 2, 2017, p. 239. According to the latter Author, the EU has been perceived to be one of the top three most influential leaders. However, the fact that no leader consistently was able to register over 50% support from potential followers, demonstrates that the world has lacked a single undisputed leader in the field of climate change. This is a situation that can be described as a "fragmented leadership landscape". See p. 248.

[54] See Council conclusions of 14 October 2024, Preparations for the 29th Conference of the Parties (COP29) of the United Nations Framework Convention on Climate Change (UNFCCC), in https://data.consilium.europa.eu/doc/document/ST-14459-2024-INIT/en/pdf; the Council conclusion of 14 October 2024 about Convention on Biological Diversity, in https://data.consilium.europa.eu/doc/document/ST-14480-2024-INIT/en/pdf, and Council conclusion of 14 October 2024 on Desertification, Land Degradation and Drought, in https://data.consilium.europa.eu/doc/document/ST-14146-2024-INIT/en/pdf.

[55] Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration and amending Regulation (EU) 2022/869. The Nature Restoration

This provided a strong basis for international negotiations, serving as an example in the global scene.

The COP16 confirmed the lack of consensus among Parties on how to address the international biodiversity finance gaps. However, relevant steps forward have been done about the expanded role of Indigenous Peoples and Local Communities (IPLCs) in saving biodiversity [56] and a groundbreaking decision on operationalising a multilateral mechanism for the use of digital sequencing information from genetic resources (DSI).

Similarly, in the context of the COP16 under the UN Convention to Combat Desertification (UNCCD), [57] the EU emphasised its commitment to strengthening the implementation of global action to address the water crisis and to defining a global response to drought. Indeed, strengthening water resilience is a central objective of EU policy, as it is instrumental in preventing and mitigating present and future risks to public health, ensuring food and energy security, and promoting integrated and cross-sectoral approaches to water resource management.

In this context, several policy deliverables were announced at the summit. It was established a Transboundary Water Knowledge Platform, intended to enhance cooperation and legal coordination in the management of shared water resources; a commitment to accelerate the implementation of the Freshwater Challenge, which aims to restore 300,000 kilometres of degraded rivers and 350 million hectares of degraded wetlands by 2030, and the launch of the One Water Vision, a science-based initiative designed to co-develop innovative methodologies for water monitoring and governance, including the further development of early warning systems for droughts and floods. Furthermore, participating States agreed to promote awareness among young people of pressing global water challenges through a newly introduced "Adopt a River" initiative.

Currently, the results achieved in other areas of international fora are less encouraging, as in the context of the negotiations to adopt a legally binding instrument on plastic pollution.

In 2002, UN Member States agreed to establish such an instrument also with

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Law is a key element of the EU Biodiversity Strategy, which sets binding targets to restore degraded ecosystems, in particular those with the most potential to capture and store carbon and to prevent and reduce the impact of natural disasters.

[56] A newly established Fund will allocate a significant share of its resources to IPLCs. Pharmaceutical, cosmetics, agribusiness, nutraceutical, and large technology companies that benefit from genetic data are encouraged to contribute to the Cali Fund.

While the contributions to the mechanism will be voluntary, the agreement suggests that these industries allocate 1% of the profits derived from the use of DSI or 0.1% of their overall revenue to the fund. In return, they will get legal conformity and access to a multilateral system of DSI.

[57] The COP 16 took place in Riyadh, in Saudi Arabia, in December 204.

the purpose of preventing plastic pollution in the marine and other environments and conferred a mandate to conclude negotiations to the Intergovernmental Negotiating Committee (INC).

Even in this area, the EU has cutting-edge legislation [58] and seeks to adopt an agreement with binding obligations to tackle plastic pollution at all stages of the plastic value chain, including restrictions and bans on certain chemicals used in plastic polymer production and phase-outs of problematic products, such as certain single-use plastic products.

The final text of the Treaty on global plastics pollution was expected to be concluded by December 2024. However, the fifth negotiating session (INC-5) ended without an agreement, due in part to the lack of convergence around treaty objectives and the establishment of targets for reducing the production of primary plastic polymers, and for bans and restrictions of chemicals of concern in plastic products. [59] Preparations for further negotiations will continue, and it remains to be seen how the negotiations will evolve during the upcoming INC session. [60]

Taking a broader view, it appears that the pursuit of environmental goals, both within the European Union and externally, is currently facing some obstacles.

The events that have taken place in recent years, in particular the international reaction to Russia's invasion of Ukraine, have had a significant impact on national economies and energy costs, also reshaping the global geopolitical balance.

As Tusk stated in his speech to the European Parliament, «we need to protect environment, that we need to protect our climate. We are well aware of the potentially disastrous consequences that would follow in the case of no action, but there is a but». [61] The point is that protecting the environment entails costs that

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[58] Consider, first of all, the Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment and the Regulation (EU) 2025/40 of the European Parliament and of the Council of 19 December 2024 on packaging and packaging waste. More than 127 countries had already introduced rules on single-use plastics before the negotiations started, according to the United Nations Environment Programme (UNEP).

[59] See the INC 5.2 Report at https://wedocs.unep.org/rest/api/core/bitstreams/f912d799-b2de-4d8a-b26f-363f01b14fc3/content. Even though no agreement was reached in Busan, the negotiating committee has made significant progress towards a deal by agreeing on a text that should serve as a basis for negotiations at the next meeting. An overwhelming majority of more than 100 countries shared the ambitions of the EU and the number of countries continues to grow.

[60] The next meeting, the third part of the INC-5(INC-5.3) is scheduled for 7 February 2026 at the Geneva International Conference Centre (CICG).

[61] See the text of the speech in https://polish-presidency.consilium.europa.eu/en/news/the-

may affect economic sustainability and competitiveness. [62] It is noteworthy that, according to Tusk's reasoning, the European Union cannot afford a loss of competitiveness since, if we go bankrupt as Europe, no one could take its leading role in protecting the environment. According to this reasoning, the EU also retains a role as a global example.

At the internal level, the European Union has partially slowed the process initiated by the Green Deal and, in some cases, even taken some backward steps. [63] However, the regulatory process for achieving environmental protection is now underway thanks to the Green Deal, and in many other areas it is progressing to improve this necessary path. [64]

At the international level, this has occurred alongside a broader rethinking of environmental policy.

In line with this overview, the outcomes of COP30 have not lived up to the expectations that accompanied the conference, particularly in light of its symbolic importance and the urgency of the climate challenge. [65] Indeed, the mere fact that an agreement has been reached seems to be an outcome that cannot be taken for granted.

After intensive negotiations, the final agreement calls for mobilising at least $1.3 trillion annually by 2035 to support climate action. It also commits to

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speech-of-polish-prime-minister-at-the-european-parliament-europe-is-not-yet-lost-as-long-as-we-are-alive/. The Prime minister, to better explain the concept, also said «Our citizens do want a safe natural environment. They do care about nature, but they do not want to have the highest energy prices, because it affects our citizens directly. Let us be courageous».

[62] See the Draghi report on competitiveness and the next steps taken by the European Union in https://commission.europa.eu/topics/competitiveness/draghi-report_en.

[63] See the so-called Omnibus Packages adopted by the European Commission in the purpose of making environmental laws simpler, less costly, and more efficient for businesses. About the adoption of the adoption of the Omnibus I see F. Ferraro, *Tutela ambientale versus competitività economica: il paradigma della sostenibilità*, in *Quaderni AISDUE*, 1, 2026, p. 1 and for a discussion of the recent Ominbus Package adopted in relation to Directive (EU) 2024/1760, see the chapter written in this volume by Carmen Di Carluccio and Eva Lacková.

[64] See, for instance, the progress done by the Ecodesign regulation, Regulation (EU) 2024/1781, cit., and the other legal act adopted following the Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the regions on making sustainable products the norm, COM2022/140, and the Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the regions – A new Circular Economy Action Plan For a cleaner and more competitive Europe, COM/2020/98.

[65] See the Council conclusion of 21 October 2025 Preparation for the 30th Conference of the Parties (COP30) of the United Nations Framework Convention on Climate Change (UNFCCC) (Belém, Brazil, 10-21 November 2025) in https://data.consilium.europa.eu/doc/document/ST-14310-2025-INIT/en/pdf.

tripling adaptation finance and operationalising the loss and damage fund agreed at COP28, and establishes the Global Implementation Accelerator, aimed at supporting countries in implementing their nationally determined contributions (NDCs) and national adaptation plans. [66]

It is also worth noting that, as recently occurred within the EU, in the COP30 for the first time it has been recognised the need to address climate disinformation, committing to promoting information integrity and countering narratives that undermine science-based climate action. [67] Therefore, even from this point of view, it is possible to see a consistency between internal and external action.

Furthermore, on closer inspection of the negotiations, it is worth observing that, also on this occasion, the coherence and the consistency among the EU Member States were essential to achieving a result. At first, Italy and Poland were reluctant to the idea of a roadmap for phasing out fossil fuels. Then, an agreement was reached within the EU and all countries remained united. [68]

A joint effort is needed to ensure that, in the near future, environmental sustainability remains a priority while balancing the needs that arise at international level, both within the European Union and in the framework of its external action.

Abstract

The activities of the various EU institutional actors in the environmental field have evolved over time, leading to the adoption of an increasingly comprehensive body of legislation. However, as also pointed out in the European Green Deal, the Union's efforts can be thwarted by various processes of relocation and offshoring of firms and companies and their supply chains to countries with less stringent regulations, or by the replacement of EU products with imported products that are more carbon-intensive or otherwise have a greater life-cycle impact on the environment.

At the same time, especially in environmental matters, it is possible to highlight the Union's ability to trigger legislative and regulatory changes in other international organizations and non-Member States, or at least to influence multinational companies' adoption of its standards.

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[66] See the documents in https://cop30.br/en/news-about-cop30/cop30-documents.

[67] See, as an example of EU legal act aimed at combat environmental disinformation, Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information.

[68] About the building on the Team Europe approach, see also Council conclusions on Green Diplomacy as approved by the Council at its meeting held on 18 March 2024, in https://data.consilium.europa.eu/doc/document/ST-7865-2024-INIT/en/pdf.

This paper aims to evaluate the evolution of EU internal environmental policy and the current development of its external environmental action, also seeking to identify new scenarios in the relationship between internal and external environmental policies.

LA BASE GIURIDICA DELLA SOSTENIBILITÀ NEGLI ACCORDI DI LIBERO SCAMBIO DELL'UNIONE EUROPEA

Giulia D'Agnone[*]

SOMMARIO: 1. Introduzione. – 2. Il Parere 2/15 della Corte di giustizia dell'Unione Europea… – 3. *Segue*: … alla luce delle caratteristiche del CSS contenuto nell'accordo tra l'Unione Europea e Singapore. La prima generazione di capitoli sul commercio e lo sviluppo sostenibile. – 4. Il nuovo approccio ai capitoli sul commercio e lo sviluppo sostenibile… – 5. *Segue*: … e i suoi effetti sull'ambito di applicazione della politica commerciale comune. – 6. Osservazioni conclusive.

1. *Introduzione*

Era il 2001 quando il Consiglio europeo di Laeken riconosceva che «[l]'Europa deve assumere le proprie responsabilità nella gestione della globalizzazione", così che "il ruolo che essa deve svolgere è quello di una potenza […] che intende modificare i rapporti nel mondo […] che vuole iscrivere mondializzazione entro un quadro etico, in altri termini, calarla in un contesto di solidarietà e di sviluppo sostenibile» [1].

Quest'ultimo profilo, quello dello sviluppo sostenibile [2], è diventato centrale nella strategia di liberalizzazione degli scambi commerciali avviata a partire dal 2006 per il rafforzamento del ruolo dell'Unione Europea sulla scena mondiale. Con la Comunicazione *Europa Globale: Competere nel mondo* [3], la Direzione

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[1] Presidenza del Consiglio europeo, conclusioni, Riunione del Consiglio europeo di Laeken, Allegato 1, Dichiarazione di Laeken sul futuro dell'Unione Europea, SN 300/1/01 REV 1 del 14 e 15 dicembre 2001, p. 6.

[2] Nel presente scritto la sostenibilità sarà intesa con riferimento, principalmente, alla sua componente ambientale.

[3] Comunicazione della Commissione al Consiglio, al Parlamento europeo, al Comitato economico e sociale europeo e al Comitato delle regioni *Un'Europa globale – competere nel mondo* COM(2006) 567 def del 4 ottobre 2006.

Generale Commercio della Commissione europea ha infatti integrato l'agenda interna, delineata dalla rinnovata strategia di Lisbona [4], con un'agenda esterna per la creazione di opportunità in un'economia globalizzata, da realizzare, in particolare, tramite il potenziamento degli impegni in ambito OMC e la moltiplicazione degli accordi di libero scambio. Per quanto riguarda questi ultimi, la Commissione ha dichiarato che «[a]ll'atto di contemplare la stipula di nuovi FTA [Free Trade Agreements] dovremo fare in modo di rafforzare lo sviluppo sostenibile tramite i nostri rapporti commerciali bilaterali. In questo potrebbe rientrare l'inclusione di nuove disposizioni di cooperazione in ambiti concernenti gli standard lavorativi e la protezione dell'ambiente» [5].

In tale direzione, l'inclusione di capitoli dedicati allo sviluppo sostenibile rappresenta uno dei maggiori profili di novità degli accordi di libero scambio c.d. di nuova generazione, dei quali quello concluso con la Corea, nel 2011, rappresenta il primo di una lunga serie.

Tale approccio da parte delle istituzioni europee è stato d'altronde rafforzato dall'introduzione, ad opera del Trattato di Lisbona, di due disposizioni che costituiscono espressione della dimensione internazionale del quadro costituzionale europeo [6]: l'art. 3, par. 5, e l'art. 21 TUE. I due articoli fanno riferimento – talvolta in maniera poco chiara – a principi, valori e obiettivi che l'Unione è chiamata a perseguire non solo sul piano interno, bensì anche su quello esterno: tra essi risulta, per l'appunto, lo sviluppo sostenibile.

Si tratta tuttavia di comprendere in quale misura il perseguimento di obiettivi volti alla promozione dello sviluppo sostenibile negli accordi di libero scambio sia compatibile con gli obiettivi specifici attribuiti dai Trattati alla politica commerciale comune. Occorre, in altri termini, indagare se la base giuridica della politica commerciale comune possa ricomprendere anche misure di natura ambientale che non abbiano un nesso sufficientemente stretto con gli scambi commerciali, ovvero se tali misure debbano fondarsi su una base giuridica aggiuntiva rispetto a quella della politica commerciale comune.

La Corte di giustizia dell'Unione Europea ha già affrontato la questione quando è stata chiamata a pronunciarsi in merito alla compatibilità con il diritto

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[4] A fronte delle proposte avanzate dalla Commissione (Comunicazione al Consiglio europeo di primavera *Lavorare insieme per la crescita e l'occupazione – Il rilancio della strategia di Lisbona* COM(2005)24 del 2 febbraio 2005, a seguito del Consiglio europeo del marzo 2005 è stata rinnovata la strategia di Lisbona, l'ambizioso programma di riforme dell'Unione Europea avviato dal Consiglio europeo nel marzo del 2000.

[5] Comunicazione *Un'Europa globale – competere nel mondo*, cit., p. 11.

[6] Così E. Cannizzaro, *The Value of the EU International Values*, in W.T. Douma-C. Eckes-P. Van Elsuwege-E. Kassoti-A. Ott-R.A. Wessel (eds), *The Evolving Nature of EU External Relations Law*, T.M.C. Asser Press, The Hague, 2022, p. 4.

europeo dell'accordo commerciale di libero scambio negoziato tra l'Unione Europea e Singapore nel 2017 (*infra*, paragrafo 2) [7].

Nel frattempo, proprio a partire da tale anno, la Commissione ha avviato una riflessione sulla necessità di riforma dei capitoli sul commercio e lo sviluppo sostenibile (CSS) inclusi negli accordi di libero scambio e, nel 2022, con la Comunicazione *Il potere dei partenariati commerciali: insieme per una crescita economica verde e giusta* [8], ha annunciato l'intenzione di rafforzare e di garantire agli stessi maggiore efficacia. In effetti, negli ultimi accordi firmati, o in corso di negoziazione, sembrerebbero emergere delle nuove disposizioni, la cui compatibilità con la base giuridica della politica commerciale comune merita di essere approfondita.

L'analisi del presente contributo sarà condotta a partire dai rilievi svolti dalla Corte di giustizia europea in occasione del Parere 2/15 (paragrafo 2), alla luce delle caratteristiche e del contenuto dei capitoli sul commercio e lo sviluppo sostenibile inseriti negli accordi di libero scambio conclusi prima della citata Comunicazione della Commissione del 2022 (paragrafo 3). Si procederà dunque a verificare se e in quale misura le conclusioni relative all'ambito di applicazione della politica commerciale comune dell'Unione Europea, e al rapporto tra gli obiettivi specifici di questa politica con quelli generali in materia ambientale, possano essere valide con riferimento ai CSS di nuova generazione (paragrafi 4 e 5). Saranno quindi svolte delle considerazioni conclusive (paragrafo 6).

2. *Il Parere 2/15 della Corte di giustizia dell'Unione Europea…*

La questione della riconducibilità delle disposizioni contenute nel capitolo sul commercio e lo sviluppo sostenibile nell'ambito della politica commerciale comune rappresenta una delle questioni che sono state oggetto, come già anticipato, di una richiesta di parere avanzata alla Corte di giustizia dell'Unione Europea dalla Commissione in merito all'accordo di libero scambio negoziato tra l'Unione Europea e la Repubblica di Singapore. La questione ha riguardato, più precisamente, la competenza esclusiva dell'UE a firmare e a concludere l'accordo [9].

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[7] Corte giust., Parere 2/15 del 16 maggio 2017, ECLI:EU:C:2017:376.

[8] Comunicazione della Commissione al Parlamento europeo, al Consiglio, al Comitato economico e sociale europeo e al Comitato delle Regioni, *Il potere dei partenariati commerciali: insieme per una crescita economica verde e giusta* COM/2022/409 final del 22 giugno 2022.

[9] Per alcuni commenti iniziali, si veda C. Beaucillon, *Opinion 2/15: Sustainable Is the New Trade. Rethinking Coherence for the New Common Commercial Policy*, in *EP*, 2017, 3, p. 819

Ciò in quanto quello tra l'Unione Europea e Singapore costituisce uno dei primi accordi di libero scambio di nuova generazione, contenente, oltre alle tradizionali disposizioni riguardanti la riduzione dei dazi doganali e degli ostacoli non tariffari incidenti sugli scambi di merci e di servizi, disposizioni in materie connesse al commercio, come la tutela della proprietà intellettuale, gli investimenti, gli appalti pubblici, la concorrenza e lo sviluppo sostenibile.

La Corte ha dovuto perciò risolvere la questione riguardante la possibilità che obiettivi diversi dal commercio, come la promozione dello sviluppo sostenibile, siano perseguiti per mezzo della politica commerciale comune (di competenza esclusiva dell'Unione) o se, al contrario, per gli stessi sia necessario individuare una base giuridica *ad hoc* (per quanto riguarda i profili ambientali, l'art. 191 TFUE).

Per valutare se le disposizioni riguardanti lo sviluppo sostenibile contenute nel capitolo CSS dell'accordo fossero riconducibili o meno alla politica commerciale comune, i giudici europei hanno innanzitutto richiamato gli obiettivi generali dell'azione esterna dell'Unione Europea che – come già sopra ricordato – includono anche lo sviluppo sostenibile (art. 21, par. 2, lett. f), TUE) [10]. Hanno inoltre menzionato le clausole di integrazione di cui agli artt. 9 e 11 TFUE e l'art. 3, par. 5, TUE, che stabilisce un obbligo, a carico dell'Unione, di contribuire al «commercio libero ed equo» nella sua azione esterna.

Da tali disposizioni la Corte ha dedotto che «l'obiettivo dello sviluppo sostenibile costituisce ormai parte integrante della politica commerciale comune» [11], con la conseguenza che gli obiettivi generali enumerati negli articoli 3, par. 5, e 21 TUE completano il sistema di competenze dell'UE, in netto contrasto con la posizione dell'Avvocato generale Sharpston, secondo cui gli obiettivi generali «non possono incidere sulla portata della politica commerciale comune» [12].

Il criterio che ha indotto la Corte di giustizia dell'Unione Europea a concludere che le misure sullo sviluppo sostenibile previste dal CSS dell'accordo di libero scambio UE-Singapore rientrano nell'ambito di applicazione della

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ss.; C. Cellerino, *Il Parere 2/15 della Corte di giustizia sull'accordo di libero scambio UE-Singapore: luci e ombre*, in *Eurojus.it*, 25 luglio 2017, disponibile online; M. Cremona, *Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017*, in *Const. Law Rev.*, 2018, 1, p. 231 ss.; G. Marín Durán, *Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues*, in *Com. Mar. Law Rev.*, 2020, p. 1031 ss.; L. Prete, *The Constitutional Limits to the Choice of Mixity after EUSFTA, COTIF I, MPA Antarctic and COTIF II: Towards a More Constructive Discourse?*, in *Eur. Law Rev.*, 2020, 1, p. 113 ss.

[10] Parere 2/15, cit., punto 142.

[11] *Ivi*, punto 146.

[12] Conclusioni dell'Avvocato generale Sharpston del 21 dicembre 2016 nel Parere 2/15, ECLI:EU:C:2016:992, punto 495.

politica commerciale comune e che, di conseguenza, non necessitano di una base giuridica autonoma, è da individuare nell'esistenza di una stretta interconnessione tra la protezione ambientale e la politica commerciale comune. Secondo la Corte, le disposizioni sullo sviluppo sostenibile contenute nell'accordo non sarebbero volte a proteggere l'ambiente di per sé, ma definiscono piuttosto le modalità di svolgimento degli scambi commerciali, avendo così «effetti diretti e immediati su tali scambi» [13].

Questa conclusione è stata raggiunta sottolineando che «le disposizioni del capo 13 [relativo al commercio e allo sviluppo sostenibile] dell'accordo previsto hanno per obiettivo non già di regolamentare i livelli di protezione sociale e di tutela ambientale nel rispettivo territorio delle Parti, bensì di *disciplinare gli scambi commerciali tra l'Unione e la Repubblica di Singapore subordinando la liberalizzazione degli stessi alla condizione che le Parti rispettino i propri obblighi internazionali* in materia di protezione sociale dei lavoratori e di tutela dell'ambiente» [14].

Meno chiara pare invece la statuizione della Corte riguardo al «ruolo essenziale [del capitolo relativo al commercio e allo sviluppo sostenibile] nell'accordo previsto» [15]. I giudici europei, infatti, hanno evocato una terminologia tipica della politica di condizionalità, quella sugli elementi essenziali di un accordo; evocazione confermata tra l'altro anche dal successivo riferimento alla «norma di diritto internazionale consuetudinario codificata nell'articolo 60 della Convenzione di Vienna sul diritto dei trattati» per dimostrare la specificità del nesso che lega le disposizioni in materia di sviluppo sostenibile a quelle relative alla liberalizzazione del commercio [16].

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[13] Parere 2/15, cit., punto 157. Secondo la giurisprudenza della Corte di giustizia successiva all'entrata in vigore del Trattato di Lisbona, non sarebbe sufficiente che un atto possa avere delle implicazioni per il commercio a giustificarne la riconducibilità all'ambito di applicazione della politica commerciale comune; ciò si verificherà invece «nella misura in cui è destinato a promuover[e il commercio], agevolarlo o regolarlo e ha effetti diretti e immediati su di esso»: v. parere 2/15, cit., punto 36. V. anche Corte giust., sentenza del 18 luglio 2013, causa C-414/11, *Daiichi Sankyo e Sanofi-Aventis Deutschland*, ECLI:EU:C:2013:520, punto 51; sentenza del 22 ottobre 2013, causa C-137/12, *Commissione c. Consiglio*, ECLI:EU:C:2013:675, punto 57, nonché il parere 3/15 del 14 febbraio 2017, ECLI:EU:C:2017:114, punto 61.

[14] Parere 2/15, cit., punto 166. Corsivo aggiunto.

[15] *Ivi*, punto 162.

[16] Da un punto di vista formale, l'applicabilità dell'invocata Convenzione di Vienna sul diritto dei trattati (CVDT) del 1969 è discutibile. La Convenzione di Vienna del 1969, infatti, non vincola l'Unione Europea in quanto essa non ne fa parte (non potendo nemmeno diventarla, ai sensi dell'art. 83). Per quanto riguarda la Convenzione di Vienna sul diritto dei trattati tra Stati e organizzazioni internazionali e tra organizzazioni internazionali del 1986, essa non è ancora in vigore e, comunque, l'Unione Europea non vi ha aderito. Tuttavia, si ritiene che entrambe le Convenzioni riflettano il diritto internazionale consuetudinario.

Invero, in base al diritto internazionale, per poter terminare o sospendere un trattato in caso di violazione sostanziale di una delle parti, occorre primariamente dimostrare l'essenzialità della norma di diritto pattizio violata, da intendersi come «la violazione di una disposizione essenziale per la realizzazione dell'oggetto o dello scopo del trattato» [17]. Ebbene, nell'accordo in questione il carattere essenziale delle disposizioni riguardanti lo sviluppo sostenibile non emerge chiaramente, e non è così evidente che la violazione di una delle disposizioni del CSS possa legittimarne la sospensione, anche in ragione del fatto che dette disposizioni presentano una stretta interconnessione con il commercio, così da non avere, sostanzialmente, un ruolo autonomo. Non si comprende dunque sulla base di quali elementi la Corte di giustizia abbia dedotto che «la specificità del nesso che le disposizioni del capo 13 dell'accordo previsto presentano con gli scambi commerciali tra l'Unione e la Repubblica di Singapore deriva anche dal fatto che una violazione delle disposizioni in materia di protezione sociale dei lavoratori e di tutela dell'ambiente [...] autorizza l'altra Parte [...] a porre fine alla liberalizzazione di questi scambi prevista nelle altre disposizioni dell'accordo summenzionato, ovvero a sospenderla».

Nonostante ciò, la conclusione della Corte relativa all'obiettivo perseguito dalle disposizioni del CSS pare condivisibile: queste ultime (che saranno meglio analizzate *infra*, paragrafo 3) mirano infatti non tanto alla protezione dell'ambiente *ex se*, quanto alla regolamentazione (sostenibile) del commercio tra le parti. Con la diretta conseguenza che le disposizioni in materia di sviluppo sostenibile contenute nel CSS dell'accordo rientrano nell'ambito di applicazione della politica commerciale comune: l'art. 207 TFUE costituisce dunque, secondo la Corte, una base giuridica appropriata anche per tale componente dell'accordo, la cui conclusione è perciò di competenza esclusiva dell'Unione Europea.

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[17] Si veda l'art. 60, par. 3, lett. b), CVDT. Si vedano anche le perplessità al riguardo di L. Ankersmit, *Opinion 2/15: Adding Some Spice to the Trade & Environment Debat*e, in *Eur. Law Blog*, 15 giugno 2017, reperibile online. Sulle differenze tra l'invocazione del diritto internazionale e la clausola di non-esecuzione contenuta in accordi dell'Unione, v. E. Cannizzaro, *The Scope of EU Foreign Power: Is the EC Competent to Include Human Rights Clauses in Agreements Concluded with Third States?*, in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations*, Kluwer, The Hague, 2002, p. 297 ss., a p. 302, nota 18.

3. Segue: ... *alla luce delle caratteristiche del CSS contenuto nell'accordo tra l'Unione Europea e Singapore. La prima generazione di capitoli sul commercio e lo sviluppo sostenibile*

Per poter pienamente comprendere le conclusioni della Corte in merito all'accordo di libero scambio con Singapore, non si può prescindere da un'analisi più dettagliata delle disposizioni oggetto della pronuncia del Kirchberg.

Come è stato riassunto dalla Corte, «gli articoli da 13.6 a 13.10 dell'accordo previsto stabiliscono, oltre a diversi impegni delle Parti a cooperare, a scambiarsi informazioni e a tener conto delle informazioni scientifiche, l'obbligo per esse di attuare effettivamente gli accordi multilaterali in materia di ambiente cui esse aderiscono (articolo 13.6, paragrafo 2), di lottare contro il commercio del legname e dei prodotti derivati frutto di raccolta illegittima [articolo 13.7, lettera b)], di praticare una gestione sostenibile delle risorse alieutiche quale definita negli strumenti internazionali ratificati dalle Parti [articolo 13.8, lettera a)], di lottare contro la pesca illegale, non dichiarata e non regolamentata [articolo 13.8, lettera b)], nonché di adottare misure di monitoraggio e di controllo efficaci al fine di garantire il rispetto delle misure di conservazione [articolo 13.8, lettera c)]» [18].

In buona sostanza, le disposizioni citate farebbero sì che le parti dell'accordo si siano impegnate, «a garantire che gli scambi commerciali tra di esse abbiano luogo nel rispetto degli obblighi derivanti dalle convenzioni internazionali in materia […] di tutela dell'ambiente cui esse aderiscono».

Costituisce, questa, una delle caratteristiche tipiche della prima generazione di capitoli sul commercio e lo sviluppo sostenibile [19]. Si tratta dell'elemento della "contestualizzazione", attraverso il quale le parti riaffermano gli impegni internazionali esistenti, con un riferimento specifico agli accordi ambientali multilaterali (MEA), come la Convenzione sulla Diversità Biologica [20], il Protocollo di Kyoto [21], l'Accordo di Parigi [22]. Il riferimento è ai MEA già ratificati da ciascuna parte dell'accordo bilaterale; di conseguenza, si tratta di obblighi

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[18] Parere 2/15, cit., punto 150.

[19] Sugli elementi dei capitoli sul commercio e lo sviluppo sostenibile v., per un maggiore approfondimento, G. Marín Durán, *The EU's Evolving Approach to Environmental Sustainability in Free Trade Agreements*, cit., p. 3.

[20] Convenzione sulla Diversità Biologica (CBD) del 5 giugno 1992, in 1760 U.N.T.S. 69.

[21] Protocollo di Kyoto alla Convenzione quadro delle Nazioni Unite sui cambiamenti climatici dell'11 dicembre 1997, in 2303 U.N.T.S 162.

[22] Accordo di Parigi del 12 dicembre 2015, in 3156 U.N.T.S. 79. La lista completa degli accordi multilaterali può essere rinvenuta in G. Marín Durán, *The EU's Evolving Approach to Environmental Sustainability in Free Trade Agreements*, in *UCL Research Paper Series* n. 3/2023, reperibile online, p. 3.

già assunti in fori multilaterali da ciascuna delle parti dell'accordo bilaterale, le quali perciò non vedono accrescere il novero degli obblighi su di esse gravanti. Difetta, peraltro, un elenco di trattati multilaterali da ratificare e attuare, valido per tutti gli accordi di libero scambio, a differenza degli impegni in materia di protezione sociale, che invece contemplano una lista di convenzioni multilaterali che tutte le parti di accordi di libero scambio sono tenute ad osservare.

In aggiunta, per quanto riguarda l'accordo di libero scambio UE-Singapore, la Corte ha sottolineato che nel capitolo sulla sostenibilità in esso contenuto è fatta salva l'applicazione di meccanismi di interpretazione, di mediazione e di risoluzione delle controversie esterni [23], da ciò deducendo che il CSS in questione «non concerne né la portata delle convenzioni internazionali cui esso si riferisce, né le competenze dell'Unione o degli Stati membri relative a tali convenzioni. Per contro, detto capo presenta un nesso specifico con gli scambi commerciali tra l'Unione e la Repubblica di Singapore» [24].

La circostanza che l'accordo UE-Singapore non estende il novero degli obblighi in materia ambientale in capo alle parti, bensì si limita a riaffermare gli impegni che ciascuna di esse ha contratto sul piano multilaterale, è dunque enfatizzata dalla Corte per dimostrare che le disposizioni in materia di tutela ambientale contenute nel capitolo relativo al commercio e allo sviluppo sostenibile «assicur[ano] che [gli scambi] avvengano nel rispetto delle convenzioni sopra citate» e sono perciò idonee ad avere effetti diretti ed immediati sugli scambi di essi [25].

Tale ultima conclusione è rafforzata dal richiamo della clausola (anch'essa tipica dei CSS) relativa al c.d. "*level playing field*", contenente l'impegno delle parti a non abbassare gli standard ambientali per favorire il commercio o attrarre investimenti, e a garantire un'efficace attuazione di tali standard. Queste clausole sono state criticate perché «do not prohibit any derogation or enforcement failure of domestic environmental standards, but only insofar as actual or intended effects on bilateral trade (or investment) can be shown, making a violation thereof harder to establish» [26].

Secondo i giudici europei una simile clausola dimostrerebbe come le disposizioni relative alla protezione ambientale dell'accordo di libero scambio UE-Singapore abbiano effetti immediati sugli scambi commerciali, in quanto volte a «non incoraggiare il commercio tramite un abbassamento dei livelli di

[23] Parere 2/15, cit., punto 154.

[24] *Ivi*, punto 155.

[25] *Ivi*, punti 156 e 157.

[26] G. Marín Durán, *The EU's Evolving Approach to Environmental Sustainability in Free Trade Agreements*, cit., p. 4.

protezione sociale e di tutela ambientale nel proprio rispettivo territorio al di sotto degli standard previsti dagli impegni internazionali e, dall'altro, a non attuare tali standard in modo protezionistico» [27].

La Corte, dunque, ha dedotto lo stretto rapporto esistente tra le disposizioni a carattere ambientale e quelle di natura commerciale dalla circostanza che, sostanzialmente, le clausole contenute nel capitolo sullo sviluppo sostenibile sopra richiamate non estendono gli obblighi ambientali già esistenti in capo alle parti, le quali rimangono vincolate solo a quelli già assunti sul piano multilaterale, nonché dal fatto che detti impegni avrebbero l'effetto di disciplinare gli scambi commerciali tra le parti.

Queste disposizioni che, con alcune fisiologiche differenze, sono riprodotte anche nei capitoli sul commercio e lo sviluppo sostenibile inseriti in altri accordi di libero scambio di prima generazione, sono in genere accompagnate da una terza categoria di disposizioni, che riguarda i livelli attuali e futuri di protezione ambientale: ciascuna parte si impegna, in sostanza, a garantire che la propria legislazione interna assicuri elevati livelli di protezione ambientale e che gli stessi siano assicurati nel tempo.

Oltre a queste tipologie sostanziali di clausole, i primi capitoli sul commercio e lo sviluppo sostenibile contengono anche meccanismi istituzionali predisposti per monitorare l'attuazione di tali capitoli. Tuttavia, proprio il profilo dell'*enforcement* ha sollevato le principali perplessità in dottrina. Ciò per due ordini di motivi: che i CSS di prima generazione non prevedono sanzioni o altre misure in caso di violazione degli obblighi in essi contenuti; e che gli stessi non sono soggetti alle procedure di risoluzione delle controversie previste per le violazioni degli altri obblighi degli accordi [28].

L'assenza di meccanismi sanzionatori per la violazione di impegni di natura ambientale e, più in generale, volti a garantire la sostenibilità, differenzia profondamente i capitoli sullo sviluppo sostenibile dalla ben nota condizionalità democratica e sui diritti umani.

Quest'ultima si caratterizza, come già sopra ricordato, per la presenza, negli accordi commerciali o di cooperazione allo sviluppo dell'UE, della c.d. "clausola sull'elemento essenziale", che permette di sospendere o terminare l'accordo in questione nel caso in cui si assista ad una violazione sostanziale dello stesso. La situazione è diversa quando si tratta di disposizioni di natura ambientale, poiché queste non sono qualificate come elementi essenziali degli accordi

[27] Parere 2/15, cit., punto 158.

[28] V. A. Marx-F. Ebert-N. Hachez-J. Wouters, *Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements*, Leuven Centre for Global Governance Studies, Leuven, 2017.

di libero scambio, né esiste una clausola che consenta di sospendere o terminare gli accordi in caso di violazioni delle stesse [29]. Al contrario, è stato osservato che «the main value added of TSD chapters is to enhance dialogue and cooperation in order to attain sustainable trade objectives» [30].

A ciò si aggiunga che, come anticipato, i CSS sono soggetti a procedure *ad hoc*, ossia procedure specifiche, alternative ai meccanismi di risoluzione delle controversie usati per far rispettare tutti gli altri obblighi degli accordi di libero scambio [31]. Mentre le violazioni di questi ultimi di solito sono accertate mediante decisioni vincolanti per le parti, emesse da organi indipendenti, i capitoli sul commercio e lo sviluppo sostenibile stabiliscono che se una delle parti sospetta che l'altra stia violando gli impegni in esso contenuti, può avviare consultazioni intergovernative e, in caso di fallimento, può essere convocato un gruppo di esperti per determinare se una parte è inadempiente e suggerire possibili soluzioni. Peraltro, l'attuazione delle misure indicate dal panel di esperti è rimessa alla discrezionalità degli Stati.

Questo meccanismo, che è non giudiziario e si basa principalmente sul dialogo tra le parti, è stato molto criticato poiché dipende inevitabilmente molto dalla cooperazione della parte che non intende o ha difficoltà a rispettare gli impegni [32].

4. *Il nuovo approccio ai capitoli sul commercio e lo sviluppo sostenibile…*

Alla luce delle caratteristiche delle disposizioni in materia ambientale contenute nei capitoli sul commercio e lo sviluppo sostenibile di prima generazione,

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[29] Ciò non esclude, tuttavia, che tali accordi possano essere sospesi o terminati ai sensi del diritto internazionale. Nel Parere 2/15, si è già detto, la Corte di giustizia ha infatti ricordato la possibilità di sospendere o terminare l'accordo ai sensi dell'art. 60 della Convenzione di Vienna sul diritto dei trattati in caso di violazione degli obblighi che garantiscono la protezione dell'ambiente, cfr. Parere 2/15, cit., punto 161.

[30] I. Borchert-P. Conconi-M. Di Ubaldo-C. Herghelegiu, *The Pursuit of Non-Trade Policy Objectives in EU Trade Policy*, in *W.T.R.*, 20, 2021, p. 623 ss., a p. 631.

[31] V. ad esempio l'art. 285, par. 5, dell'accordo tra l'Unione Europea e la Comunità andina, secondo il quale «This Title is not subject to Title XII (Dispute Settlement)»; v. anche l'art. 284, par. 4, dell'Accordo tra l'UE e l'America centrale «The Parties shall not have recourse to dispute settlement procedures under Title X (Dispute Settlement) of Part IV of this Agreement and to the Mediation Mechanism for Non-Tariff Measures under Title XI (Mediation Mechanism for Non-Tariff Measures) of Part IV of this Agreement for matters arising under this Title».

[32] V., a titolo esemplificativo, M. Bronckers-G. Gruni, *Retooling the Sustainability Standards in EU Free Trade Agreements*, in *Jour. Int. Ec. Law*, 24, 2021, p. 1 ss. Si veda altresì il capitolo scritto da L. Pantaleo-F. Tomazini de Souza-A. Brusca, *Towards a New Normative Model: Reassessing EU External Strategies for Sustainable Development*, in questo volume.

così come sopra descritte, le argomentazioni della Corte nel parere 2/15 paiono dunque condivisibili.

Si tratta tuttavia di comprendere in quali circostanze e a quali condizioni le norme in materia ambientale contenute nei CSS possano fuoriuscire dall'ambito di applicazione della politica commerciale comune.

La questione sorge in ragione del fatto che, negli ultimi anni, la Commissione ha annunciato la volontà di modificare l'approccio dell'Unione Europea allo sviluppo sostenibile negli accordi di libero scambio, rafforzandolo. Come anticipato, già nel 2017, in un documento non ufficiale [33], la Commissione aveva manifestato dei dubbi riguardo all'approccio fino ad allora seguito per mezzo dei capitoli sul commercio e lo sviluppo sostenibile; e, nel 2020, il Commissario per il commercio, vicepresidente esecutivo Dombrovskis, ha proposto di includere il rispetto dell'Accordo di Parigi sui cambiamenti climatici del 2016 tra gli elementi essenziali dei futuri accordi [34]. Inoltre, nel suo riesame della politica commerciale del 18 febbraio 2021, la Commissione ha annunciato la volontà di «strengthen the enforcement of trade and sustainable development commitments» così che «[f]urther actions will be considered […] including the scope of commitments, monitoring mechanisms, the possibility of sanctions for non-compliance, the essential elements clause as well as the institutional set-up and resources required» [35].

Solo nel giugno 2022 la Commissione europea, attraverso la Comunicazione *Il potere dei partenariati commerciali: insieme per una crescita economica verde e giusta* ha annunciato ufficialmente un nuovo approccio allo sviluppo sostenibile, volto in particolar modo a rafforzare l'attuazione e l'effettività delle disposizioni contenute nei CSS, attraverso l'individuazione di sei priorità politiche: 1) la necessità di essere più proattivi nella cooperazione con i partner; 2) il rafforzamento dell'approccio specifico per ciascun paese; 3) l'integrazione della sostenibilità al di là del capitolo sul commercio e lo sviluppo sostenibile contenuto negli accordi commerciali; 4) un maggiore monitoraggio dell'attuazione degli impegni in materia di CSS; 5) il rafforzamento del ruolo della società civile; e 6) un'applicazione rafforzata tramite l'imposizione di sanzioni commerciali come misura di *extrema ratio* [36].

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[33] Commissione europea, Non-paper on Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs).

[34] Comitato sul commercio internazionale, audizione del Vicepresidente Valdis Dombrovskis, 2 ottobre 2020, reperibile online.

[35] Comunicazione della Commissione al Parlamento europeo, al Consiglio, al Comitato economico e sociale e al Comitato delle Regioni *Riesame della politica commerciale -Una politica commerciale aperta, sostenibile e assertiva* COM(2021) 497 final del 18 febbraio 2021. Per un primo commento v. M. Colli Vignarelli, *The European Commission Trade Policy Review: The Effectiveness of Sustainable Development Chapters in EU FTAs*, in *EP*, 2021, p. 1.

[36] Comunicazione *Il potere dei partenariati commerciali: insieme per una crescita economica verde e giusta*, cit.

Ai nostri fini, sono essenzialmente tre le modifiche ai capitoli sul commercio e lo sviluppo sostenibile di maggiore interesse: i) l’estensione del meccanismo generale di risoluzione delle controversie ai capitoli sul commercio e lo sviluppo sostenibile; ii) la previsione della possibilità di stabilire sanzioni commerciali in caso di mancato rispetto degli obblighi che vanificano l’oggetto e lo scopo dell’Accordo di Parigi sui cambiamenti climatici; iii) l’inserimento del rispetto dello stesso (ed, eventualmente, della Convenzione sulla biodiversità) tra gli elementi essenziali degli accordi di libero scambio [37].

Ad inaugurare il nuovo approccio europeo al commercio e allo sviluppo sostenibile annunciato nella citata Comunicazione è stato l’accordo commerciale con la Nuova Zelanda concluso nel 2024 [38], il quale è stato presentato come esempio di una nuova generazione di accordi commerciali, contenente «the most ambitious sustainability commitments in any trade agreement ever» [39].

In effetti, tale accordo rappresenta un notevole passo avanti nella ricerca di una maggiore effettività delle disposizioni ambientali contenute nei CSS; al tempo stesso, non mancano alcuni elementi di divergenza rispetto a quanto proclamato dalla Commissione.

Prima di tutto, l’assenza di una clausola che definisca espressamente la protezione ambientale quale elemento essenziale dell’accordo.

Nondimeno, altri accordi (seppur a carattere non esclusivamente commerciale [40]), di recente negoziazione o conclusione, inseriscono, seppur con alcuni limiti, il rispetto di trattati multilaterali in materia ambientale tra gli elementi essenziali degli stessi. Ne costituisce un esempio l’accordo commerciale e di

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[37] Alla nota 30 della Comunicazione si legge che «Basandosi sull’elaborazione di un futuro e solido quadro globale in materia di biodiversità, in particolare per quanto riguarda la definizione degli obiettivi di biodiversità e di un meccanismo adeguato per la rendicontazione e il monitoraggio internazionali, la Commissione valuterà la possibilità di inserire la convenzione sulla diversità biologica in questo nuovo approccio».

[38] In GU L 2024/866 del 25 marzo 2024. L’accordo è stato concluso dall’Unione mediante decisione (UE) 2024/244 del Consiglio ed è entrato in vigore il 1° maggio 2024. Cfr. Decisione (UE) 2024/244 del Consiglio, del 27 novembre 2023, relativa alla conclusione, a nome dell’Unione, dell’accordo di libero scambio tra l’Unione Europea e la Nuova Zelanda, in GU L 244 del 28 febbraio 2024. Per dei primi commenti all’accordo v. in particolare G. D’Agnone, *Sviluppo sostenibile: una condizionalità ambientale… soft? Alcune brevi osservazioni sull’accordo commerciale negoziato tra l’Unione europea e la Nuova Zelanda*, in *BlogDUE*, 11 settembre 2022, reperibile online; C. Ceretelli, *EU-New Zealand FTA: Towards a New Approach in the Enforcement of Trade and Sustainable Development Obligations*, in *EJIL: Talk!*, 28 settembre 2022, reperibile online; S. Kelly-M. Doidge, *Beyond Trade: The European Union-New Zealand Free Trade Agreement*, in *Aus. and New Zea. Journ. Eur. Stud.*, 15, 2023, p. 23 ss.

[39] Comunicato stampa del 30 giugno 2022, *EU-New Zealand Trade Agreement: Unlocking Sustainable Economic Growth*, reperibile online.

[40] Gli accordi di libero scambio costituiscono infatti, talvolta, parte delle relazioni bilaterali globali disciplinate da accordi quadro o da accordi di partenariato e cooperazione.

cooperazione concluso dall'Unione Europea con il Regno Unito [41], il quale indica tra gli elementi essenziali il rispetto dell'Accordo di Parigi e della Convenzione quadro delle Nazioni Unite sui cambiamenti climatici (UNFCCC), nonché l'obbligo di astenersi da atti o omissioni che possano vanificare nella sostanza l'oggetto e la finalità dell'Accordo sul clima del 2016 [42].

Anche l'accordo con il MERCOSUR, siglato il 17 gennaio 2026, contiene una clausola sugli elementi essenziali, che stabilisce l'obbligo, per ciascuno dei due partners commerciali, di rimanere parte della convenzione quadro delle Nazioni Unite sui cambiamenti climatici e dell'Accordo di Parigi [43].

Per quanto riguarda altri accordi di libero scambio in corso di negoziazione, non è esclusa la possibilità che sia inserito un riferimento a strumenti di protezione ambientale nella clausola sugli elementi essenziali [44].

Rileva, peraltro, che la clausola sugli elementi essenziali che include tra questi lo sviluppo sostenibile, è generalmente accompagnata da una clausola di non esecuzione [45]. Le due clausole non sono, tuttavia, sempre compresenti nei capitoli di nuova generazione.

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[41] Accordo sugli scambi commerciali e la cooperazione tra l'Unione Europea e la Comunità Europea dell'energia atomica, da una parte, e il Regno Unito di Gran Bretagna e Irlanda del nord, dall'altra, in GU L 149 del 30 aprile 2021. Per dei commenti v. W. Gehring Markus, *Analysis 5 of the Brexit Deal: Environment and Climate Provisions*, in *EU Law Analysis*, 22 gennaio 2021, reperibile online; A. Muccione, *La tutela dell'ambiente e del clima*, in G. Adinolfi-A.L. Malatesta-M. Vellano (a cura di) *L'accordo sugli scambi commerciali e la cooperazione tra l'Unione Europea e il Regno Unito*, Giappichelli Editore, Torino, 2022, p. 149 ss.

[42] V. art. 771 dell'accordo sugli scambi commerciali e la cooperazione tra l'Unione Europea e la Comunità Europea dell'energia atomica, da una parte, e il Regno Unito di Gran Bretagna e Irlanda del nord, dall'altra, cit.

[43] Commissione europea, *The upgraded EU-Mercosur agreement – what is new compared to the 2019 agreement* del 10 dicembre 2024, reperibile online: «The inclusion of the Paris Agreement as an essential element of the EU-Mercosur agreement is a key element of the new deal. It will allow the suspension of the agreement if a Party leaves the Paris Agreement and also if it stops being a party "in good faith", i.e. undermines the Paris Agreement from within. This result is, in substance, comparable to the EU-New Zealand or EU-UK agreements and would make the EU-Mercosur agreement only the third EU agreement with such a clause».

[44] V. ad esempio la dichiarazione congiunta sul commercio e lo sviluppo sostenibile dell'Unione Europea e del Cile del 2 dicembre 2022: «Without prejudice to the outcome of the review, the Parties will also consider the possibility of including the Paris Agreement on Climate Change as an essential element of the Agreements».

[45] V. ad esempio l'accordo tra l'Unione Europea e il Regno Unito, il cui art. 772, intitolato "Adempimento degli obblighi descritti come elementi essenziali", prescrive che «Se una delle parti ritiene che vi sia stata una grave e sostanziale inosservanza da parte dell'altra parte di uno degli obblighi descritti come elementi essenziali ..., può decidere di risolvere o sospendere l'applicazione del presente accordo o di qualsiasi accordo complementare in tutto o in parte» e che un atto o un'omissione che sostanzialmente vanifica l'oggetto e lo scopo dell'accordo di Parigi deve sempre essere considerato come grave e sostanziale inadempimento ai fini dello stesso articolo.

Ne costituisce un esempio il già citato accordo di libero scambio concluso con la Nuova Zelanda il quale, pur non inserendo il rispetto dell'Accordo di Parigi tra gli elementi essenziali, nondimeno prevede la possibilità che siano adottate misure appropriate «in the event of an act or omission that *materially defeats the object and purpose* of the Paris Agreement» [46], conformemente alla procedura disciplinata dall'art. 54 del più ampio accordo di partenariato concluso tra le parti.

E tuttavia, in riferimento agli obblighi contenuti nel CSS, la clausola di non esecuzione si riferisce generalmente solo – per quel che concerne lo sviluppo sostenibile – al caso in cui si assista ad una violazione dell'obbligo di astenersi da qualsiasi azione o omissione che pregiudichi materialmente l'oggetto e lo scopo dell'Accordo di Parigi [47].

Non sarà, dunque, qualsiasi violazione di tale Accordo a legittimare il ricorso alle sanzioni previste, bensì solo quelle idonee a vanificarne l'oggetto e lo scopo.

5. Segue: *... e i suoi effetti sull'ambito di applicazione della politica commerciale comune*

Pur non registrandosi ancora una prassi consistente relativa ai nuovi capitoli sul commercio e lo sviluppo sostenibile, nondimeno si intravedono – anche alla luce di quanto appena detto – alcuni elementi comuni che spingono ad una più ampia riflessione circa l'impatto del mutato approccio europeo ai CSS sull'ambito di applicazione della politica commerciale comune.

Come è emerso dai paragrafi precedenti, nel Parere 2/15 la Corte di giustizia dell'Unione Europea ha concluso che l'art. 207 TFUE costituisce una base giuridica il cui ambito di applicazione è sufficientemente ampio da includere le disposizioni sullo sviluppo sostenibile contenute nel CSS dell'accordo UE-Singapore. Tuttavia, le disposizioni prese in considerazione nel Parere reso nel 2017 hanno un contenuto sensibilmente diverso da quello dei CSS che attuano il nuovo approccio della Commissione europea.

Ebbene, le argomentazioni utilizzate dai giudici europei per stabilire che l'art. 207 TFUE rappresenta la corretta base giuridica anche per l'inclusione di disposizioni del CSS in materia di protezione ambientale possono essere estese anche alle disposizioni incluse nei nuovi capitoli sul commercio e lo sviluppo sostenibile?

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[46] Art. 27.4, par. 3, dell'accordo. Corsivo aggiunto.

[47] Così l'art. 764, par. 1, dell'accordo UE-Regno Unito e l'art. 27.4, par. 3, dell'accordo UE-Nuova Zelanda.

Per rispondere a tale quesito, occorre verificare se, e in quale misura, il nuovo approccio europeo ai capitoli sul commercio e lo sviluppo sostenibile è in grado di alterare il rapporto di stretta interconnessione tra le disposizioni in materia di protezione dell'ambiente e il commercio. Si tratta, in altri termini, di stabilire se queste ultime costituiscano una componente autonoma e non più ancillare rispetto a quella relativa al commercio, e se per l'effetto debbano essere fondate su di una base giuridica distinta.

L'analisi è tutt'altro che agevole, poiché definire in che misura gli obiettivi generali dell'azione esterna dell'Unione completino gli obiettivi specifici di ciascuna delle politiche materiali europee e quando, al contrario, debbano essere considerati autonomi, è una questione piuttosto complessa [48].

Occorre infatti ricordare che la Corte di giustizia ha generalmente adottato un approccio olistico nella determinazione delle competenze esterne dell'UE e ha riconosciuto che l'art. 21, par. 2, TUE ha l'effetto di consentire a una determinata politica esterna dell'Unione Europea di perseguire anche obiettivi diversi, vale a dire gli otto obiettivi generali per l'azione esterna contenuti nel summenzionato articolo, considerando che solo "eccezionalmente" è consentito il ricorso a basi giuridiche multiple [49]. Ciò è possibile attribuendo rilevanza allo scopo e al contenuto della misura, il c.d. "test del centro di gravità". In base a tale test, se una misura persegue un duplice scopo o ha una duplice componente, e una di queste componenti o finalità è predominante rispetto all'altra, la misura può (e deve) essere fondata su un'unica base giuridica. Al contrario, se non è possibile individuare una componente principale, il ricorso a più basi giuridiche non solo è consentito, ma è anche dovuto in base al principio di attribuzione.

I criteri ermeneutici per individuare il centro di gravità di un accordo internazionale non sono tuttavia così chiari e lineari in dottrina e nella stessa giurisprudenza della Corte.

Da un lato, si potrebbe perciò sostenere che la presenza di una clausola sull'elemento essenziale riguardante il rispetto di obblighi di natura ambientale, combinata con una clausola di non esecuzione (seppur attenuata, nel senso esposto al paragrafo precedente), sarebbe in grado di trasformare la tutela ambientale (*rectius* il rispetto dell'Accordo di Parigi) in un obiettivo fondamentale e autonomo dei nuovi accordi di libero scambio conclusi dall'Unione Europea.

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[48] V. Kube, *The European Union's External Human Rights Commitment: What is the Legal Value of Article 21 TEU?*, in *EUI Department of Law Research Paper* n. 2016/10.

[49] Tuttavia, se si sposa l'approccio olistico adottato dalla Corte di giustizia nel Parere 2/15, questo «would then require to determine the functional link between a measure and the competence to which it pertains on the basis of all the objectives: the general objectives of the external action and the more specific objectives assigned to its single areas»: v. E. Cannizzaro, *The Value of the EU International Values*, cit.

Mutatis mutandis, le osservazioni sollevate in passato sulla condizionalità dei diritti umani varrebbero anche con riguardo alla protezione dell'ambiente [50].

In effetti, il solo fatto che una parte di un accordo di libero scambio non rispetti gli obblighi dell'Accordo di Parigi potrebbe di per sé indurre l'Unione a ricorrere, tra gli altri mezzi, alla sospensione delle relazioni commerciali con il Paese partner, indipendentemente dall'impatto della sua condotta sugli obblighi commerciali nei confronti dell'UE.

Ciò differenzia profondamente i nuovi CSS da quelli di prima generazione. Per questi ultimi è infatti necessario dimostrare l'incidenza della mancata osservanza degli obblighi a carattere ambientale sugli scambi o sugli investimenti; al contrario, seppur difficile da dimostrare, e seppur valevole solo per violazioni particolarmente gravi, l'inosservanza degli obblighi derivanti dall'Accordo di Parigi, indipendentemente dalle possibili ripercussioni sugli scambi commerciali, è di per sé idonea a legittimare la sospensione dell'accordo o a terminarlo.

Ciò testimonia con evidenza che l'interrelazione tra commercio e protezione ambientale è in qualche misura interrotta, e che gli obiettivi ambientali non integrano più gli obiettivi propri della politica commerciale, ma hanno assunto un ruolo indipendente ed autonomo che, per l'effetto, farebbe sì che tali disposizioni non possano più trovare fondamento nell'art. 207 TFUE, e che sia necessaria la previsione di una base giuridica *ad hoc*: nello specifico, l'art. 191, par. 4, TFUE [51].

In senso contrario potrebbe obiettarsi che la Corte di giustizia, nel caso *Portogallo c. Consiglio*, ha ritenuto che la clausola sull'elemento essenziale in materia di diritti umani inserita nell'accordo di cooperazione tra la Comunità europea e la Repubblica dell'India fosse legittimamente fondata sulla base giuridica della cooperazione allo sviluppo così che, in buona sostanza, l'obiettivo di tutela e di protezione dei diritti umani è stato ritenuto compatibile e legittimamente perseguibile attraverso l'esercizio di tale competenza.

Tuttavia, nel caso in questione difettava una clausola di non esecuzione. E se, come già ricordato, ciò non esclude che in caso di violazione di elementi essenziali

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[50] «The essential character of the obligation to respect human rights undoubtedly renders more crucial the demand to identify an autonomous legal basis. There is a certain paradox on the conclusion that fundamental rights clause might occupy an ancillary position amongst the objectives of an agreement, so that a specific human rights' legal basis needs not be identified for its conclusion, while at the same time insisting that breach of the clause is of such fundamental importance as to entitle the other party thereto to suspend or terminate the agreement»: v. E. Cannizzaro, *The Scope of the EU Foreign Powers. Is the EC Competent to Conclude Agreements with Third States Including Human Rights Clauses?*, cit.

[51] Il quarto paragrafo dell'articolo prevede infatti che «Nell'ambito delle rispettive competenze, l'Unione e gli Stati membri collaborano con i paesi terzi e con le competenti organizzazioni internazionali. Le modalità della cooperazione dell'Unione possono formare oggetto di accordi tra questa ed i terzi interessati».

l'accordo potesse essere comunque sospeso o terminato ai sensi del diritto internazionale, nondimeno l'assenza di una clausola di non esecuzione ha inevitabilmente ridimensionato la portata di quella sugli elementi essenziali [52].

A ciò si aggiunga la possibilità che il test di gravità sia inteso ponendo enfasi sull'accordo inteso nel suo complesso, cioè sull'obiettivo generale dello stesso, senza essere "scomposto", come ad esempio sostenuto dall'Avvocato generale Sharpston nelle sue conclusioni relative al Parere 2/15 [53].

In questo caso, l'accordo non deve essere frammentato in più segmenti per valutare se ciascuno di essi condivide o meno l'obiettivo principale: si darà perciò rilievo agli ulteriori obiettivi solo se si discostano palesemente da quello principale, che viene spesso isolato, a volte ricorrendo a un criterio qualitativo, altre ad uno quantitativo [54]. In base a questo approccio, anche le disposizioni dei capitoli sul commercio e lo sviluppo sostenibile di nuova generazione, nonostante la loro sensibile differenza rispetto alle clausole dell'accordo di libero scambio UE-Singapore, potrebbero essere ritenute compatibili con la base giuridica dell'art. 207 TFUE.

Non è dunque agevole stabilire in astratto se, in futuro, l'inclusione di CSS di ultima generazione negli accordi di libero scambio dell'Unione possa implicare l'aggiunta di un base giuridica specifica a fondamento delle misure a carattere ambientale.

6. *Osservazioni conclusive*

Il nuovo approccio dell'Unione Europea nei confronti dello sviluppo sostenibile, inaugurato con l'accordo concluso con la Nuova Zelanda, rappresenta un

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[52] Corte giust., sentenza del 3 dicembre 1996, causa C-268/94, *Portogallo c. Consiglio*, ECLI: EU:C:1996:461, punto 24: «il mero fatto che l'art. 1, n. 1, dell'accordo disponga che il rispetto dei diritti dell'uomo e dei principi democratici «costituisce un elemento fondamentale» dell'accordo non consente di concludere che esso esorbita dall'obiettivo enunciato dall'art. 130 U, n. 2, del Trattato. Infatti, lo stesso testo di quest'ultima disposizione dimostra l'importanza che va attribuita al rispetto dei diritti dell'uomo e dei principi democratici. Ne consegue, in particolare, che la politica di cooperazione dello sviluppo si deve adattare ad esso».

[53] V. Conclusioni dell'Avvocato generale Sharpston del 21 dicembre 2016, cit., punti 497-499. Secondo l'Avvocato generale, il capitolo 13 dell'Accordo di libero scambio UE-Singapore ha quattro componenti, e che «Nessuna di dette componenti può essere considerata solo un'integrazione necessaria per garantire l'efficacia delle altre componenti dell'ALS/UE-S o del capo 13, né si può ritenere che esse abbiano una portata estremamente ridotta. […] Ne consegue che la decisione dell'Unione europea di assumere impegni per ognuna delle quattro componenti deve essere fondata su una base giuridica diversa».

[54] V. M.E. Bartoloni, *La procedura per la conclusione degli accordi internazionali*, in M.E. Bartoloni-S. Poli (a cura di), *L'Azione esterna dell'Unione europea*, Editoriale Scientifica, Napoli, 2021, p. 74.

indubbio passo avanti verso l'effettiva promozione della tutela ambientale nella dimensione esterna dell'Unione Europea, che negli anni passati ha avuto natura essenzialmente programmatica o comunque scarsamente prescrittiva. Si tratta dunque di comprendere se, anche alla luce delle nuove caratteristiche dei CSS, le disposizioni di questi ultimi saranno considerate riconducibili all'ambito di applicazione della politica commerciale comune.

È evidente che, nel caso del Parere 2/15, la decisione della Corte di giustizia abbia dovuto tener conto che la mancata riconducibilità delle disposizioni del CSS all'ambito di applicazione della politica commerciale comune avrebbe inciso sull'esclusività della competenza europea a concludere l'accordo in questione.

In principio è dunque possibile che, in presenza di circostanze diverse, e alla luce delle riscontrate differenze che presentano le disposizioni dei CSS di nuova generazione, il giudice del Kirchberg possa giungere a nuove considerazioni sull'ambito di applicazione della politica commerciale comune.

Al momento, come è noto, la Corte di giustizia non è stata nuovamente interrogata sulla questione e, comunque, un'eventuale pronuncia sarebbe inevitabilmente condizionata dalla concreta formulazione delle disposizioni del singolo CSS in questione, per cui non è possibile giungere a conclusioni generalizzate e astratte, valevoli per tutti i capitoli di nuova generazione.

La sensazione è tuttavia che i giudici europei possano essere tentati dalla conferma non solo di un'interpretazione estensiva dell'ambito di applicazione della politica commerciale comune [55], ma anche di un approccio che tende a limitare la moltiplicazione delle basi giuridiche, e che dunque le considerazioni svolte nella giurisprudenza precedente possano essere eventualmente replicate anche con riguardo alla politica di promozione dello sviluppo sostenibile attuata attraverso i nuovi accordi di libero scambio dell'UE.

Certo è che, in tal caso, la Corte sarà chiamata a chiarire e a giustificare in modo rigoroso il nesso funzionale di un'eventuale clausola di non esecuzione e/o una clausola sugli elementi essenziali in materia ambientale con gli obiettivi della politica commerciale comune.

[55] V. già Corte giust., sentenza del 26 marzo 1987, causa 45/86, *Commissione c. Consiglio*, ECLI:EU:C:1987:163, punto 20. In detta pronuncia, la Corte ha statuito che «la politica commerciale comune non potrebbe più essere seguita efficacemente se la Comunità non potesse disporre del pari di mezzi d'azione più complessi rispetto agli strumenti destinati ad incidere unicamente sugli aspetti tradizionali del commercio estero».

SUSTAINABILITY IN EU INTERNATIONAL INVESTMENT AGREEMENTS

Angelos Dimopoulos[*]

1. *Introduction*

In the past 15 years the EU has asserted a proactive role in the field of foreign investment and has become a powerful and influential global actor. In that context, particular consideration has been paid to the EU's international investment agreements, whereby the EU has created its own distinct model on investment law. Combining elements of investment liberalisation and investment protection and offering an innovative model for ISDS, the EU has managed to present a new model for international investment policy that aims to address sustainable development objectives.

This contribution aims to discuss the sustainable development (SD) dimension of international investment agreements (IIAs) concluded by the EU. The objective of this paper is twofold: It aims primarily to assess whether and how the EU aims to integrate sustainability objectives in its IIAs; and secondarily to assess the role of the EU as a global normative actor, setting a new paradigm for balancing investment objectives and sustainability goals. In order to answer these questions, this paper discusses first the overall role of sustainable

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development within the EU's investment policy. It then examines the sustainability dimension of investment liberalisation, investment protection, and investor state dispute settlement (ISDS) provisions. It is argued that on the one hand EU IIAs offer a distinct global paradigm in terms of integrating sustainability objectives with traditional investment law norms; yet this does not mean that EU IIAs present the only or best paradigm for balancing traditional investment law goals with SD objectives.

2. *Integrating Sustainability in EU investment policy*

Although foreign investment was not a field entirely strange to the EU, it was only in 2009 when the Lisbon Treaty entered into force and endowed the EU with exclusive competence over FDI, [1] that the emergence of an autonomous and comprehensive EU investment policy became a policy priority. Since then, the EU has concluded investment agreements with Canada, [2] Singapore, [3] Vietnam, [4] Chile, [5] and Mexico [6] and has progressed in negotiations with Indonesia, [7] India [8] and Tunisia. [9] EU investment agreements differ from other

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[1] Article 207 TFEU together with Article 3(1)(e) TFEU confer exclusive competence to the EU in the field of the Common Commercial Policy, which since 2009 covers also FDI.

[2] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/23.

[3] Council Decision (EU) 2018/1676 of 15 October 2018 on the signing, on behalf of the European Union, of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part [2018] OJ L 279/1.

[4] Council Decision (EU) 2019/1096 of 25 June 2019 on the signing, on behalf of the Union, of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part [2019] OJ L 175/1.

[5] It replaces the 2002 EU-Chile Association Agreement. The Council adopted the necessary decisions on the signing and conclusion of the EU-Chile AFA and the interim trade agreement on 18 March 2024.

[6] The treaty text agreed in principle by the parties in 2018 is found in https://policy.trade.ec.europa.eu/eu-.

[7] The EU has started negotiations with Indonesia for an FTA including investment protection provisions in 2016. See Commission, Report of the 14th round of negotiations for a Free Trade Agreement between the European Union and Indonesia 8 to 12 May 2023, Brussels. The EU's textual proposals are found in https://policy.trade.ec.europa.eu/eu.

[8] The EU launched negotiations for an IPA with India on 17 June 2022. The EU's textual proposals are found in https://policy.trade.ec.europa.eu/eu-tr.

[9] The EU's negotiating proposals for an IPA were adopted in 2018 and are found in https://policy.trade.ec.europa.eu/eu-.

investment agreements, even 'new generation' BITs concluded recently by other countries. Such differences are especially present as regards investment liberalization, the limitation of substantive standards of investment protection and their balancing with the right to regulate, and the development of an entirely new system for ISDS, where specific attention has been paid to the achievement of sustainable development. Indeed, a careful assessment of EU IIAs would indicate that they progressively include additional references and qualifications to their scope, the Trade and Sustainable Development (TSD) chapters have become longer and more detailed, and there are explicit references to general or specific SD objectives.

Starting with the legal and policy framework that shapes the EU's investment treaty-making action, one should consider firstly the primary law framework that sets the main objectives of EU external action. Pursuant to Article 207 TFEU, the primary objective of CCP and, by extension, investment policy is to promote competitiveness and provide the conditions for the liberalisation of trade and investment. [10] In addition to liberalisation objectives, EU institutions are required to promote all external policy objectives identified under Article 21 TEU, and in particular the Union's commitment to contribute to the 'sustainable development of the Earth' when the EU acts on the international plane. [11] The obligation to pursue sustainable development objectives in EU investment policy is further enhanced by specific legal obligations, embedded in the Treaties, most notably, the principles of environmental integration and coherence. [12]

Without entering a lengthy discussion on the scope of these primary law legal obligations, [13] it is significant to stress that primary EU law affords significant discretion to EU institutions in terms of how they can implement these objectives. The parameters of the balancing of liberalisation goals with sustainable development objectives are set by Union institutions. Considering the institutional design of external action in the field of the CCP, [14] whereby the Commission is tasked to develop policy guidelines, while the European Parliament

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[10] A. Dimopoulos, *Chapter 7: The constitutional fundamentals of EU investment policy*, in S. Schill-C. Tams (eds), *International Investment Protection and Constitutional Law*, Edward Elgar, Cheltenham, 2022.

[11] Art. 21(2)(f) TFEU.

[12] Arts 11 and 205 TFEU, 7 TFEU, art. 37 CFR.

[13] For a detailed analysis see G. Marín Durán-E. Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions*, Hart, Oxford, 2012.

[14] On institutional balance in EU external relations and in particular the CCP see P. Koutrakos, *Institutional Balance and Sincere Cooperation in Treaty-Making under EU Law*, in 68 *ICLQ* 1, 2019.

and the Council hold growing powers in shaping the outcomes of EU policy, the objectives of EU investment policy have gradually evolved, addressing ongoing developments in international investment law as well as the shifting priorities of EU external action.

More specifically, the foundations of EU investment policy were laid in 2010 with the Commission's Communication on a 'comprehensive European international investment policy'. [15] Considering the nascent role of the EU in a field dominated by Member States agreements, EU action in its initial stages was characterised by a strong influence of 'traditional' investment policy goals, aiming to draw and reflect upon Member States' practices. The aim was to provide a 'robust' investment protection framework for foreign investors, while sustainable development objectives were briefly identified, but mainly in passing. [16]

With the gradual clarification of the scope of EU powers in the field of foreign investment that arose with Opinion 2/15, [17] the EU has gradually developed a reformed investment policy agenda that gave a pivotal role to the pursuance of sustainable development goals. The backlash to investment protection that the negotiation of the EU-United States Transatlantic Trade and Investment Partnership (TTIP) created, [18] alongside the conclusion of the Paris agreement on Climate Change and the adoption of the 2030 Agenda for Sustainable Development resulted in a significant reshaping of EU investment policy. [19] In that context, sustainable development and regulatory autonomy became key objectives of the EU's investment policy under the 2015 'Trade for All' strategy. [20] According to the strategy, EU IIAs must insert preambular references and a right to regulate clause in the operative part, investment protection standards were to be clearly balanced and ISDS discretion to be curtailed. [21] The strategy

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[15] European Commission, *Towards a comprehensive European international investment policy*, in *Communication*, COM (2010) 343 final 7.

[16] European Commission, *Global Europe: Competing in the World*, in *Communication*, COM (2006) 567 final.

[17] Opinion 2/15, (ECLI:EU:C:2017:376.

[18] F. Nicola, *The Politicization of Legal Expertise in the TTIP negotiation*, in 78 (4) *Law and Contemporary Problems* 175, 200-201, 2015.

[19] Paris Agreement to the United Nations Framework Convention on Climate Change (12 December 2015) T.I.A.S. No. 16-1104; UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development (21 October 2015) A/RES/70/1.

[20] European Commission, *Trade for All: Towards a more responsible trade and investment policy*, (Communication) COM (2015) 497 final.

[21] European Commission, *Investment in TTIP and beyond—the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court*, in *Concept* Paper, 5 May 2015.

also called for an enhanced role for TSD chapters, including extensive rules on MEAs and requiring the incorporation of CSR provisions. [22]

The sustainable development dimension of EU investment policy was further strengthened in the Commission's 2021 trade strategy, [23] which highlighted the value of trade and investment policy towards achieving the objectives of the EU's Green Deal. [24] The role that investment law can play towards achieving environmental and broader SD objectives was put to the forefront, and SD was given prominence as the overarching goal of EU investment policy, sitting idly next to EU competitiveness and economic growth, as the main path for achieving the latter objectives.

Yet, in a shifting geopolitical context, it is uncertain whether sustainable development can maintain its role as a key objective of EU investment policy. Competitiveness has once again emerged a key objective of Union action, [25] while open strategic autonomy has become a key pillar of EU external relations, already shaping EU policy in the field of trade foreign investment. The development of the EU FDI screening regulation in 2019 [26] and its proposed reform [27] highlight the significance attached to strategic autonomy within EU investment policy, questioning the role that SD will play in future investment agreements.

3. *Investment liberalization and promotion of SD-friendly investments*

First of all, EU IIAs place particular emphasis on market access commitments. Following its pre-Lisbon practice, as reflected in its agreements with CARIFORUM States and Korea, [28] the EU follows an adapted General Agreement in

[22] Trade for All strategy (n 19).

[23] European Commission, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, in Communication, COM (2021) 66 final, 12.

[24] European Commission, *The European Green Deal*, in *Communication*, COM (2019) 640 final 21.

[25] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, A Competitiveness Compass for the EU, COM(2025) 30 final.

[26] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L 791/1.

[27] European Commission, Proposal for a Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council SWD(2024) 23 final.

[28] Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other Part, [2008] OJ L289/3.

Trade in Services (GATS) model to regulate admission and establishment of FDI. The emphasis given on competitiveness and growth allows the EU to address the interests of EU investors in third countries. Yet, EU IIAs contain safeguards that aim to protect the right to regulate and safeguard regulatory autonomy, objectives crucial for the sustainability direction of EU IIAs.

EU investment agreements usually have a distinct set of provisions in a separate chapter devoted to FDI liberalization, which is different from investment protection, such as Chapter 8 CETA. The emphasis placed on investment liberalisation is evident from the far-reaching scope of liberalization commitments that contain provisions not only prohibiting states from regulating the making of new investments in a discriminatory manner (MFN and National Treatment), which are becoming increasingly common in investment treaties, but also prohibiting states from applying specific regulatory conditions to the making of new investment (Market Access). [29] For example, as the national treatment standard is subject to different interpretations and exceptions under investment protection and investment liberalization agreements, [30] the distinctiveness of investment liberalization chapters provide the opportunity to offer a distinct clarification on the scope and content of "treatment" under liberalisation rules. Moreover, the clarifications on the scope of most-favoured-nation (MFN) treatment under existing EU FTAs, which make specific exceptions to MFN treatment and delimitate the scope of this standard, are more suitable to address the varying liberalization commitments made by EU Member States in different sectors and allow for closer cooperation with certain countries. [31] Hence, investment liberalization is a key component of EU investment policy, but its structure, nature and content depart from typical investment agreements that contain liberalization commitments.

The role of investment liberalization is further proven by the emphasis placed on investment liberalisation in the in EU-China Comprehensive Agreement on Investment. [32] The CAI, which is currently at the stage of being agreed 'in principle', presents the only agreement between two major global players that focuses exclusively on investment liberalisation. It aims to provide for new

[29] For a discussion of investment liberalisation commitments see I. Takamiya, *The Evolution of Investment Liberalization under the Recent Investment Treaties*, in 16 *Pub. Policy Review* 407, 2020.

[30] C. Lévesque, *The Challenges of "Marrying" Investment Liberalisation and Protection in the Canada-EU CETA*, in M. Bungenberg-A. Reinisch-C. Tietje (eds), *EU and Investment Agreements*, in *Nomos*, 2013, pp. 121-44.

[31] S. Schacherer, *Sustainable Development in EU Foreign Investment Law*, Brill, Leida, 2021, chapter 6.

[32] European Commission, *EU-China Comprehensive Agreement on Investment*, in *CAI*, 22 January 2021, https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237.

opportunities and improved conditions for access to the EU and Chinese markets for Chinese and EU investors respectively. It exemplifies a new type of investment treaties that aim to address the hurdles that investors actually consider when making investment decisions, rather than focusing on traditional investment protection standards. Considering the role of China and the EU in terms of global investment flows, the level of obligations assumed by the parties, which can impact on the level of regulatory autonomy protected, [33] the CAI showcases how the EU can develop innovative models for international investment cooperation with different third countries.

The sustainability direction of investment liberalisation provisions becomes obvious when the economic sectors where liberalisation is pursued is examined. This is firstly evident from the approach to liberalisation adopted in EU IIAs. Unlike North American practice, EU IIAs adopt a positive list approach, which means that liberalisation occurs only in the sectors and to extent allowed according to the commitments made in the Annexes. Such approach has the potential to enhance the sustainability effects of EU IIAs, to the extent that liberalisation occurs in sectors that can boost economic growth. Of course, the determination of the economic sectors where liberalisation will boost sustainable development friendly investments or result in unsustainable economic activity is country and context dependent. Yet, there is a clear pattern as to how the EU views sustainable investments. For example, EU IIAs include liberalisation and non-discrimination commitments in the field of renewable energy, while brownfield investments are not subject to the same liberalisation commitments. [34] At the same time, investment liberalisation is minimal or even non-existent in significant economic sectors whereby strong regulatory control by the state is viewed as necessary for ensuring sustainable development goals. For example, health, education and social services are not covered under any EU IIA.

Finally, it is imperative to discuss the role of performance requirements under EU IIAs and their impact on sustainable development goals. Performance requirements are provisions that prohibit states from imposing conditions on foreign investments with respect to their business activity. [35] While the prohibition of performance requirements may enhance competitiveness and economic

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[33] See L. Cotula, *EU-China Comprehensive Agreement on Investment: An Appraisal of its Sustainable Development Section*, in 6 *Business and Human Rights Journal* 360, 2021.

[34] For example in the EU-Vietnam FTA mining in energy sectors is excluded from the scope of the MFN provisions, while both the EU and Vietnam in their schedules of commitments (Annexes 8A and 8B) make no reservations regarding the production and distribution of clean green energy. See also Schacherer, above n 30.

[35] For a discussion on performance requirements see D. Collins, *Performance Requirements and Investment Incentives under International Economic Law*, Edward Elgar, Cheltenham, 2015.

growth, some requirements are considered beneficial for sustainability purposes, such as technology transfer or local employment requirements. [36] In that context, some IIAs from developing countries include provisions that reaffirm rather than restrict the ability of states to impose some performance requirements. [37] Yet, EU IIAs follow a traditional approach of prohibiting (almost all) performance requirements, regardless of their sustainability effect. While such prohibition in a north-north IIA, such as the ones with Canada and Singapore, may be neutral or positive from a sustainability angle, this is not necessary the case for IIAs with developing countries, such as Vietnam. Yet, the EU-Vietnam FTA contains a prohibition on performance requirements that mirrors EU IIAs with developed countries. [38]

4. *Standards of investment protection*

EU investment agreements provide for a more nuanced balance between investors rights and the right of host states to regulate. EU IIAs contain provisions that are similar to the standards of investment protection offered under traditional BITs. Yet, EU investment agreements introduce novelties for the determination of the scope of investors' rights. The introduction of novel language has contributed significantly towards incorporating sustainability concerns in EU IIAs. Departing from the "gold standard" of Member States BITs, which included broad, ambiguous standards of investment protection, EU IIAs place regulatory autonomy at the forefront, aiming to ensure that states can take appropriate measures to achieve sustainability objectives. This is primarily done via the adoption of explicit language that aims to reduce the broad scope of investment protection offered under BITs and curtail the discretion afforded to arbitral tribunals to provide investor-friendly interpretation of investment protection standards.

More specifically, in addition to novel preambular language, which explicitly acknowledges the right of host states to regulate, [39] EU investment agreements have significantly influenced the shape of key provisions, such as the one

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[36] UNCTAD, *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries* (UN 2003).

[37] PAIC, Art. 17.

[38] Art. 8.8 of the EU-Vietnam FTA.

[39] The Preamble to CETA provides among others that 'the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity'.

on fair and equitable treatment (FET). FET is a vague standard that provides protection against a broad spectrum of national measures. [40] It is noteworthy that EU investment agreements aim to contain it by providing an exhaustive list of specific actions that would actually breach investors' rights. [41] More specifically, FET can be violated when a measure constitutes denial of justice, a fundamental breach of due process, including a breach of transparency obligations, manifest arbitrariness or discrimination, or abusive treatment of investors, such as coercion. It is important that EU treaties aim to set a high threshold for the violation of FET, by explaining in footnotes the meaning of the 'qualifiers' used. [42] In addition to providing a specific list, EU investment agreements take a further step in shaping the content of the FET standard by explaining the role that investors' legitimate expectations play. As the EU-Singapore FTA provides, legitimate expectations are taken into account when considering whether a breach of the above list of conduct has taken place, while the formation of legitimate expectations is based explicitly on the existence of 'specific representations' made to an investor in order to induce an investment. [43]

Turning to protection against expropriation, EU investment agreements aim to clarify the circumstances under which a regulatory measure can amount to expropriation, thus aiming to provide clarity to the concept of indirect expropriation, which has been highly controversial in arbitral jurisprudence. [44] In order to do so, EU investment agreements include an annex on expropriation, which clearly indicates that the existence of regulatory expropriation depends not only on the effect of the measure, but also on its object, context, and intent. [45] More importantly, EU investment agreements clearly state that regulatory measures taken in order to protect legitimate public objectives, such as health and the environment do not constitute indirect expropriation, unless they are manifestly excessive and discriminatory. [46] The strong emphasis placed on the objectives and nature of regulatory measures, coupled with the absence of any reference to investors' expectations as illustrated in the context of the EU-

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[40] J. Ostřanský, *Fair and Equitable Treatment*, in Schneiderman-Van Harten (eds), *Rethinking Investment Law*, OUP, Oxford, 2023, p. 141.

[41] Art. 8.10.2 CETA; EU-Chile AFA, art. 10.15 (2); EU-Singapore IPA, art. 2.4. (2); EU-Vietnam IPA, art. 2.5. (2).

[42] See, EU-Mexico agreement, art. 15(2); EU-Chile AFA, art. 10.15 (2); EU-Singapore IPA, art. 2.4. (2).

[43] Art. 9.4.2(e) of the EU-Singapore FTA.

[44] N. Perrone, *Expropriation*, in Schneiderman-Van Harten (eds), *Rethinking Investment Law*, OUP, Oxford, 2023, p. 66.

[45] E.g., Annex 8-A, Article 2(d) of CETA.

[46] E.g., Annex 9-A, Article 2 of the EU-Singapore FTA.

Singapore FTA, [47] illustrate a departure from similar provisions found in US and Canadian investment agreements, guaranteeing a higher level of autonomy for recipient countries' right to regulate.

In that respect, although EU IIAs include all standards of investment protection that are typically covered by IIAs, including even more controversial ones such as umbrella clauses, [48] their scope of protection departs significantly from Member State pre-existing practice. It excludes wide protection standards offered under gold-standard BITs. Yet, they do not adopt groundbreaking language, as akin to that included in IIAs adopted by developing countries, such as the 2016 Draft Pan-African Investment Code. [49] Such distinction demonstrates that the EU has established its own paradigm in international investment law, offering a distinct set of investment protection standards that is more sustainable development oriented that past BITs. However, this does not mean that sustainability presents the main or even a key goal of investment protection rules, since standards of protection remain broad.

Moreover, the use of well-defined treaty language attempts to limit the scope of discretion offered to investment tribunals to engage in pro-investor interpretations of IIA standards. The aim is to provide "clear guidance to tribunals on how these standards should be applied." [50] In that regard, EU IIAs aim to address one of the key criticisms raised against IIAs, whereby ambiguous text has been interpreted by tribunals in ways that have expanded the scope of protection offered to foreign investors. [51] Yet, despite the use of novel language, arbitral discretion remains and non-SD friendly interpretations of investment protection standards remain possible. For example, regarding the FET standard the use of a closed list or the addition of qualifiers does not prevent tribunals from engaging in expansive interpretations of what constitutes "targeted" discrimination, or a "manifest" violation of due process. [52] Likewise with regard to expropriation, the

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[47] *Ibid.*

[48] R. Basedow, *The European Union's New International Investment Policy and the United Nation's Sustainable Development Goals: Integration as a Motor of Substantive Policy Change?*, in C. Beverelli-J. Kurtz-D. Raess (eds), *International Trade, Investment, and the Sustainable Development Goals: World Trade Forum*, CUP, Cambridge, 2020, p. 50.

[49] On the Pan-African Investment Code, see M. Mbengue-S. Schacherer, *The 'Africanization' of international investment law: The Pan-African Investment Code and the reform of the international investment regime*, in 18(3) *JWID* 414, 2017.

[50] 2017 CETA JI instrument, para 6 point (c).

[51] C. Henckels, *Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA and TTIP*, in 19(1) *JIEL* 27, 2016.

[52] For example, on the evolution and broad interpretation of the FET standard see P. Dumberry-K. Turnbull, *The 'Minimum Standard of Treatment' in International Investment Law: The Fascinating Story of the Emergence, Decline and Recent Resurrection of a Concept*, in P.

annexes on indirect expropriation do not guarantee that the intent and object of the measure will be prioritised over its impact on foreign investors, or that the sustainability dimension of the intent and object of a measure will make any difference in a tribunal's assessment.

5. *Safeguarding regulatory space for sustainable development*

The limitations to the scope of investment protection standards are accompanied by specific substantive safeguards to policy space under EU IIAs, namely a right to regulate clause and public policy exceptions. Moreover, the incorporation of Trade and Sustainable Development (TSD) chapters in EU IIAs provides a unique setting aiming to integrate sustainability in investment treaties.

In addition to preambular references, all EU IIAs recognise the state's right to regulate for the public welfare. [53] The relevant clause provides that the parties have 'the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of … environment'. [54] In addition, some agreements have joint interpretative instruments (JI), which are adopted by the parties or by a treaty-based joint committee, whose decisions are binding on tribunals, and provide additional clarifications. [55] By adding such qualifications to the substantive rules of investment protection, the EU and its treaty partners seek to strengthen their flexibility to regulate in the public interest, limiting instead the discretion of tribunals to determine when regulatory actions amount to a treaty breach. [56]

Further to this, EU IIAs contain exceptions that aim to limit the scope of application of investment liberalization and protection provisions, based on the object of the measure, the type and the timing of regulatory measure. [57] In that

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Merkouris *et al.* (eds), *Custom and Its Interpretation in International Investment Law*, CUP, Cambridge, 2024, p. 15.

[53] See M. Mbengue-S. Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)*, Springer, Cham, 2019.

[54] e.g. CETA, art. 8.9 (1); EU-Mexico agreement, ch XX, art. 1; EU-Vietnam IPA, art. 2.2 (1).

[55] For example, JI instruments have been adopted under CETA and EU-Chile AFA.

[56] This is, for example, made explicit in the CETA's 2017 JI. See Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States [2017] OJ L 11/3 ('CETA JI instrument 2017') para. 6, point (a).

[57] For a categorization of investment exceptions see J. Viñuales, *Seven Ways of Escaping a Rule: Of Exceptions and their Avatars in International Law*, in L. Bartels-F. Paddeu (eds), *Exceptions in International Law*, OUP, Oxford, 2020).

respect, EU investment agreements usually contain a clause modelled on Article XIV of the GATS and Articles XX of the GATT, which only applies to NT and MFN violations. [58] Security exceptions are also common under EU IIAs that draw inspiration from Article XXI of the GATT. [59] Moreover, exceptions for specific types of governmental action are also included in EU IIAs. Most notably, the parties have the right 'not to issue, renew, or maintain a subsidy', including any form of state aid granted by the EU, provided that this accords with the terms or conditions of the subsidy and there was no 'specific commitment under law or contract' concerning it issuance, renewal, or maintenance. [60] In addition to the above, EU IIAs include exceptions based on which the parties reserve the right to maintain measures for certain policy areas or activities or to renew and modify them in the future, irrespective of whether they constitute a breach of an investment protection standard (non-conforming measures). [61]

Last but not least, sustainability objectives are introduced in EU IIAs via the incorporation of the Trade and Sustainable Development (TSD) chapters of the FTAs in which investment liberalisation and protection are parties to, or by the direct reference to TSD rules under standalone IPAs. [62] More specifically, EU IIAs incorporate sustainability principles to align foreign investment with long-term economic, environmental, and social goals. TSDs highlight the right of the parties to regulate in a way that respects the ability of each party to set the domestic levels of environmental protection in pursuit of their own policies and international commitments. [63] It is worth noting that EU IIAs stress that parties shall set high levels of protection *consistently* with the multilateral environmental agreements (MEA) and multilateral labour standards, hence requiring the Parties to *effectively implement* measures to comply with specific MEAs, such as the Convention on Biological Diversity (CBD) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). [64] Another important provision of TSD chapters relating to investment is the non-regression clause. This is a clause that obliges the parties *not* to weaken, reduce, waive or derogate from the domestic levels of environmental protection if the purpose of their regulatory action is to encourage investment (non-regression

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[58] e.g. EU-Singapore IPA, art. 2.3 (3).

[59] e.g. EU-Chile Framework Agreement, Ch 32.2. (1)(b).

[60] EU-Mexico Agreement, art. 14 (2)(3); CETA, art. 8.9 (3)(4); EU-Chile AFA, art. 10.14 (3)(4).

[61] e.g. Art. 10.12 of the EU-Chile AFA and Art. 12 of the EU-Mexico Agreement.

[62] See for example Art. 4.12. of the EU-Singapore IPA.

[63] E.g. Art. 26.2 EU-Chile AFA.

[64] See also G. Marín Durán, *The EU's Evolving Approach to Environmental Sustainability in Free Trade Agreements*, in *UCL Research Paper Series* No. 3/2023, 2023, p. 4.

clause). Many IIAs include strong language by prohibiting any regression that may *encourage* investment, [65] which is stronger than language which prohibits regression only when it has actual "effects" on investment, regardless of the intent of the state. [66] The third key set of provisions in TSD chapters that ensure the sustainable dimension of EU IIAs is the one addressing CSR obligations of foreign investors. EU IIAs reaffirm the parties' obligation to 'promote' CSR practices domestically and by means of inter-state cooperation, usually making specific references to CSR standards, as codified in various non-binding international instruments. [67]

Assessing the effectiveness of the safeguards to regulatory autonomy that are provided in EU IIAs, it can be argued that the introduction of exceptions and carve-outs enable states to incorporate sustainability in their IIAs. For example, exceptions for measures necessary to protect the environment, or the exception of state aid from the scope of application of IIAs enable states to implement sustainability measures, without the fear of regulatory chill. [68] Moreover, the careful design of sectoral or measure specific carve outs, as provided in the Annexes to EU IIAs, enables states to achieve a high level of protection, without compromising the effects of specific measures that are crucial for sustainability, such as support for "green energy" or a phase-out of existing rights afforded to investors in the fossil-fuel industry.

On the other hand, the scope and conditions attached to the exceptions introduced in EU IIAs can have a significant impact on their effectiveness. The introduction of WTO-style exceptions has been criticised in terms of their potential effectiveness under traditional investment protection treaties. [69] Investment tribunals have interpreted investment protection standards as distinct, wholesome obligations, whereby object-based regulatory exceptions have been interpreted as being of minimal legal value. [70] Even if the legal value of object-based

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[65] e.g. CETA, art. 24.5 (2); EU-Chile AFA, art. 26.2 (5); EU-Mexico agreement, ch XX, art. 2(4).

[66] G. Marín Durán, *Sustainable development chapters in EU free trade agreements: Emerging compliance issues*, in 57(4) *CMLR* 1031, 2020.

[67] UNCTAD, UNCTAD's Reform Package for the International Investment Regime (2018) 67.

[68] K. *Tienhaara, Regulatory Chill and the Threat of Arbitration: A View from Political Science*, in C. Brown-K. Miles (eds), *Evolution in Investment Treaty Law and Arbitration*, CUP, Cambridge, 2011, p. 606.

[69] C. Lévesque, *The Inclusion of GATT Article XX Exceptions in IIAs: A Potentially Risky Policy*, in R. Echandi-P. Sauvé (eds), *Prospects in International Investment Law and Policy*, CUP, Cambridge, 2014, p. 363; M. Ghering-M. Tokas, *Synergies and Approaches to Climate Change in International Investment Agreements: Comparative Analysis of Investment Liberalization and Investment Protection Provisions in European Union Agreements*, in 23 *JWIT* 778, 2022.

[70] *Eco Oro Minerals Corp v The Republic of Colombia*, ICSID Case No ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, (9 September 2021) See also R.

exceptions is clear, the use of necessity as the main test for determining the discretion afforded to states to implement sustainable development goals can be restrictive. EU IIAs follow the familiar pattern of trade law, whereby an objective determination of necessity is required for justifications pertaining to health or environmental protection, while necessity is self-judging under the security exception. Without engaging in a detailed analysis of the concept of necessity under WTO Arts XX and XXI, and the criticism they have attracted regarding their ability to sufficiently ensure the SD dimension of WTO trade rules, [71] it is imperative to stress that the right of states to regulate is constrained by necessity requirements, the determination of which would lie in the discretion of arbitral tribunals.

Turning to the TSD rules of EU IIAs, their contribution towards rendering investment law more sustainable cannot be understated. The introduction of TSD rules has rendered the EU one of the frontrunners in the global debate on revisiting international investment law rules. The reliance on TSD provisions has influenced and shaped the content investment rules around the world. For example, the 2023 AfCFTA Protocol contains rules on "Sustainable – Related Issues" and "Investors' Obligations", which largely mirror the EU's TSD rules. In addition, TSD rules present context for the interpretation of investment protection standards. As the EU-Chile AFA recognises, when tribunals interpret investment protection standards, they are required to give due consideration to the TSD commitments of the Parties and provide interpretations that support the materialisation of Parties' TSD obligations. [72] Although compliance with TSD obligations cannot justify the violation of investment treaty standards, [73] they set a requirement for "SD friendly" interpretations of investment protection rules. [74]

On the other hand, TSD rules are of limited value. First and foremost, TSD rules are usually exempted from dispute settlement. This means that TSD rules can neither form a defence in cases brought by investors against states, nor can states rely on TSD obligations to force their counterparties to comply with their SD obligations. Even in the context of their limited enforcement, mainly through cooperation, the hortatory and abstract language used limits the scope

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Garden, *Eco Oro v Colombia: The Brave New World of Environmental Exceptions*, in 38 *ICSID Rev* 17, 2023.

[71] For a detailed discussion see C. Henckels, *Should Investment Treaties Contain Public Policy Exceptions?*, in 59 *B.C.L. Rev.* 2825, 2018.

[72] Joint Interpretative Instrument of the EU-Chile AFA.

[73] Restrictions Applied by Ukraine on Exports of Certain Wood Products to the European Union, Final Report of the Arbitration Panel, (11 December 2020), para. 244.

[74] G. Kübek, *Sustainable development chapters in EU FTAs and dispute settlement: lessons learned from Ukraine – Wood Products and Korea – Labour Rights*, in E. Fahey-I. Mancini (eds), *Understanding the EU as a Good Global Actor*, Elgar, Cheltenham, 2022, p. 277.

for their effectiveness. [75] More importantly, TSD chapters are not bold enough in promoting investors' accountability. Despite the growing voices identifying the need for a binding international legal framework on investors' obligations, [76] EU IIAs remain sheepishly vague on the issue, using at best hortatory language that aims to promote investors' accountability. Such approach can be contrasted with bolder approaches on investors' obligations taken by a number of states, mainly developing countries, which offer innovative language that aims to complement domestic and voluntary frameworks on investors' responsibility. [77]

6. *Reforming Investor State Dispute Settlement*

The last and arguably most important novelty introduced by EU investment agreements relates to the complete transformation of ISDS. In 2015 the EU launched its position for substituting arbitration with an Investment Court System (ICS), [78] with the aim of establishing a legitimate, neutral and transparent framework for the settlement of investment disputes. The EU has indicated that the ICS is a permanent feature of all future EU investment agreements and so far has been an integral element of all concluded EU IIAs. The development of the ICS has been premised on the idea of creating a 'hybrid' system in the form of an international court, minimizing the elements of arbitration that are linked to private disputes and emphasizing the characteristics of a public court system.

Without entering into an analysis and review of the features of the ICS and whether it manages to address the shortcomings of ISDS that it was expected to address, [79] it is necessary to highlight its key characteristics. The ICS aims to set

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[75] D. Prévost-I. Alexovicova, *Mind the Compliance Gap: Managing Trustworthy Partnerships for Sustainable Development in the European Union's Free Trade Agreements*, in 6 *IJPLAP* 236, 2019.

[76] See indicatively M. Sattorova, *Investor Responsibilities from a Host State Perspective: Qualitative Data and Proposals for Treaty Reform*, in *113 AJIL Unbound* 22, 2018.

[77] For a discussion of existing Treaty practices see IISD, *Integrating Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements* (Report of the Expert Meeting Held in Versoix, Switzerland, 11-12 January 2018).

[78] European Commission, *Concept Paper, Investment in TTIP – the Path for Reform*, 5 May 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF accessed 11 August 2017.

[79] For a critical review of the ICS see F. Baetens, *The European Union's Proposed Investment Court System: Addressing Criticisms of Investor-State Arbitration while Raising New Challenges*, in 43 *Legal Issues of Economic Integration* 4, 2016, pp. 367-84; S.W. Schill, *Authority, Legitimacy, and Fragmentation in the (Envisaged) Dispute Settlement Disciplines in Mega-Regionals*, in S. Griller-W. Obwexer-E. Vranes (eds), *Mega-Regional Agreements: TTIP,*

up a permanent mechanism whereby the selection and appointment of panel members would resemble more the procedures followed in the WTO dispute settlement, thus departing from the practice of commercial arbitration whereby arbitrators are chosen by the parties. Such changes aim to address criticisms concerning the impartiality of arbitral tribunals that all too often have been criticized for not being favourable towards investors' claims. More importantly, the ICS creates a permanent appeal mechanism, thus introducing a new level for adjudicating complex legal questions, which can contribute towards greater consistency in investment law jurisprudence and enhanced legitimacy of investment decisions. Finally, aiming to enhance transparency in investment arbitration, such as the creation of the new UNCITRAL rules on transparency in investment arbitration, the ICS and EU investment agreements create rules that aim to enhance the public nature and broader participation of interested parties in ISDS.

Finally, it is worth highlighting that the ICS proposal was developed with the original aim of eventually developing a multilateral framework for investment dispute resolution. The EU's proposal coincided with UNCITRAL's initiative for the negotiation of a multilateral dispute settlement mechanism. [80] Although the EU was initially reluctant to participate in UNCITRAL's work, it has gradually endorsed the process and has since been a very active contributor. [81] It has taken the lead in submitting proposals for a multilateral investment framework, which have been broadly endorsed by many third countries, thus exemplifying the EU's normative leadership in treaty negotiations.

Assessing ISDS reform from a sustainability perspective, it is worth noting that the ICS system has been praised for enhancing legitimacy and transparency in ISDS, addressing a number of the criticisms raised against investment arbitration. [82] Yet, the ICS cannot overcome many of the structural limits of ISDS, which place its sustainability orientation in question. For example, reforms do not aim to alter the jurisdiction of investment tribunals. ISDS is a mechanism aimed at providing protection to foreign investors from the potential violation of their rights under IIAs; hence there is limited scope for addressing investors'

CETA, TiSA. New Orientations for EU External Economic Relations, Oxford University Press, Oxford, 2017.

[80] Report of the United Nations Commission on International Trade Law, Fiftieth session (3-21 July 2017), A/72/17, para 264.

[81] 'Establishing a standing mechanism for the settlement of international investment disputes', Annex – Submission from the European Union and its Member States, UNCITRAL Working Group III, A/CN.9/WG.III/WP.159, thirty-seventh session, 1-5 April 2019.

[82] For a discussion see S. Kam, *Crafting more sustainable investor-state dispute settlement procedures through the UNCITRAL ISDS reform process*, in C. Segger-Gleason-Stephenson (eds), *Research Handbook on Investment Law and Sustainable Development*, Edward Elgar, Cheltenham, 2025, p. 420.

obligations, or other states' obligations towards investors, while there is little room left for third parties that may have an interest in the dispute to participate. [83]

7. *The way forward*

The analysis of the EU's investment treaty practice indicates that the EU has established its own paradigm in international investment law and the (re)calibration of investment treaties. This achievement is particularly significant given the point of departure: the EU's investment protection approach was initially rooted in the so-called 'best practices' of its Member States. Despite being subject to strong criticism from Member States, EU institutions and the civil society, the EU has managed to develop a coherent policy framework for foreign investment that presents significant innovations: the EU aims to redraft substantive rules on foreign investment protection, providing a clearer balance between investors' rights and recipient countries' public policies, it intends to increase legitimacy of the institutional framework on dispute settlement and enhance the reach of aspects of FDI regulation, such as market access, that are of importance to European investors. Sustainability plays a key role in shaping the content of investment liberalisation and protection rules and this is evident not only via the use of hortatory language, but rather with the use of legally binding norms that curtail the scope of much criticised provisions of investment treaties.

Establishing its own paradigm does not mean though that the EU provides a "better" balancing of investment rights and the right to regulate when compared to investment treaty practice of other countries. Without entering the debate over how best to balance investment protection with regulatory autonomy, suffice it to highlight that the EU has not picked up some innovative elements found in modern investment treaty practice. One could look into the recent treaty practice of African countries, which have been perhaps the most active in the (re)calibration of investment treaties, [84] to identify that the EU has not incorporated restrictive language that would avoid any arbitral discretion regarding the balancing of investors' rights and regulatory autonomy. Yet, the cautious approach taken by the EU should not come as a surprise, considering that liberalization and global competitiveness rather than sustainability lie at the heart of EU investment policy.

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[83] A. Dimopoulos, *Climate change in investment disputes: dispute settlement*, in P. Delimatsis (ed.), *Research Handbook on Climate Change and Trade Law*, Edward Elgar, Cheltenham, 2016, p. 338.

[84] O. Akinkugbe, *Africanization and the Reform of International Investment Law*, in 53(1) *Case W Res J Intl L* 7, 2021.

THE "BRUSSELS EFFECT" PUT TO THE TEST: EU DIRECTIVE 2024/1760 AND THE CHALLENGES OF SOCIAL EXTRATERRITORIALITY

Carmen Di Carluccio, *Eva Lacková*[*]

SUMMARY: 1. The "Brussels Effect" and the EU's global reach. Defining the scope of the analysis. – 2. Overview of Directive (EU) 2024/1760 Corporate Sustainability Due Diligence Directive. – 3. Mechanism of the "Brussels Effect" under the CSDDD. Potential impact on labour rights in third countries. – 4. "Omnibus effect" on transformative ambition of CSDDD. – 4.1. The "Omnibus Package": Regulatory simplification or deregulation? The redefinition of stakeholders … – 4.2. … partial dismantling of the enforcement framework and restriction of due diligence scope across value chains. – 5. Final remarks.

1. *The "Brussels Effect" and the EU's global reach. Defining the scope of the analysis*

The European Union's very existence rests on the premise of serving as a «force for good» [1] – an original peace project that consciously embedded legal provisions about core human values and rights into its founding Treaties. Article 2 of the Treaty on European Union (TEU) explicitly anchors Union's identity to the values of «respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities (…) in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail». Moreover, artt. 3 par. 5 and 21 par. 1 TEU extend the EU's "good-doing" in «its

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[1] See the discourse of J. Solana, EU High Representative for the CFSP and ESDP, *Countering globalisation's dark side*, 2006, available online: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/articles/96791.pdf.

relations with the wider world» [2] and on its «action on the international scene» [3].

While questions inevitably arise with regards to effectiveness of the self-imposed legal constraints in the real world practice, about the criteria for assessing what being "good" means and the extent of the EU's "global" outreach, [4] the aforementioned normative aspirations find support in both theoretical and empirical accounts suggesting that the EU possesses some capacity to project its internal values beyond its territorial boundaries through the mechanism called the "Brussels Effect" (henceforth "BE").

Situated between cooperative engagement and regulatory coercion, the BE reflects the EU's ability to induce legal and policy convergence beyond its borders by leveraging its economic weight and normative power. [5] According to the original formulation of this theory by Anu Bradford, the EU is able to unilaterally export its internal standards – particularly in areas such as product safety, environmental protection and, as of relatively recent, data privacy – by conditioning access to its internal market on compliance with its regulatory framework. [6] However, Bradford suggests that labour standards prove largely immune to this form of extraterritorial influence, as they are less easily transmitted through market-based regulatory diffusion alone. [7]

The present paper seeks to revisit and extend Bradford's thesis by arguing that Corporate Sustainability Due Diligence Directive – Directive (EU) 2024/1760 (henceforth "CSDDD") – provides concrete evidence of the BE extending into the domain of labour rights. [8] Moreover, this thesis is aligned with more recent

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

[3] The Art. 21 par. 1, imposes the obligation for the EU to follow the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

[4] For a comprehensive and critical analysis of these elements see E. Fahey-I. Mancini (eds), *Understanding the EU as a good global actor*, Edward Elgar Publishing, Cheltenham, 2022.

[5] A. Bradford, *The Brussels Effect*, in *Northwestern University Law Review*, 107, 1, 2012, p. 9.

[6] The EU's promotion of its standards aligns closely with Ian Manners' concept of "normative power Europe", see I. Manners, *Normative Power Europe: A Contradiction in Terms?*, in *Journal of Common Market Studies*, 40(2), 2002, pp. 235-258. Anu Bradford's analysis of the Brussels Effect builds on Manners' foundational insights.

[7] A. Bradford, *op. cit.*, pp. 18-9, note 73.

[8] It must be mentioned that additional legal instruments – beyond the scope of present

scholarly contributions contesting Bradford's position by critically assessing the extent to which particular labour law norms may satisfy the conditions necessary to trigger the BE. [9]

The scope of this paper is deliberately circumscribed in several respects. First, it focuses exclusively on a single legislative instrument, namely the CSDDD. Second, within the framework of the Directive, the analysis is further limited to those provisions concerning human rights as outlined in Annex I, Part I, Section 2, with particular emphasis on labour-related rights. Third, the paper examines the potential for BE arising from these specific provisions, particularly in light of the recent legislative developments introduced by so called "Omnibus Package", which seems to streamline, simplify and in some respects, potentially dilute the regulatory obligations established by the original CSDDD text[10].

Given the restricted area of study and prior to undertaking the substantive analysis, it appears necessary to clearly and precisely define the nature of said object of inquiry.

When it comes to the Directive's material scope, the EU legislator has adopted a "restricted list approach", incorporating a significant number of

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analysis – are being used as an external strategy to perpetuate the BE. Namely, the EU has increasingly incorporated provisions aimed at safeguarding workers and their fundamental rights and freedoms into its free trade agreements (FTAs). For an in-depth analysis of one such provision – embedded in the Trade and Sustainable Development (TSD) chapter of the EU Mercosur FTA – see L. Pantaleo-F. Seatzu, *Protecting Workers' Rights and Freedoms under the Eu-Mercosur Trade Agreement: a Dream Coming True?*, in *Il Diritto dell'Unione Europea*, 2, 2023. According to authors, the clause represents an effort to move beyond the longstanding divide between trade regulation and labour-rights protection, underscoring the EU's considerable influence in trade negotiations and its ability to foreground labour rights and freedoms even when engaging with powerful emerging economies. At the same time, the approach adopted in this FTA does not confer labour rights and freedoms the same legal status as the agreement's trade disciplines. Labour protections appear to be incorporated only insofar as they do not interfere with the commercial objectives of the parties. Nonetheless, the agreement marks a step toward integrating labour rights into international trade law by referencing several ILO core labour standards and by creating bodies and procedures to address labour-related matters. The authors ultimately regard this as a worthwhile attempt to strike a delicate balance between commercial and non-commercial interests, even if the equilibrium achieved remains imperfect.

[9] In the case of Regulation on prohibiting products made with forced labour on the Union market, Regulation 2024/3015, see A. Eustace, *The European Union's forced labour regulation: Putting the 'Brussels effect' to work for international labour standards*, in *European Labour Law Journal*, 15, 1, 2024, pp. 151-157.

[10] The present analysis is mainly limited to the regulatory developments introduced by the first draft of the Omnibus Package of 26 February 2025, which was the version available at the time of writing. The final version of the Omnibus Package approved on 16 December 2025 is therefore not considered, as it post-dates the analytical framework and would require a separate and updated assessment to ensure methodological consistency and accuracy.

internationally recognised human rights while omitting others. For instance, while, on the one hand, the abolition of forced and child labour are covered in the Annex, as well as freedom of association and right to organise, [11] on the other hand, the Directive appears to overlook certain intersectional risk factors for human rights abuse. This gap is largely attributable to the choice in favour of typification [12] and failure to reference some of the international human rights instruments that specifically address some forms of vulnerability and discrimination. [13] Focusing exclusively on a limited set of human rights may leave many individuals unprotected, potentially create hierarchies among rights and undermine comprehensive corporate accountability. [14] Even though the Directive offers some interpretative openings, these remain largely aspirational, [15] leaving legal uncertainty for businesses regarding their responsibilities toward human rights not explicitly addressed by the law. Furthermore, this selective approach marks a departure from international standards which call for businesses to respect all human rights and has been criticised for failing to recognise the human rights' indivisibility and interdependence. [16]

Nevertheless, by introducing binding obligations of "human rights due

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[11] To mention just a few: the ILO's Forced Labour Convention, 1930 (No. 29), together with its 2014 Protocol aimed at strengthening its enforcement; the Abolition of Forced Labour Convention, 1957 (No. 105), which seeks to eliminate all forms of forced or compulsory labour; the Minimum Age Convention, 1973 (No. 138), establishing minimum age requirements for employment to protect children; and the Worst Forms of Child Labour Convention, 1999 (No. 182), which targets the immediate elimination of the most hazardous forms of child labour. Additionally, the United Nations Convention on the Rights of the Child provides a broad framework safeguarding children's rights, including labour protections. Concerning workers' rights to organise and bargain collectively, CSDDD includes the ILO's Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

[12] See L. Ruggeri, *Corporate Due Diligence between the needs for the implementation of sustainability and protection of human rights*, in *The Italian Law Journal*, Special issue, 2024, p. 35.

[13] Missing from the list are, for instance: the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979), United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW, 1990) and others.

[14] S. Deva, *Mandatory human rights due diligence laws in Europe: A mirage for rightsholders?*, in *Leiden Journal of International Law*, 36, 2023, pp. 389-414.

[15] In this sense F. Guarriello, *Take Due Diligence Seriously: commento alla direttiva 2024/1760*, in *Giornale di Diritto del lavoro e di relazioni industriali*, 183, 2024, pp. 258-259.

[16] N. Meyer-C. Patz, *Dividing the indivisible. Human Rights under the EU Corporate Sustainability Due Diligence Directive*, in *Verfassungsblog*, 1 June 2024, available online: https://verfassungsblog.de/dividing-the-indivisible-human-rights-under-the-eu-corporate-sustainability-due-diligence-directive/.

diligence" – a notion originally articulated in the UN's Protect, Respect and Remedy framework [17] – the CSDDD is still able to align itself with key international developments concerning the risks caused by a company to society, albeit in a more constrained manner.

The present paper will then specifically focus on the human labour rights, [18] a concept whose boundaries remain subject to ambiguity and ongoing academic debate. For the purpose of this analysis, the Authors rely on authoritative scholarship asserting that, irrespective of differing interpretations, at least certain core labour rights possess the characteristics of being «compelling, stringent, universal, and timeless entitlements», thereby warranting recognition as fundamental human rights. [19] Moreover, the text of the Directive reveals an evident normative orientation that functionally qualifies certain labour rights as human rights; for example, by stating (under Recitals 46 and 47) that companies must ensure their business models and purchasing practices support the realization of living wages and living incomes throughout their chain of activities, the Directive seem to effectively establish an adequate remuneration as salient human rights risks within their due diligence processes.

Against this backdrop, this chapter aims to assess whether and how the Directive's labour rights due diligence obligations may exert extraterritorial influence under evolving institutional and normative conditions. In doing so, the

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[17] Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN doc. A/HRC/8/5 (7 April 2008), available at http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework. This concept was further developed in the UN Guiding Principles on Business and Human Rights (UNGPs) and subsequently incorporated into the 2011 revision of the OECD Guidelines for Multinational Enterprises.

[18] For a macro-analysis of human labour rights violations outside EU and the existing legal remedies see: F. Guarriello-L. Nogler, *Violazioni extraterritoriali dei diritti umani sul lavoro: un itinerario di ricerca tra rimedi nazionali e contrattazione collettiva transnazionale*, in *Giornale di diritto del lavoro e di relazioni industriali*, 166, 2, 2020, p. 18 ff.

[19] The authoritative scholarship on the matter concludes that, irrespective of ongoing debates, at least certain labour rights possess the characteristics of being «compelling, stringent, universal, and timeless entitlements», thereby warranting recognition as fundamental human rights. For the in-depth analysis of different theoretical approaches to the identification of human rights among labour rights see: V. Mantovalou, *Are labour rights human rights?*, in *European Labour Law Journal*, 3, 2, 2012, p. 151-172. For a broader international discourse from recent years, see, for instance: P.M. Collins, *The Role of Human Rights in Labour Law*, in P.M. Collins (ed.), *Putting Human Rights to Work*, Oxford University Press, Oxford, 2022; J. Bellace-B. ter Haar, *Perspectives on labour and human rights*, in J. Bellace-B. ter Haar (eds), *Research Handbook on Labour, Business and Human Rights Law*, Edwar Elgar Publishing, Cheltenham, 2019. For Italian scholarship on the matter see, for all, A. Perulli-V. Brino (eds), *A Global Labour Law: Towards a New International Framework for Rights and Justice*, Giappichelli, Torino, 2024.

analysis situates the CSDDD within broader discussions on the EU's identity as a global normative actor, and explores whether its due diligence regime can evolve from a compliance tool into a transformative framework, [20] capable of reshaping corporate conduct and state-market relations on a global scale.

2. *Overview of Directive (EU) 2024/1760 Corporate Sustainability Due Diligence Directive*

In July 2024, the European Union adopted Directive 2024/1760 on Corporate Sustainability Due Diligence after a lengthy legislative process. [21] This is the first legally binding and harmonised instrument on corporate due diligence that requires companies to adhere to concrete standards regarding human rights and the environment throughout their global value chains. [22] Similarly, at the international level, a treaty is currently being negotiated that aims to establish direct corporate liability for violations of fundamental rights within the supply chain. [23]

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[20] See D.R. Muñoz, *The Corporate Sustainability Due Diligence Directive (CSDDD): Everything, Everywhere, All at Once?*, in *Oxford Business Law Blog*, 6 February 2025, available online: https://blogs.law.ox.ac.uk/oblb/blog-post/2025/02/corporate-sustainability-due-diligence-directive-csddd-everything-everywhere, that suggests that in order to have some transformative effect, the CSDDD must, among other things, aim to reshape corporate behaviour and redefine due diligence not as a regulatory burden but as a strategic advantage for sustainable business.

[21] On the topic of sustainability in the labour law debate and regarding the proposed directive see, *ex multis*, G. Bevivino, *Dalla "responsabilità sociale di impresa alla "sostenibilità: andata e ritorno*, in *Lavoro e Diritto*, 3, 2023, p. 490 ff.; A. Bonfanti-Brino V., *Verso una Direttiva europea sulla due diligence in materia di diritti umani lungo la catena globale del valore: riflessioni di diritto internazionale privato*, in W. Sanguineti Raymond-J.B. Vivero Serrano (eds), *Diligencia Debida y trabajo decente en las cadenas globales de valor*, Aranzadi, Navarre, 2022, p. 1 ff.; M. Borzaga-F. Mussi, *Luci e ombre della recente proposta di direttiva relativa al dovere di due diligence delle imprese in materia di sostenibilità*, in *Lavoro e diritto*, 3, 2023, p. 500 ff.; V. Brino, *Lavoro dignitoso e catene globali del valore: uno scenario (ancora) in via di costruzione*, in *Lavoro e Diritto*, 3, 2019, p. 553 ff.; B. Caruso-R. Del Punta-T. Treu, *Il Diritto del lavoro nella giusta transizione. Un contributo "oltre" il manifesto*, in *CSDLE "Massimo D'Antona"*, 2023; S. Gualandi, *Addressing MNEs' violations of workers' rights through Human Rights Due Diligence. The proposal for an EU Directive on Sustainable Corporate Governance*, in *Diritti Lavori Mercati International*, 2022, 1, p. 84 ff.; V.F. Ponte, *Catene di valore, diritti dei lavoratori e diritti umani: riflessioni intorno alla proposta di direttiva relativa al dovere di diligenza delle imprese ai fini della sostenibilità*, in *AmbienteDiritto.it*, 1, 2024, p. 1 ff.; P. Tullini, *La responsabilità dell'impresa*, in *Lavoro e Diritto*, 2022, 2, p. 357 ff.

[22] V. Brino, *Diritto del lavoro e catene globali del valore, La regolarizzazione dei rapporti di lavoro tra globalizzazione e localismo*, Giappichelli, Torino, 2020; M. Murgo, *Global value chains e diritto del lavoro. Problemi e prospettive*, Cedam, Torino, 2021.

[23] OEIGWG, *Legally Binding Instrument to Regulate*, in *International Human Rights Law,*

The CSDDD reflects and goes beyond the partial approaches found in the 2011 UN Guiding Principles on Business and Human Rights, the OECD Guidelines, the German Supply Chain Act (*Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten*) of 2021, the French Duty of Vigilance Law of 2017, and the Norwegian Transparency Act on decent work of 2021, among others. [24] While some of these instruments were primarily declaratory in nature, [25] the CSDDD marks the shift by establishing actual legal obligations for companies, accompanied by civil and criminal liability (albeit the former mitigated by the recent Omnibus package reforms: e.g., §§ 4.1 and 4.2). [26] The aim

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the Activities of Transnational Corporations and Other Business Enterprises, Third Revised Draft, 17 August 2021.

[24] On the Guiding Principles and other institutional initiatives at the international level, V. Brino, *Diritto del lavoro e catene globali del valore*, Giappichelli, Torino, 2020, esp. p. 43 ff.; E. Partiti, *Polycentricity and polyphony in international law: interpreting the corporate responsibility to respect human rights*, *International and Comparative Law Quarterly*, 70, 1, 2021, pp. 133-164. On the interpretation of the Guiding Principles, J. Bonnitcha-R. McCorquodale, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, in *European Journal of International Law*, 2017, 28(3), p. 899 ff.; J.G. Ruggie-J.F. Sherman, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, in *European Journal of International Law*, 2017, 28(3), p. 921 ff. In particular, on the French law, see I. Benallal-S. Coiffard-D'Amico, *The Impact of the EU Corporate Sustainability Due Diligence Directive on the French Duty of Vigilance*, in https://www.revuedesjuristesdesciencespo.fr/en/post/the-impact-of-the-eu-corporate-sustainability-due-diligence-directive-on-the-french-duty-of-vigilanc-1; A. Lyon-Caen, *Verso un obbligo legale di vigilanza in capo alle imprese multinazionali?*, in *Rivista giuridica del lavoro*, 2018, 2, p. 245 ff.; on the Dutch experience, which focused on preventing the risk of child labour, see Y. Erkens, *Sustainable business agreements in the Netherlands: search for the missing link*, in *Giornale di diritto del lavoro e delle relazioni industriali*, 2021, p. 19 ff.; on the German Supply Chain Act see L. Nogler, *Lieferkettensorgfaltspflichtengesetz: perché è nata e quali sono i suoi principali contenuti*, in *DLRI*, n. 173, 2022, p. 1 ff. For a comparison of the German and Norwegian models, M. Krajewski-K. Tonstad-F. Wohltmann, *Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?*, in *Business and Human Rights Journal*, 6, 3, 2021, p. 550 ff. On the instruments introduced in non-European countries (in particular United Kingdom and California), see Aa.Vv., *Study on Due Diligence Requirements Through the Supply Chain: Final Report*. *A study requested by the European Commission*, Directorate-General for Justice and Consumers. Publications Office of the European Union, Bruxelles, 2020, esp. p. 165 ff.

[25] On the growing awareness that private voluntary standards and soft law instruments alone are insufficient to promote labour standards in global value chains, and on the underlying causes of these shortcomings, see C. Spinelli, *Regulating Corporate Due Diligence: from Transnational Social Dialogue to EU Binding Rules (and Back?)*, in *Diritti Lavori Mercati International*, 2022, I, p. 103 ff.

[26] While the French and Norwegian laws cover the full spectrum of internationally recognised human rights and relevant environmental obligations, the German law identifies only 11 specific human rights, along with a limited set of environmental requirements. The French and

– at least originally – was to avoid mere "box-ticking": procedural models that, without real accountability mechanisms, risk remaining ineffective. [27]

The CSDDD represents a significant step toward real legal accountability for companies. [28] Through a combination of public enforcement, civil liability, and participatory involvement of workers and trade unions, it lays the foundation for corporate accountability to be integrated into the European economic model. It thus highlights a meaningful institutional effort by EU policymakers to rebalance a framework that has so far been overly focused on market promotion and competition. The goal is to hold companies accountable to people and the environment: to introduce behavioral rules and obligations that shape a new organisational paradigm for sustainable business. Within this evolutionary vision, a clear thread emerges connecting the due diligence directive to recent regulatory developments in sustainability, such as the Corporate Sustainability Reporting Directive [29] (CSRD) and the Taxonomy Regulation. [30]

In other words, the Directive pushes national legal systems toward an internalization of sustainability that is not merely ideological, but operational,

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Norwegian frameworks apply broadly – to companies, their subsidiaries, and their entire supply chains. In contrast, the German legislation primarily targets direct (first-tier) suppliers and mandates action beyond that level only when there is "substantiated knowledge" of potential issues. These national laws also differ significantly in their requirements for reporting and transparency, enforcement mechanisms, complaint procedures, and other key elements. For these observations, see J.C. Drimmer-T.K. Giunta-R. Knox, *Is the CSDDD Really Setting a Level Playing Field for Human Rights Due Diligence?*, https://www.paulhastings.com/insights/international-regulatory-enforcement/is-the-csddd-really-setting-a-level-playing-field-for-human-rights-due?.com.

[27] J. Bonnitcha-R. McCorquodale, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, cit., p. 910; C. Mark, *Corporate sustainability due diligence: More than ticking the boxes?*, in *Maastricht Journal of European and Comparative Law*, 29, 3, 2022, pp. 302-303.

[28] For an examination of the debate on the introduction of regulatory instruments aimed at governing corporate behaviour, with particular reference to human rights and fundamental social rights, see ILO, *Decent work in a globalized economy. Lessons from public and private initiatives*, G. Delautre-E. Echeverría Manrique-C. Fenwick (eds), 2021. With regard to the European context, see also Amfori Trade with purpose, *Human Rights Due Diligence Legislation in Europe: Recommendations for a European Approach, Taking into Account Key Principles of Due Diligence*, Position Paper, 2020, in https://www.amfori.org/sites/default/files/amfori-2020-12-02-Position-Paper-Human-Rights-Due-Diligence.pdf.

[29] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

[30] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088.

through rules that impose concrete obligations and sanctions. Furthermore, it complements the framework of next-generation duties outlined in recent European Union legislation, extending it to a wide range of stakeholders who are, in turn, granted corresponding participatory rights. [31]

The CSDDD applies to both EU-based companies with at least 1,000 employees and a turnover equal to or exceeding €450 million, and to non-EU companies with similar thresholds if operating within the internal market (thresholds based solely on turnover generated in the EU, without considering the number of employees). The parameters used to define the subjective scope of application of the Directive are the number of employees and turnover. However, this aspect is bound to spark debate. Human rights violations affect all sectors and are independent of the size of companies and/or turnover thresholds. On this point, the Directive goes against the approach adopted by the Guiding Principles. Furthermore, the choice to limit the scope of application to large companies may encourage opportunistic behaviour, leading businesses to reorganise their business models to evade the constraints imposed by the Directive. [32]

The obligations also extend to subsidiaries and business partners. The Directive defines the scope of due diligence to include both the relationships between companies and their subsidiaries (Art. 3 letter d) and the relationships between the parent company and business partners (the established business relationships – Art. 3 letter f – expand the obligations of the company regardless of the territory in which they are located).

Legally, companies are required to identify, prevent, mitigate, and remedy adverse impacts on human rights – including child labour, forced labour, freedom of association, health and safety – and on the environment, as specified in Annex Part I and Articles 6, 7, and 8. [33]

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[31] M. Giovannone, *The European directive on 'corporate sustainability due diligence': the potential for social dialogue, workers' information and participation rights*, *Italian Labour Law e-Journal*, Issue 1, vol. 17, 2024, p. 229 ff.

[32] V. Brino, *Governance societaria sostenibile e* due diligence*: nuovi orizzonti regolativi*, in *Lavoro Diritti Europa*, 2022, n. 2, esp. pp. 12-13. On the standards of behaviour that respect human rights see T. Treu-A. Perulli, *Sustainable Development, Global Trade and Social Rights*, Wolters Kluwer, Milan, 2018.

[33] The Directive therefore departs from the Guiding Principles: Principle No. 12 clearly highlights the comprehensive nature of the rights that may be violated as a result of corporate activities. The potential impact of business operations concerns all human rights, which makes the choice to limit the scope of application based on a non-exhaustive reference to relevant international legal sources unconvincing. See M. Fasciglione, *Luci e ombre della Proposta di Direttiva europea sull'obbligo di due diligence d'impresa in materia di diritti umani e ambiente*, in http://www.sidiblog.org/2022/05/26/luci-ed-ombre-della-proposta-di-direttiva-europea-sullobbligo-di-due-diligence-dimpresa-in-materia-di-diritti-umani-e-ambiente/.

Companies must: map risks across their entire chain of activities, including subsidiaries and both direct and indirect partners, requesting information where there are "plausible" or "objectively verifiable" indications of risk; prepare effective action plans to prevent and mitigate negative impacts; implement monitoring measures; terminate or suspend contracts with suppliers that fail to comply with required standards; periodically report on their due diligence activities; and bear civil liability in the event of damages.

From a legal liability perspective, the CSDDD introduces a civil liability regime based on clearly defined conditions: identifiable harm to an individual, negligent or intentional breach of due diligence obligations, a causal link, and a burden of proof resting with the injured party. Purely environmental damage is not covered unless it results in harm to a person. However, the burden of proof may be eased through national procedural tools that allow for the disclosure of evidence under the control of the company.

On the enforcement side, the CSDDD requires Member States to designate public authorities with powers of inspection, injunction, and sanction. The directive also provides for sanctions, naming and shaming, prohibitions, and exclusion from public procurement. However, the division of responsibilities among Member States, national authorities, and judicial systems may lead to inconsistent application if not managed with international coordination. The effectiveness of the directive toward non-EU companies remains highly debated due to territorial limitations of international cooperation mechanisms – an issue further explored in this paper. In light of the increasing number of jurisdictions in which global companies operate and the various actors involved in the development of transnational economic activities, due diligence can serve as a regulatory tool that brings order and coherence to an economic model based on the fragmentation of responsibility and the outsourcing of risks. It reorients the company toward a commitment to reducing the social and environmental threats it may potentially generate. [34]

3. *Mechanism of the "Brussels Effect" under the CSDDD. Potential impact on labour rights in third countries*

Given its recent entry into force in July 2024, the potential external effects of the CSDDD could, at this stage, be assessed only with certain methodological limitations.

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[34] V. Brino, *Governance societaria sostenibile e* due diligence*: nuovi orizzonti regolativi*, cit., p. 18; V. Brino, *Diritti dei lavoratori e catene globali del valore: un formante giurisprudenziale in via di definizione?*, in *Giornale di diritto del lavoro e di relazioni industriali*, 167, 3, 2020, p. 451 ff.

Its capacity to generate BE may be evaluated through a few approaches: either mapping and measuring the factual aligning of foreign companies' practices to the European legal requirements (*de facto* BE), analysing the actual due diligence codifications in other jurisdictions (*de jure* BE), or simply verifying the law's mere theoretical possibility to have external influence if specific key indicators are satisfied.

The first two approaches are – at this point – only capable of providing a fragmented and incomplete picture, although some examples, especially of *de facto* BE, can already be found. There is evidence that certain multinational corporations have begun aligning their global practices with human rights due diligence standards. For instance, major EU-based companies such as Unilever, Lego, L'Oréal and Adidas have been extending human rights and environmental due diligence policies across their entire global operations to streamline compliance, and their suppliers in Asia, Africa, and Latin America are being required to meet EU-level sustainability standards to retain contracts. [35] However, rather than creating compliance framework in anticipation of CSDDD adoption or implementation, those actions appear more aligned with international soft law standards from which CSDDD drew inspiration.

A more comprehensive picture can be drawn regarding the anticipated BE impacts of the CSDDD.

As articulated by Bradford, the criteria that must be fulfilled in order to activate the possible BE are: a sufficiently large and attractive market, robust regulatory capacity, a high degree of regulatory stringency, the presence of inelastic target and the indivisibility of production across jurisdictions. [36]

The first four of these criteria are closely interrelated and may be examined collectively.

In the global economy, the EU's large and affluent internal market gives it

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[35] For example, Adidas already implements a Human Rights and Environmental Due Diligence (HREDD) process to identify, assess, and mitigate risks. They comply with global and national regulations, including the German Supply Chain Act and declares the commitment to make the whole of its value chain covered by due diligence in human rights issues by 2025. See: https://www.adidas-group.com/en/sustainability/people/human-rights. Unilever also has processes in place for assessing and identifying risks related to human rights impacts. They have developed internal guidelines (Code of business principles) for responsible disengagement, ensuring consideration of potential impacts on people in their value chains: https://www.unilever.com/files/unilever-approach-human-rights-due-diligence.pdf. For a full report on some case studies preceding adoption of CSDDD see, for example: The Danish Institute for Human Rights, *Due diligence in the downstream value chain. Case studies of current company practice*, revised version 7 May 2024, available online: https://www.humanrights.dk/publications/due-diligence-downstream-value-chain-case-studies-current-company-practice.

[36] A. Bradford, *op. cit.*, pp. 10-19.

significant power to set global standards, as many producers are willing to bear high compliance costs to maintain access to it. The EU single market, comprising 27 Member States and some non-EU countries, represents one of the world's largest economies with a GDP of € 17 trillion. [37]

Market size then goes hand in hand with regulatory capacity: in the EU's case, the latter has been developed through institutional empowerment and legal authority in some areas where Member States have delegated regulatory competence. Though lagging behind in velocity and voracity in other aspects, such as economic growth and incomparable market size of some Asian countries, [38] EU's regulatory capacity promotes it to a "superstate" thanks to sufficient enforcement of its regulations. This aspect is particularly evident in the CSDDD which establishes (in its original text) a comprehensive enforcement framework. The Directive mandates the establishment of supervisory authorities in each Member State (Article 24) and introduces provisions on civil liability (Article 29). By combining administrative supervision with civil liability, the CSDDD establishes a relatively robust and complementary [39] system that enhances corporate accountability through both preventive public oversight and access to remedy.

Besides the enforcement element, this regulatory solidity is further strengthened by the high quality and sophistication of EU legislation. In recent years, the Union's normative leadership has been proven, for example, in the field of digital governance, as demonstrated by landmark regulatory frameworks such as the General Data Protection Regulation – Regulation (EU) 2016/679, the Digital Markets Act – Regulation (EU) 2022/1925, the Digital Services Act – Regulation (EU) 2022/2065, and the Artificial Intelligence Act – Regulation (EU) 2024/1689.

As previously outlined (see supra, § 2), the CSDDD represents – in its original formulation – one of the most stringent legal instruments in its field, surpassing many national regulations and soft law frameworks. Bradford attributes this to a deliberate political choice, arguing that the establishment of higher normative standards ultimately depends on the legislator's intentional action. [40] While this is accurate, it may also be argued that such choices are not entirely autonomous, but rather shaped – at least in part – by public demand and

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[37] https://european-union.europa.eu/principles-countries-history/facts-and-figures-european-union_en#:~:text=GDP:%20as%20one%20of%20the,EU%20is%20%E2%82%AC17%20trillion.

[38] A. Bradford, *op. cit.*, p. 13.

[39] In particular, Recital 79 of the CSDDD explicitly states that the liability regime established under Article 29 does not preclude or restrict companies' liability under existing national laws or Union law.

[40] A. Bradford, *op. cit.*, p. 14.

prevailing societal attitudes. EU citizens have consistently demonstrated a preference for higher standards and stricter oversight, particularly in relation to workplace safety and environmental protection, thereby exerting pressure on policymakers to adopt more ambitious regulatory measures. [41] Also recent findings indicate consistently strong support for CSDDD enforcement mechanisms across Member States, with particularly high level of endorsement observed in response to human rights violations. [42] The CSDDD recognises this sentiment among European «customers and investors» as a «rising concern» in Recital 4.

However, strict regulations can only evolve into global standards when regulatory subjects – such as companies – are unable to circumvent them by shifting their operations to jurisdictions with weaker legal requirements. [43] In this regard, consumers represent a quintessential inelastic target: they cannot be easily relocated, and their purchasing power remains tied to specific markets. The EU, as home to one of the world's largest and most affluent consumer bases, offers a particularly compelling example. Given the strategic importance of maintaining access to this high-value market, companies are more likely to absorb the compliance costs associated with regulations such as CSDDD, rather than risk exclusion.

Up until now the criteria for the activation of BE in CSDDD have been met quite effortlessly. The last element of non-divisible production represents the only possible conundrum especially when it comes to labour law.

According to Bradford, the BE only occurs when companies adopt the EU's strict standards globally, due to legal, technical, or economic non-divisibility in their operations, making uniform compliance more efficient than market-specific adjustments. This effect seems weaker in the area of labour standards because they are generally viewed as divisible, allowing companies to shift their

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[41] EU citizens signed petitions and supported initiatives like Clean Clothes Campaign (https://cleanclothes.org/file-repository/cso_statement_csddd_en.pdf), Justice is everybody's business (https://corporatejustice.org/news/over-100-groups-launch-justice-is-everybodys-business-campaign/) and Fashion Revolution (https://italy.fashionrevolution.org/en/good-clothes-fair-pay/), calling for EU legislation ensuring companies take responsibility for human rights violations abroad. EU consumers have also increasingly favoured fair trade and ethical certification labels, particularly for coffee, cocoa, and textiles, indirectly pressuring suppliers in third countries to uphold decent labour standards. Petitions, media pressure, and campaigns by consumers and NGOs prompted the European Commission to propose a forced labour ban on goods entering the EU market (aforementioned Regulation 2024/3015), mirroring the U.S. Uyghur Forced Labor Prevention Act, see: the European Parliament resolution on the topic of 17 December 2020, https://www.europarl.europa.eu/doceo/document/TA-9-2020-0375_EN.html.

[42] H. Jabotinsky-R. Sarel, *Attitudes toward the Corporate Sustainability Due Diligence Directive: Survey Evidence*, 2025, available online: https://ssrn.com/abstract=5312055.

[43] A. Bradford, *op. cit.*, p. 16.

operations or register in jurisdictions with more lenient regulations to minimise compliance costs. [44] As a result, businesses apply different labour standards across regions.

While Bradford's thesis about the divisibility of labour standards could withstand some theoretical criticism, it tumbles down under the empiric evidence and concrete examples of European labour legislation that disrupts this dynamic. [45] For example, under the EU Forced Labour Regulation (Reg. 2024/3015), any product made with forced labour is banned, regardless of where in the supply chain the abuse occurs, whether in raw material extraction, intermediate processing, or final assembly. Because companies cannot reliably predict in advance whether a component produced with forced labour will eventually enter the EU internal market, they may feel compelled to eliminate forced labour across their entire supply chain, including in segments not directly exporting to the EU. This "epistemic non-divisibility", [46] where uncertainty about supply chain outcomes leads to comprehensive compliance beyond formal legal requirements, directly results in the regulation producing a full BE.

The CSDDD also applies extraterritorially to the entire value chain of companies placing goods or services on the EU market, regardless of the company's place of incorporation or the geographical location of its operations. In doing so, the Directive limits the scope for regulatory arbitrage in labour standards, implicitly requiring companies to implement consistent labour rights protections across jurisdictions if they wish to maintain access to the EU market.

However, in contrast with the Forced Labour Regulation, the CSDDD does not impose market-based bans on products linked to human rights abuses. Instead, it imposes due diligence obligations on companies, focusing on their conduct throughout the chain of activities. Legal liability and compliance duties thus attach to corporate behaviour rather than to the goods or services themselves. This means that, in the absence of automatic market exclusions (such as bans), companies retain greater discretion and face weaker incentives to ensure that operations not directed at the EU market adhere to the same standards. Consequently, the quality of the enforcement measures becomes of utmost importance: only if companies align all operations with EU labour standards, eliminating labour rights violations even in goods and services not destined for the internal market, can the CSDDD produce a genuine BE.

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[44] A. Bradford, *op. cit.*, pp. 17-19.

[45] A. Eustace, *op. cit.*, pp. 151-157.

[46] A. Eustace, *op. cit.*, p. 156, who describes with this terminology the convenience of eliminating forced labour from all the productive processes, despite no explicit legal obligation.

4. *"Omnibus effect" on transformative ambition of CSDDD*

For the CSDDD to fulfil its transformative ambition, [47] it must fundamentally reframe how both companies and regulatory authorities perceive due diligence: e.g. not as a mere compliance obligation, but as a strategic tool for responsible and sustainable business conduct. This vision aligns with the broader role of the EU as a global normative actor and reflects an effort to counter the adverse effects of globalisation on labour standards [48] through the regulatory diffusion described by the BE. However, the final version of the CSDDD adopted by the Council and Parliament reflects significant compromises. [49] The personal scope of the Directive was considerably narrowed down, resulting in its application to only a small fraction of EU-based companies – estimated at just 0.05% of the total [50] – and globally it was expected to apply to only around 900 non-EU companies operating within the EU market. [51] This dilution, coupled with the so-called "Omnibus Package" proposed in the aftermath of its adoption, raises critical questions about the Directive's capacity to deliver on its original, transformative promise and to produce meaningful extraterritorial effects. [52]

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[47] D.R. MUÑOZ, *op. cit.*

[48] For the vision of EU as the one institution with power «to set globalisation within a moral framework» see Leaken Declaration on the future of the European Union (15 December 2001), available online: http://www.cvce.eu/obj/laeken_declaration_on_the_future_of_the_european_union_15_december_2001-en-a76801d5-4bf0-4483-9000-e6df94b07a55.html. For the increased concerns in terms of unintended negative consequences of BE see: K. Buhmann-L. Feld, *Shifting boundaries: a transnational legal perspective on the EU Corporate Due Diligence Directive*, in *Transnational Legal Theory*, 15, 3, p. 387 ff. Scholarship is becoming increasingly aware that the CSDDD's due diligence requirements could and will impact not only third country companies but consequently e inevitably also workers and communities dependent on those enterprises, particularly in the Global South. Enforcing due diligence can lead to unintended negative consequences – such as job losses, weakened local economies, or withdrawal from high-risk regions – as companies would seek to avoid the complexity of compliance, echoing past experiences with similar regulations.

[49] Referred by many as a "watered down", "toothless" or "scaled-down" version, see: A. Niranjan, *EU approves watered-down human rights and supply chain law*, 15 March 2024, available online: https://www.theguardian.com/world/2024/mar/15/eu-approves-watered-down-human-rights-and-supply-chain-law; also M. Foley, *Beware: The scaled-down CSDDD Regulation still has bite*, 27 March 2024, available online: https://www.forbes.com/sites/maryfoley/2024/03/27/beware-the-scaled-down-csddd-regulation-still-has-bite/.

[50] Representing approximately 6000 companies, see: https://corporatejustice.org/news/reaction-csddd-endorsement-brings-us-0-05-closer-to-corporate-justice/.

[51] https://commission.europa.eu/business-economy-euro/doing-business-eu/sustainability-due-diligence-responsible-business/corporate-sustainability-due-diligence_en.

[52] Shortly after Omnibus even more radical step was proposed, namely abolishing CSDDD altogether was called for by German Chancellor Friedrich Merz and French President Emmanuel Macron: https://www.politico.eu/article/macron-merz-supply-chain-green-ethical/.

4.1. *The "Omnibus Package": Regulatory simplification or deregulation? The redefinition of stakeholders…*

In February 2025, the European Commission proposed the *Omnibus I Package*, with the stated aim of simplifying and reducing bureaucratic burdens related to Environmental, Social, and Governance (ESG) regulations. [53]

In particular, the package seeks to amend the Corporate Sustainability Reporting Directive (CSRD) – Directive 2022/2464/EU, transposed into Italian law via Legislative Decree 125/2024 – as well as Directive 2024/1760/EU. The legislative process for some of the Commission's proposals has already concluded with the adoption of Directive (EU) 2025/794, which Member States must transpose by 31 December 2025. This directive is known as the "*stop the clock*" measure, as it postpones certain ESG-related deadlines. Conversely, the legislative process for the more substantial amendments to the current legal framework[54] has already raised legitimacy concerns among experts. [55]

[53] It should be noted that sustainability policy rewriting forms a part of a broader (mis)use of the Omnibus instrument by the European Commission. So far in 2025, as many as seven reform packages were introduced – not only on sustainability, but also on investment, agriculture, defence, the single market, chemicals and, the most recent, digital omnibus on ePrivacy and AI – in an effort to reduce the regulatory burden on businesses by 25%, see https://www.consilium.europa.eu/en/policies/simplification/ and https://ec.europa.eu/commission/presscorner/detail/en/ip_25_2718. This accelerated legislative push appears to be driven partly by the 2024 Draghi Report on EU competitiveness and by broader geopolitical pressures such as the "Trump effect" on the global economy.

[54] If not specified otherwise, this paper refers to the original text of the European Commission's proposal for the Omnibus package from 26 February 2025 (https://data.consilium.europa.eu/doc/document/ST-10276-2025-INIT/en/pdf). It is important to note, however, that the Council has since issued its negotiating position (available at https://data.consilium.europa.eu/doc/document/ST-10276-2025-INIT/en/pdf), introducing several substantial modifications, particularly regarding the scope and implementation timelines of the CSDDD. While the Council's version aligns with the Commission's approach on certain aspects it diverges notably on others, reflecting differing institutional priorities and interpretations of the Directive's objectives. The European Parliament's negotiating position was issued on 13 November 2025. With EP's position the CSDDD Omnibus reached its final legislative stage. That opened the way for inter-institutional negotiations between the EP, the Council, and the Commission on the final text of the revised CSRD, CSDDD, and Taxonomy Regulation. On 16 December 2025, the final text was approved by the European Parliament. https://www.europarl.europa.eu/news/en/press-room/20251211IPR32164/simplified-sustainability-reporting-and-due-diligence-rules-for-businesses.

[55] More than one hundred legal scholars have cautioned the JURI Committee that the procedural shortcut embodied in the omnibus approach could, in the event of a future challenge before the Court of Justice of the EU, result in the annulment of the directives due to procedural irregularities and inadequate consultation. Such a prospect further exacerbates the uncertainty surrounding the investments and strategic adjustments already undertaken by the most forward-looking companies in relation to the CSRD and CSDDD. See https://euobserver.com/green-economy/ar2f3d1a9f.

Outlined below are some of the key changes proposed so far by the Commission, the Council, and the European Parliament (henceforth "EP").

In primis, the Council and EP proposals include a major increase in scope thresholds, from original 1.000 to 5.000 employees and from €450 million to €1.5 billion in turnover, potentially curtailing the already limited scope of the Directive.

A mandatory transition-plan requirement is softened and in the Commission and the Council's versions, the EP proposes to remove the transition-plan obligation altogether.

While the Commission and the Council limit in-depth due diligence assessments to direct suppliers (tier 1 suppliers), while investigations into indirect partners are required only when credible and plausible information emerges, [56] with the Council providing additional guidance on assessing indirect business partners, the EP instead advocates a broader, risk-based approach that is not restricted to tier 1 suppliers.

The Commission removes the obligation to terminate business relationships as a measure of last resort with a preference for suspension if it results in lesser impact (the EP and Council's proposals being broadly aligned on the topic).

When it comes to civil liability the harmonised rules under Article 29 are (unanimously) repealed, delegating civil liability regulation to individual Member States (see *infra*, § 4.2).

Lastly, the Commission proposes removing the 5% minimum penalty of global turnover, assigning itself the role of issuing non-binding guidelines instead, while the Council sets a maximum fine of 5% of net worldwide turnover, a position broadly supported by the EP, which also recommends that guidance take company turnover into account.

The first transposition deadline is pushed back to July 2027, and the first operational phase to July 2028, giving companies more time to adapt and interpret guidelines and standards (Art. 37).

The amendments introduced by the "Omnibus Package" have had a particularly significant impact on the concept and scope of the term "*stakeholder*", as defined in Article 2. [57] In the original version of the Directive, this definition

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[56] See artt. 8-10: a reduction in the so-called "trickle-down effects" of due diligence obligations on small and medium-sized enterprises is expected. Enterprises (with fewer than 500 employees) will only be required to provide their business partners, who are subject to the Directive, with the information specified in the voluntary reporting standards of the CSRD – unless additional information is specifically needed to identify impacts not covered by the standards, and only if such information cannot be obtained by alternative means.

[57] For an analysis of the concept of "worker participation" in an organization's decision-making processes, and the benefits of meaningful involvement of workers and their representatives in human rights due diligence processes, see C. Cordella, *The Slow Approval Process of the Due*

encompassed a broad range of individuals and groups potentially affected by or interested in a company's activities, including workers, trade unions, local communities, NGOs, consumer associations, ethnic and indigenous minorities, as well as other relevant actors from civil society.

However, following the amendments introduced through the "Omnibus Package", this definition has been narrowed down, expressly or implicitly excluding certain categories – most notably consumer organizations and some NGOs – on the grounds that they are less directly involved in the company's chain of activities.

From a legal standpoint, this narrowing down of stakeholder categories has sparked criticism. The restriction risks undermining the inclusive, multi-level approach promoted by the 2011 UN Guiding Principles on Business and Human Rights and the OECD Guidelines, which emphasise broad participation of social actors in the governance of corporate due diligence. [58]

At the same time, the central role of workers and trade union representatives has been preserved in the final definition – and even strengthened – with respect to their rights to information, consultation, and active participation in risk identification and mitigation processes.

Politically, the restriction of stakeholders has been justified as a necessary step to reduce procedural burdens on businesses and limit the risk of strategic or non-genuine litigation initiated by parties not directly harmed. However, the systemic risk is that due diligence may devolve into a mere formal compliance exercise, stripped of the civil society dialogue that gives it substance.

From a jurisprudential perspective, it is worth recalling that the Court of Justice of the EU has recognised the importance of involving vulnerable groups in proceedings that affect their fundamental rights, including the right to freedom of association and access to social protection. [59] In light of such case law, the final version of the Directive may be subject to future legal challenges or interpretative scrutiny, particularly if the narrowing of standing rights undermines

Diligence Directive and the Different Paths for the Involvement of Trade Unions, in *Italian Labour Law e-Journal Issue* 2, 2023, vol. 16, p. 17 ff.; F. Guarriello, *Il ruolo del sindacato e delle rappresentanze del lavoro nei processi di due diligence*, in *Rivista Giuridica del Lavoro*, 2021, p. 581; J. Nunes Vicente, *Neglecting the Involvement of Trade Unions in Due Diligence processes? A Critical Appraisal of the EU's Corporate Due Diligence Directive*, in *Diritti Lavori Mercati International*, 2024, 1, esp. p. 273 ff.; R.W. Sanguineti, *Le catene globali di produzione e la costruzione di un diritto del lavoro senza frontiere*, in *Giornale di diritto del lavoro e di relazioni industriali*, 166, 2, 2020, pp. 187-226.

[58] See, for a pre-Omnibus analysis, V. De Stefano-N. Countouris, *Labour rights, due diligence and corporate responsibility in the EU legal framework*, in *European Labour Law Journal*, vol. 15, 2024, p. 17 ff.

[59] See, for example, Case C-507/17, NH v. Associazione Avvocatura per i diritti LGBTI.

the effectiveness of protections guaranteed under articles 47 and 52 of the EU Charter of Fundamental Rights.

4.2. ... *partial dismantling of the enforcement framework and restriction of due diligence scope across value chains*

Art. 4 of the Omnibus Proposal (2025/0045) introduces other several significant amendments to the CSDDD. Among the most consequential – particularly in relation to potential labour rights violations – is the reform of its enforcement framework.

Art. 29 originally aimed to establish a harmonised framework for civil liability across the EU. Under the proposed revisions, however, most of the article has been removed and the determination of liability is now deferred to national legal systems. [60] While paragraph 1 of the original provision set out clear (albeit rigorous) conditions for liability, [61] its removal creates a serious risk of an enforcement gap. Furthermore, paragraph 7, which previously ensured the overriding and mandatory application of EU liability rules, has also been eliminated, weakening the Directive's coherence and potentially undermining its effectiveness.

The removal left potential victims of human rights violations dependent on fragmented and often inadequate national legal systems. This shift not only reintroduces procedural and jurisdictional barriers that hinder transnational litigation but also risks perpetuating a *status quo* in which corporate abuses – particularly in cross-border contexts – go unremedied due to inconsistent liability standards across Member States. The shortcomings of this approach have been well illustrated by emblematic national cases – such as the Kik litigation in

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[60] After Omnibus, the proposed wording of Art. 29 is as follows: «Where a company is held liable pursuant to national law for damage caused to a natural or legal person by a failure to comply with the due diligence requirements under this Directive, Member States shall ensure that those persons, a natural or legal person have the right to full compensation», compared to the original provision of Art. 29 par. 2 stating that: «Where a company is held liable in accordance with paragraph 1, a natural or legal person shall have the right to full compensation for the damage, in accordance with national law», para. 1 referring to a situation when «a) the company has failed, either intentionally or negligently, to comply with the obligations set out in Articles 10 and 11 of the Directive, where the right, prohibition, or obligation listed in the Directive's Annex is intended to protect that natural or legal person; b) as a result of such failure, damage has occurred to the legal interests of the natural or legal person, as protected under national law».

[61] For a comprehensive account on the civil liability provisions see, for instance, F. Guarriello, *op. cit.*, pp. 288-293, who considered such regulatory framework «open to improvement, but genuinely receptive to the extraterritorial dimension of corporate liability, which in the past has been largely hindered by domestic rules that prevented effective access to remedies for damages».

Germany [62] or the case of Swedish mining company over toxic waste in Chile [63] – which highlight the persistent challenges in holding companies accountable for extraterritorial harm.

Arguably, even prior to the Omnibus revisions, the CSDDD's enforcement regime lacked clarity on applicable law and jurisdiction in private enforcement proceedings leaving significant gaps in judicial oversight for public enforcement. [64] The Omnibus reform further exacerbates this imbalance: while the administrative enforcement mechanisms (*rectius*: supervision under Art. 24) remain, the civil liability dimension has been significantly weakened, shifting the burden further away from corporate accountability and limiting access to remedy for affected rightsholders.

Originally, under Articles 10 and 11, the CSDDD imposed a mandatory and time-bound obligation to terminate business relationships if severe human rights or environmental impacts could not be prevented or mitigated within a set timeframe through an enhanced corrective action plan. This provision functioned as a strong enforcement tool, reinforcing corporate leverage over non-compliant suppliers. [65] The removal of this requirement transforms what was once a clear obligation into a discretionary option, significantly weakening enforcement pressure on business partners.

The Omnibus amendments introduce an indefinite suspension mechanism that allows companies to continue engaging with suppliers as long as they maintain a "reasonable expectation" that the adverse impact will be addressed. This vague standard – lacking objective criteria or time limits – creates legal uncertainty and reduces corporate incentives to ensure concrete and timely remediation of harm.

One of the core functions of mandatory termination was to enhance companies' bargaining power to demand corrective measures from suppliers. The shift to a more lenient and open-ended suspension undermines this leverage, particularly in high-risk sectors or contexts where suppliers are unlikely to improve

[62] See L. Nogler, *op. cit.*, p. 28 ff.; see also: https://www.ecchr.eu/en/case/kik-paying-the-price-for-clothing-production-in-south-asia/.

[63] See, for instance, *Lawsuit against Boliden over export of toxic waste to Chile & its health impact on Arica residents starts in Sweden*, Business & Human Rights Resource Centre, 19 October 2017, https://www.business-humanrights.org/en/latest-news/lawsuit-against-boliden-over-export-of-toxic-waste-to-chile-its-health-impact-on-arica-residents-starts-in-sweden/.

[64] Concerns have been raised about use of existing private international law instruments like the Rome II Regulation and the Brussels I bis Regulation, crucial in cross-border human rights and environmental cases, as their application is often complex. For an in-depth analysis see: S. Parlak de Oliveira Serra, *Corporate governance and due diligence analysis under the Corporate Sustainability Due Diligence Directive (CSDDD): Legal and extraterritorial challenges*, in S. Fina-R. Vogl (eds), *European Union Law Working Papers*, No. 105, 2025, p. 70 ff.

[65] Such provisions represented «the heart of the Directive», F. Guariello, *op. cit.*, pp. 27-30.

without clear and enforceable consequences, especially in contexts where exploitative labour practices are deeply embedded and unlikely to change without external leverage. [66]

The introduction of terms such as "reasonable expectation" adds interpretive ambiguity that will likely be resolved differently across Member States, leading to fragmented enforcement and unpredictability for companies and rights-holders alike. This potentially undercuts the Directive's harmonising function and could reduce its effectiveness as a tool for promoting EU-wide corporate accountability.

Additionally, the restriction of due diligence obligations to tier-1 suppliers pursuant changes to Article 8 par. 2, coupled with the five-year review clause under Article 15, threatens to dilute the substantive, harm-centred approach grounded in the assessment of severity and probability of adverse impacts, as promoted by the UN Guiding Principles on Business and Human Rights: an approach that prioritises meaningful engagement with human rights risks over narrow, administratively convenient compliance. [67] These changes raise critical concerns about the EU's commitment to prioritising risks to people in line with international human rights standards, and may ultimately compromise the Directive's transformative potential.

Firstly, the Omnibus amendments significantly narrow the scope of due diligence obligations under the CSDDD by limiting them primarily to direct (tier 1) business partners. Companies are only required to extend their due diligence beyond tier 1 if they possess "plausible information" indicating adverse impacts linked to indirect partners, a threshold that weakens the original ambition of a risk-based and comprehensive approach. This formulation closely mirrors the scope of Germany's Supply Chain Due Diligence Act (LkSG), though it substitutes the LkSG's standard of "substantiated knowledge" [68] with the more ambiguous criterion of "plausible information," potentially lowering the threshold for corporate responsibility.

In the context of labour rights, this limitation presents a critical gap. Some of the gravest human rights abuses – such as forced labour, [69] child labour, systemic wage theft, and hazardous working conditions – commonly occur in

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[66] S. Velluti, *Labour standards in global garment supply chains and the proposed EU corporate sustainability due diligence directive*, in *European Labour Law Journal*, 15, 4, 2024.

[67] UN Office of the High Commissioner for Human Rights (OHCHR), Guiding Principles on Business and Human Rights (2011), Principles 17–21.

[68] Section 9, par. 3 LkSG. For the analysis of the Act see: A Mardenli-K.F. Sträter-C. Herrmann-D. Sackmann, *The German Act on Corporate Due Diligence Obligations in supply chains: An empirical assessment of the agri-food supply chain based on experts' perspectives*, in *Cleaner Logistics and Supply Chain*, 16, 2025, available online: https://www.sciencedirect.com/science/article/pii/S2772390925000381.

[69] G. LeBaron, *The role of supply chains in the global business of forced labour*, in *Journal of Supply Chain Management*, 57, 2, 2021.

upstream supply chains, particularly in low-cost manufacturing regions where monitoring is weak and labour protections are poorly enforced. [70] Restricting due diligence to tier 1 relationships may enable companies to overlook these violations, shielding themselves from responsibility while continuing to benefit from exploitative practices deep in their supply chains. Moreover, by focusing only on the most visible parts of the value chain, the Directive risks once again encouraging superficial compliance rather than substantive human rights protection. [71]

As a result, the prospected revision of CSDDD not only weakens protections for vulnerable workers but also exposes companies to reputational, operational, and legal risks by allowing significant blind spots in their due diligence systems. In failing to address the structural realities of modern supply chains, the narrowed scope risks rendering the Directive ineffective in preventing labour rights abuses where they are most likely to occur.

Secondly, with regards to Omnibus revision of Article 15, that reduces the frequency of monitoring due diligence measures to a minimum of once every five years, said interval appears to significantly weaken the Directive's potential to prevent labour rights violations. In practice, such an infrequent review cycle is misaligned with the dynamic nature of labour risks in global supply chains, where working conditions can deteriorate rapidly due to subcontracting, [72] shifting production sites, or economic pressures. [73] Delaying assessments for half a decade risks allowing exploitative practices to persist undetected and unaddressed for prolonged periods.

Effective due diligence requires regular, iterative review to ensure that

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[70] *Human rights in supply chains. A call for binding global standard on due diligence*, in Human Rights Watch, 30 May 2016, available online: https://www.hrw.org/report/2016/05/30/human-rights-supply-chains/call-binding-global-standard-due-diligence.

[71] Conducted sectorial studies (pre-CSDDD) confirm this hypothesis. For instance, most major fashion brands are failing to address forced labour in their supply chains; while over three-quarters of selected companies source from countries with a high risk of forced labour, only 8% provided detailed disclosures on forced labour risks across different supply chain tiers showing fundamental failure to conduct meaningful due diligence beyond the first tier, without the specific legal obligation to do so. See *2023 Apparel & Footwear Benchmark Findings Report*, available online: https://media.business-humanrights.org/media/documents/KTC_2023_AF_Benchmark_Report.pdf.

[72] S. Borelli, *Subcontracting: exploitation by design. Tackling the business model for social dumping*, study for The Left in the European Parliament, 2022, available online: https://left.eu/issues/subcontracting-exploitation-by-design-tackling-the-business-model-for-social-dumping/.

[73] For instance, in the case of big tech companies such as Apple, the pace of production is largely dictated by the final (often the first-world) costumers, severely limiting third country suppliers' capacity to uphold and improve labour standards within their factories. J. Lee, *Global supply chain dynamics and labour governance: implications for social upgrading*, ILO research Paper No. 14, International Labour Office, 2016, p. 9.

mitigation strategies remain responsive and proportionate to the evolving nature of labour-related harms. Annual reporting obligations, as maintained in other parts of the Directive, [74] suggest that companies will in fact need to collect data and evaluate their measures more frequently in order to comply with broader transparency and accountability requirements.

This discrepancy between formal monitoring timelines and actual enforcement expectations creates legal uncertainty while weakening the Directive's deterrent effect, undermining the preventive goal of due diligence and erodes meaningful access to remedy for workers affected by corporate abuse. For due diligence to be a living process capable of protecting labour rights effectively, monitoring must be ongoing, evidence-based, and adaptable – criteria the five-year interval fails to meet.

5. *Final remarks*

More broadly, the reduction of obligations under the "Omnibus Package" may shift the system from a preventive to a reactive model, increasing the risk of failures in protecting human rights. [75] In this light, the package may effectively amount to a form of deregulation [76] and result in a mechanism that conflicts with the fundamental constitutional principles of the EU. [77]

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[74] For example, Art. 16 mandates that companies publish an annual statement on their website detailing their due diligence process and its results.

[75] S. Raval-J. Bäumler, *Left Behind. How the Omnibus Package Fails Vulnerable Workers from Informal Economies*, in *VerfBlog*, 2025/3/18, https://verfassungsblog.de/eu-omnibus-informal-workers/; O. Uvarova, *The Simplification Omnibus and the Rule of Law: Undermining Corporate Sustainability in the EU and Beyond?*, available online: https://bhrj.blog/2025/03/12/the-simplification-omnibus-and-the-rule-of-law-undermining-corporate-sustainability-in-the-eu-and-beyond/.

[76] *The Big UE Deregulation. Disastrous Omnibus proposal erodes EU's corporate accountability commitments and slashes human rights and environmental protections*, available online: https://corporatejustice.org/wp-content/uploads/2025/03/Joint-CSO-statement-reacting-to-Omnibus-publication-March-2025.pdf; J. Bogart, *Death by Omnibus? The European Commission's Proposal and the Fate of the Corporate Sustainability Due Diligence Directive (Part I)*, available online: https://opiniojuris.org/2025/07/11/death-by-omnibus-the-european-commissions-proposal-and-the-fate-of-the-corporate-sustainability-due-diligence-directive-part-i/.

[77] A. Alemanno, *The Legality of Omnibus Legislation Under EU Law: A Preliminary Analysis of Omnibus I Simplification Directive of CSRD and CSDD and its Legal Consequences on the EU Legal Order (November 09, 2025)*, available at SSRN: https://ssrn.com/abstract=5727822. According to this study, although omnibus legislation is not inherently incompatible with EU law, its systematic use to pursue a simplification agenda conflicts with the Union's fundamental constitutional principles. Omnibus I provides an example of this, as the proposal of

Undoubtedly, the “Omnibus” intervention has narrowed the range of legitimate channels for participation, potentially weakening the effectiveness of corrective actions and the multilateral pressure on companies. National implementation can (and must) address this gap by extending, within the margins allowed by the Directive, the participation of communities and representative actors in the due diligence system.

The original inclusion of liability for negligence or intent would have been revolutionary. However, the removal of Article 29 shifts the emphasis to the effectiveness of national legislation. This raises the risk of fragmentation and reduced legal harmonisation, with direct consequences for workers who have suffered harm. It will fall to national courts and the Court of Justice to fill these gaps and adopt broad interpretations of the rules to ensure the effectiveness of social rights, and to prevent a deregulatory drift that could undermine the principles enshrined in the EU Charter of Fundamental Rights and international labour law.

Legal scholarship and trade unions will need to continue advocating for strong and transparent participatory mechanisms that strike a fair balance between protecting workers and maintaining the economic sustainability of businesses.

In conclusion, in the process of integrating social rights and corporate governance the CSDDD marks a strategic cultural and legal shift. However, its real impact will depend on the ability of Member States and national courts to ensure effective enforcement. The upcoming transposition and implementation phase represents a crucial test. The hope (albeit attenuated due to the progress of the interinstitutional negotiations between Parliament, Council, and Commission) is that this phase will not become an opportunity for deregulation, but rather a proving ground to show that due diligence can result in meaningful protection of trade union rights, health, safety, and decent working conditions.

Over the course of the analysis, an effort was made to assess the extent to which the due diligence obligations set out in the Directive may produce extraterritorial effects within diverse institutional and regulatory contexts. In this regard, the CSDDD has been interpreted as part of the European Union’s broader attempt to establish itself as a global normative actor. However, as highlighted, by dismantling key elements of the civil liability framework and

its related Simplification Directive violates the principle of proportionality under Article 5(4) TEU and undermines the constitutional framework of participatory and evidence-based lawmaking established in Articles 11 TEU and 296 TFEU. It remains uncertain whether this “failure” represents an isolated deviation or the beginning of a new constitutional normality, a determination that falls to the political choice of the EU legislature.

narrowing due diligence obligations to tier-1 suppliers, the Omnibus revision risks fragmenting enforcement across Member States and weakening the EU's normative coherence. In doing so, it not only compromises protections for affected workers but also diminishes EU's capacity to project regulatory influence globally.

In light of these limitations, the promise of a "social extraterritoriality" appears, at least for now, strongly weakened. There is a risk that the Directive may end up serving a predominantly declaratory or soft law function, rather than constituting a genuinely effective instrument for influencing global market dynamics and improving working conditions along transnational value chains. Nonetheless, the possibility remains open that, through rigorous implementation and evolving judicial interpretation, its transformative potential may yet be realised.

THE SUSTAINABILITY OF THE INTERNATIONAL FISHERIES AGREEMENTS AS A TOOL OF THE EUROPEAN UNION'S EXTERNAL RELATIONS LAW

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SUMMARY: 1. Introduction. – 2. The International Fisheries Agreements and Sustainability in the European Union's External Relations Law. – 3. The Contribution of the Court of Justice of the European Union for the Recognition of Sustainability of the International Fisheries Agreements. – 3.1. The notion of an international fisheries agreement concluded by the European Union with a third country. – 3.2. The possible responsibility of the European Union before an international court or tribunal for non-compliance with an international fisheries agreement. – 3.3. The legal scope of an international fisheries agreement. – 4. Some Final Remarks.

1. *Introduction*

The exclusive competence for the conservation of fishery resources, which the European Union (EU) has been assuming for the last 40 years,[1] is not limited to maritime waters under the sovereignty or jurisdiction of its Member States, but extends beyond that to the fishing activities of fishermen and fishing vessels flying the flag of an EU Member State[2] in the waters of third States or on the

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All websites mentioned in this chapter were last consulted on 11 July 2025.

[1] Art. 3(1)(d) TFEU. In all the other fields regarding fisheries, under art. 4(2)(d) TFEU, there is a shared competence between the EU and its Members States.

[2] Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and

high seas, "without prejudice to the primary responsibility of the flag State".[3]

In order to develop this competence as well as to be able to cope with the evolution of the international law of the sea, the EU has been forging an external fisheries policy. In the author's view, this policy is not only and exclusively the international dimension of the Common Fisheries Policy (CFP), but it is also one of the elements that best define the EU's international legal personality as set out in Article 47 of the Treaty on European Union (TEU). It is argued that the external fisheries policy enables the EU to fulfil one of its fundamental objectives, as set out in the Preamble of the TEU, i.e. to affirm the EU's identity and independence in the international arena.

As is well known, in 1998 the EU concluded both the United Nations Convention of 10 December 1982 on the Law of the Sea (UNCLOS) and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof,[4] as well as making a Declaration concerning its exclusive competences about matters governed by the UNCLOS and that Agreement.[5] Furthermore, the EU signed and formally confirmed the Agreement for the Implementation of the Provisions of

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(EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, OJ L 354, 28.12.2013, p. 22. See: art. 1(2).

[3] For a detailed analysis of the EU's competence in the field of the conservation and management of fisheries, see: G.A. Oanta, *La política pesquera común*, in M. Ortega Gómez (ed.), *Las políticas de la Unión Europea en el siglo XXI*, Bosch, Barcelona, 2016, pp. 123-132; J.M. Sobrino Heredia, *La politique communautaire de conservation et gestion des ressources halieutiques et quelques problèmes concernant l'application du droit de l'Union européenne*, in R. Casado Raigón-G. Cataldi (eds), *L'évolution et l'état actuel du droit international de la mer. Mélanges de droit de la mer offerts à Daniel Vignes*, Bruylant, Bruxelles, 2009, pp. 865-885; C. Teijo García, *La dimensión externa de la política de pesca común y la protección de los recursos marinos vivos en aguas extracomunitarias*, in J. Pueyo Losa-J. Jorge Urbina J. (coords.), *La reforma de la gobernanza pesquera internacional y europea*, Thomson Reuters-Aranzadi, Cizur, 2017, pp. 150-154.

[4] United Nations Convention on the Law of the Sea (adopted and opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3. See also: Council Decision 98/392/EC *concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof*, OJ L 179, 1998, p. 1.

[5] For the first time, an international treaty contained an EU declaration of such characteristics. Concretely, the EU affirmed that its Member States had transferred it competences in this field and, therefore, "in this field it is for the Community to adopt the relevant rules and regulations (which are enforced by the member States) and, within its competence, to enter into external undertakings with third States or competent international organizations". See: Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *Law of the Sea Bulletin*, 37, 1998, pp. 7-14. On the declaration of competences made by the EU in the field of fisheries, see, e.g., L. Lijnzaad, *Declarations of competence in the law of the sea, a very European affair*, in M-W. Lodge-M-H. Nordquist (eds), *Peaceful Order in the World's Oceans. Essays in Honor of Satya N. Nandan*, Brill/Nijhoff, Leiden-Boston, 2014, pp. 187-207.

the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995),[6] which is known as the New York Agreement (1995) and was revised on four occasions so far,[7] and the recent Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (2023), which is known as the "BBNJ Agreement" or the "High Seas Treaty".[8]

The assumption of international responsibilities in the field of conservation and management of fishery resources has allowed the EU, on the one hand, to be present in the major international debates where the new international fisheries order has been staged and legally defined, defending its position as a remote fishing entity against the claims of certain coastal States with large oceanic coasts favourable to the expansion of their jurisdictions.[9] On the other hand, this competence has enabled the EU to negotiate fisheries agreements either with third countries or with regional fisheries management organizations (RFMOs)

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[6] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001), 2167 UNTS 3. See also: Council Decision 98/414/EC of 8 June 1998 on the ratification by the European Community of the Agreement for the implementing of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling stocks and highly migratory fish stocks, OJ L 189, 3.07.1998, p. 14.

[7] During the review conferences held in Nueva York in May 2006 (A/CONF.210/2006/15), May 2010 (A/CONF.210/2020/7), May 2016 (A/CONF.210/2016/5), and May 2023 (A/CONF. 210/2023/6).

[8] Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (adopted 19 June 2023, not yet in force), C.N.203.2023.TREATIES-XXI.10. This was signed by the EU on 20 September 2023, and approved on 28 May 2025. See: Council Decision (EU) 2024/1830 of 17 June 2024 on the conclusion, on behalf of the European Union, of the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, OJ L, 2024/1830, 19 July 2024; COM(2025) 173 final, Proposal for a Directive of the European Parliament and of the Council on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, Brussels, 24 April 2025.

[9] For a detailed analysis of this issue, see: E. Paasivirta, *Un acteur regional privilégié: l'Union européenne*, in M. Forteau-J-M. Thouvenin (dirs.), *Traité de droit international de la mer*, Pedone, Paris, 2017, pp. 281-284; N. Ros, *L'Union européenne et le droit international de la mer*, in *ADMO*, 2019, pp. 113-121; T. Treves, *The European Community and the European Union and the Law of the Sea: Recent Developments*, in *Indian Journal of International Law*, 48, 1, 2008, pp. 1-20.

responsible for the conservation and management of fishery resources on the high seas.[10] In this way, the external fisheries policy has become one of the essential components of the EU's external action that best projects its identity in the world, together with the Common Foreign and Security Policy, the Common Commercial Policy, and the Development Cooperation Policy. It has also enabled the EU to consolidate its position as a relevant maritime player on the international stage, and to continue maintaining the fishing fleet of its Member States active and able to supply the European fishing market. In the author's view, it is not at all insignificant that 13% of all EU catches are made on the high seas, and 8% in the exclusive economic zones (EEZs) of third countries.[11]

As regards the presence of fishing vessels flying the flag of an EU Member State in third country waters, they can operate either under the provisions of international fisheries agreements concluded between the EU and third countries, under a private fisheries access agreement or by obtaining direct authorisations from third countries in the absence of an agreement signed by the EU and that is in force. However, if the essential objective of the CFP is to promote responsible and sustainable fisheries[12] to contribute to the protection of the marine environment and the sustainable management of all commercially exploited species[13]—both in the waters under the sovereignty or jurisdiction of its Member States and in the waters of third States and on the high seas—one might ask whether these international fisheries agreements serve this purpose. To try to answer this question, the *First Part* of this chapter will address the types of fisheries agreements the EU has concluded with third countries and the extent to which these agreements reflect the sustainability requirements of the CFP *(2)*; and, the *Second Part* will focus on the judicial response of the Court of Justice of the European Union (CJEU) on the recognition of the sustainability of such international *(3)*.

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[10] On the EU's membership to RFMOs, see: R. Churchill-D. Owen, *The EC Common Fisheries Policy*, Oxford University Press, Oxford, 2010, pp. 359-368; G.A. Oanta, *The European Union and the Conservation and Management of Deep-Sea Fisheries*, in P. Chaumette (coord.), *Transforming the Ocean Law by Requirement of the Marine Environment Conservation /Le droit de l'océan transformé par l'exigence de conservation de l'environnement marin*, Université de Nantes and Marcial Pons, Nantes-Madrid, 2019, pp. 233-248; E. Penas Lado, *The Common Fisheries Policy. The Quest for Sustainability*, Wiley Blackwell, Chichester, 2016, pp. 152-161.

[11] Data available at: *Acuerdos de colaboración de pesca sostenible de la UE*, Unión Europea, 2019, p. 2.

[12] Regulation (EU) No 1380/2013, art. 2(1). For a detailed overview of this issue, see: A. Antonova, *Reforming European Union Participation in Fisheries Management and Conservation on the High Seas*, in *Ocean Yearbook*, 29, 2016, pp. 125-143; Churchill-Owen, *op. cit.*, especially pp. 75-128 and 359-397.

[13] Regulation (EU) No 1380/2013, recital 11.

2. *The International Fisheries Agreements and Sustainability in the European Union's External Relations Law*

Over the past nearly 40 years, the EU has concluded about 30 international fisheries agreements which have allowed the EU fishing fleet to have access to very diverse stocks in the waters under the jurisdiction of third countries. [14] This treaty-based activity has been made possible not only by the EU's international legal personality, but also by the international law of the sea.

Thus, according to UNCLOS, first the coastal State "shall determine the allowable catch of the living resources in" their EEZ (Article 61(1)) and determine therefore their "capacity to harvest the living resources of the exclusive economic zone" (Article 62(2)). Once this is established, the coastal State can enter into agreements or other arrangements to grant access to the fishing fleet of the EU or other States. It is interesting to mention that, according to Article 62(4) UNCLOS, those nationals of the EU Member States or of third States who are fishing in the EEZ of the coastal State, have the duty to "comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State". It is precisely in this context that the EU can sign international fisheries agreements with third countries.

Depending on the mechanisms of access to fish stocks and the legislative procedures to be adopted, there are two categories of international fisheries agreements (also known as the public access fisheries agreements), namely: the reciprocal agreements or Northern agreements that the EU signs with third countries in the North-East Atlantic[15] to cooperate in the management of shared

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[14] For a general overview of the EU's treaty-based activity on fisheries, see: K. Bangert, *Fisheries Agreements*, in *Max Planck Encyclopaedia of International Law*, Oxford University Press, Oxford, 2018; G. Proutiere Maulion, *La diplomatie verte de l'Union européenne: l'example des accords de pêche*, in A-S. Lamblin-Gourdin-E. Mondielli (dirs.), *Le Droit des Relations Extérieures de l'Union Européenne Aprés le Traité de Lisbonne*, Bruylant, Bruxelles, 2013, pp. 332-347; J.M. Sobrino Heredia-G.A. Oanta, *The sustainable fisheries partnership agreements of the European Union and the objectives of the Common Fisheries Policy: Fisheries and/or development?*, in *Spanish Yearbook of International Law*, 1, 2015, pp. 61-85; N. Van Der Burgt, *The contribution of international fisheries law to human development. An analysis of multilateral and ACP-EU fisheries instruments*, Martinus Nijhoff, Leiden-Boston, 2013; E. Witbooi, *Fisheries and sustainability. A legal analysis of EU and West African agreements*, Martinus Nijhoff, Leiden-Boston, 2012.

[15] The EU has signed such agreements with Iceland, Norway, and the United Kingdom. The EU has also concluded such an agreement with the Faeroe Islands, which, as is well-known, are an autonomous territory of Denmark where the EU law is not applied. By way of example, see: Council Regulation (EEC) No 2214/80 of 27 June 1980 on the conclusion of the Agreement on fisheries between the European Economic Community and the Kingdom of Norway, OJ L 226, 29.08.1980, p. 47. See also: Agreement on fisheries between the European Economic Community and the Kingdom of Norway, OJ L 226, 29.08.1980, p. 48.

fish stocks;[16] and, on the other hand, the sustainable fisheries partnership agreements (SFPA),[17] which are mainly concluded with Greenland[18] and the countries along the coast of West Africa,[19] in the Indian Ocean,[20] and in the Pacific Ocean.[21] Both categories of public access fisheries agreements have to be distinguished from private access agreements that are concluded between private companies based in EU Member States and third countries.

It is argued that the SFPAs are the international fisheries agreements that best address the issue of sustainability as an element of the EU's external fisheries law. For this reason, this chapter will, from now on, focus on the SFPAs. Thus, according to Article 4(1)(37) of Regulation (EU) No 1380/2013 on the current CFP, the SFPAs are concluded "with a third state for the purpose of obtaining access to waters and resources in order to sustainably exploit a share of the surplus of marine biological resources, in exchange for financial compensation from the Union, which may include sectoral support".[22] By virtue of such agreements, the EU vessels may fish in the waters of the third country and a financial compensation is paid by the EU to the partner country. They may be divided into tuna agreements[23] and mixed or multispecies

[16] The reciprocal agreements are negotiated by the European Commission. It is not necessary to be concluded or consented by the Council and the European Parliament. The fishing opportunities are set out in Council regulations. For more information, see: https://oceans-and-fisheries.ec.europa.eu/fisheries/international-agreements/northern-agreements_en.

[17] For more information, see: https://oceans-and-fisheries.ec.europa.eu/fisheries/international-agreements/sustainable-fisheries-partnership-agreements-sfpas_en#list-of-fisheries-agreements.

[18] Although Greenland is an autonomous territory of Denmark, in the last 40 years or so the CFP has no longer been applied to Greenland. See: Council Decision (EU) 2021/793 of 26 March 2021 on the signing, on behalf of the European Union, and provisional application of the Sustainable Fisheries Partnership Agreement between the European Union, of the one part, and the Government of Greenland and the Government of Denmark, of the other part, and the implementing Protocol thereto, OJ L 175, 18 May 2021, p. 1; Sustainable Fisheries Partnership Agreement between the European Union, of the one part, and the Government of Greenland and the Government of Denmark, of the other part, OJ L 175, 18 May 2021, p. 3. The Protocol was last renewed in December 2024; see: Protocol on the implementation of the Sustainable Fisheries Partnership Agreement between the European Union, of the one part, and the Government of Greenland and the Government of Denmark, of the other part (2025-2030), OJ L, 2024/3203, 30 December 2024.

[19] Such as: Cape Verde, Côte D'Ivoire, Gambia, Guinea Bissau, Liberia, Mauritania, Morocco, Sao Tome and Principe, and Senegal.

[20] E.g., with Madagascar, Mauritius, and the Seychelles.

[21] Among others, with Kiribati and Cook Islands.

[22] Regulation 1380/2013, *doc. cit.*, art. 4(37). For an overview of the current regulation of these agreements, see: Sobrino Heredia-Oanta, *op. cit.*, pp. 71-80.

[23] The EU has concluded twelve such tuna agreements so far, with: Cape Verde, Comoros, Côte d'Ivoire, Gabon, Equatorial Guinea, Kiribati, Liberia, Madagascar, Mauritius, Mozambique, Soo Tome and Príncipe, the Seychelles, and the Salomon Islands. See: F. Le Manach *et*

agreements.[24] The SFPAs are negotiated by the European Commission and signed by the Council, and they include protocols as annexes that have to be renewed regularly. Additionally, the European Parliament must give its consent to them.

As for the sustainability issue of such agreements, despite their name, it should be also mentioned that Article 28(1) of Regulation 1380/2013 on CFP sets out that "[i]n order to ensure sustainable exploitation, management and conservation of marine biological resources and the marine environment, the Union shall conduct its external fisheries relations in accordance with its international obligations and policy objectives, as well as the objectives and principles" of the current CFP. This provision is in line with the EU's will on the SFPAs to ensure that the EU's "fishing activities in third country waters are based on the best available scientific advice and relevant information exchange, ensuring a sustainable exploitation of the marine biological resources […] and, consequently, a management of the resources that is consistent with the objectives of the CFP" (recital 51).

Moreover, under Article 28(2)(d) of Regulation 1380/2013, the EU has the obligation to ensure that its fishing activities outside its waters "are based on the same principles and standards as those applicable under Union law in the area of the CFP, while promoting a level playing field for Union operators vis-à-vis third-country operators". In relation to this, it should be mentioned that the CFP looks for contributing to the sustainable management of all commercially exploited species, and, under Article 2 of Regulation 1380/2013, it aims to ensure that fishing activities "are environmentally sustainable in the long-term and are managed in a way that is consistent with the objectives of achieving economic, social and employment benefits, and of contributing to the availability of food supplies".

In addition, Articles 31 and 32 of the Regulation 1380/2013 requires that SFPAs "establish a legal, environmental, economic and social governance framework for fishing activities carried out by Union fishing vessels in third country waters", which may also include "other capacity building elements concerning the development of a sustainable fisheries policy of the third country". It is argued that sustainability is highly present in these agreements as the EU has also the obligation to ensure that the SFPAs "are of mutual benefit to the Union

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al., *Who gets what? Developing a more equitable framework for EU fishing agreements*, in *Marine Policy*, 38, 2013, pp. 257-266.

[24] Seven mixed or multispecies agreements have been signed so far, affording the EU's fishing vessels access to very diverse fish stocks in the EEZs of the following countries: Greenland, Guinea, Guinea-Bissau, Morocco, Mauritania, Micronesia and Senegal. See: *Fishing for Coherence in West Africa. Policy Coherence in the Fisheries Sector in Seven West African Countries*, OECD, 2008.

and to the third country concerned, including its local population and fishing industry, and that they contribute to continuing the activity of Union fleets and seek to obtain an appropriate share of the available surplus, commensurate with the Union fleets' interest". The European Court of Auditors affirmed one decade ago that the SFPAs "provide significant funding to contribute to the sustainable development of local fishing activities" and recognized they "support the sustainable development of their national fisheries sector".[25]

The SPFAs are therefore not synonymous with an application of the "pay, fish and go" principle, but constitute a more advanced form of cooperation with the partner country, based on a more comprehensive approach to support the third country. In addition to providing access to EU fishing vessels, these agreements seek to strengthen the capacity of the third country to ensure sustainable fishing in its own.[26] In fact, financial compensation is used to promote sustainable fisheries, and the policy to be followed in order to promote sustainable fisheries is decided jointly by the EU and the third partner country, on the basis of an assessment of the national fisheries policy of that country, an estimate of its needs for the development of sustainable fisheries, and support in the fight against illegal, unreported and unregulated (IUU) fishing.

According to European Commission data, the EU contribution to third countries under these agreements amounted to €159 million per year during the period 2015-2020, of which €126 million was paid from the EU public budget and €33 million was paid by the owners of the 211 fishing vessels benefiting from these ACPS. The €126 million was divided between €98 million paid as the EU contribution for access to fishery resources, and €28 million to the third country fishing sector.[27] In addition to these funds, the EU provided a further €200 million between 2015 and 2020 to third country partners in support of the fisheries sector in these States as part of the implementation of Sustainable Development Goal 14 "Life below water".[28]

In line with the analysis carried out in this part of the chapter, it can be argued that the EU has the necessary legal framework for fishing vessels to carry out a

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[25] "Are the Fisheries Partnership Agreements well managed by the Commission?", European Court of Auditors, Special Report No. 11, 2015; available at: https://www.eca.europa.eu/Lists/ECADocuments/SR15_11/SR_FISHERIES_EN.pdf. See above all pp. 11 and 38-39.

[26] In this regard, see: Sobrino Heredia-Oanta, *op. cit.*, p. 67. See also: N. Sporrong, *Fisheries Agreements with Third Countries – Is the EU Moving Towards Sustainable Development?*, Institute for European Environmental Policy, London, 2002, pp. 1-19.

[27] Data available at: "Evaluation and analysis of the Sustainable Fisheries Partnership Agreements (SFPAs) between the EU and third countries including an in-depth analysis of the sectoral support component of the SFPAs. Final report", European Commission, April 2023, p. i.

[28] *Ibid*, p. 113.

sustainable activity in the waters of the third countries with which it has signed these fishing agreements. This regulatory umbrella is reflected in practice as, according to the evaluation and analysis of the SFPAs published by the European Commission in 2023,[29] these agreements contribute to the sustainability of the conservation of fisheries resources and the marine environment through the sustainable exploitation of living marine resources in third country waters, while support for the development of a sustainable fisheries sector in third country partners has been demonstrated. More recently, the European Parliament in its resolution of 18 January 2024 on the state of play in the implementation of the CFP and future perspectives pointed out that the SFPAs "provide mutual benefits both to the EU and to partner countries".[30]

3. *The Contribution of the Court of Justice of the European Union for the Recognition of Sustainability of the International Fisheries Agreements*

The application of the SFPAs and the complexity of the issues involved have led to the emergence of conflictive situations, which have needed the intervention of the CJEU. Undoubtedly, fisheries relations between the EU and Morocco have occupied great diplomatic, legislative and judicial attention over the last fifteen years or so. However, there have also been other situations that have required the judicial response of the CJEU to clarify certain aspects of the EU's treaty-based fishing activity on the international stage.

In the author's view, there are three main issues that have been clarified by the CJEU's case law in relation to international fisheries agreements, namely: first, the notion of an international fisheries agreement *(3.1)*; second, the possible responsibility of the EU before an international court or tribunal arising from a breach of an international fisheries agreement *(3.2)*; and thirdly, the legal scope of an international fisheries agreement *(3.3)*.

3.1. *The notion of an international fisheries agreement concluded by the European Union with a third country*

The actions of annulment in the cases *European Parliament v Council of the European Union* (C-103/12) and *European Commission v Council of the*

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[29] *Ibid*, p. x.

[30] *Implementation of the Common Fisheries Policy and future perspectives*, European Parliament, P9_TA(2024)0045, 18 January 2014, para. 119.

European Union (C-165/12) addressed the legal basis for a decision by which the Council granted fishing opportunities in EU waters to fishing vessels flying the Venezuelan flag in the EEZ off the coast of French Guinea.[31] In this way, the Council sought to fill a gap in the legislation regarding the access of fishing vessels flying the Venezuelan flag to the EEZ of French Guiana. The aim was to circumvent the process of negotiating and concluding an international agreement in order to respond rapidly to the need to provide an international title for access to the waters of French Guiana, which had no impact for fisheries in the EU as a whole.[32] Hence, the Council considered that it would be more appropriate to issue a unilateral declaration in the above terms that would fulfil the same function as a fisheries agreement, generating international rights and obligations for the affected parties.

Regarding the legal basis for the adoption of an international fisheries agreement, this case is thought to reflect the tension (following the entry into force of the Lisbon Treaty) between the European Parliament and the Commission, on the one hand, and the Council, on the other, in relation to the legislative procedure for the adoption of fisheries legislation. As is well known, prior to 1 December 2009, the European Parliament had played only a marginal role in the legislative process in the field of the CFP. However, today, it has recognised legislative powers under Article 43 TFEU. Thus, Article 43(2) TFEU provides for the ordinary legislative procedure for the adoption of provisions that are "necessary for the pursuit of the objectives" of the CFP; whilst Article 43(3) TFEU includes a reserved executive procedure for the "fixing and allocation of fishing opportunities". This situation has been interpreted by part of the doctrine[33] as a *sui generis* procedure and an exception to the legislative procedure under Article 43(2) TFEU. At the same time, Article 218 TFEU also reflects the significant increase in the European Parliament's influence on EU adoption of fisheries treaties.

As for the question of the issues raised by the notion of an international agreement concluded in the field of fisheries, the EU had offered to allow—in the present case—a limited number of fishing vessels flying the Venezuelan flag to operate in relation to part of the surplus allowable catches in French

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[31] Judgment of 26 November 2014, *European Parliament and European Commission v Council*, joined cases C-103/12 and C-165/12, ECLI:EU:C:2014:2400. For a larger study of this judgment, see: G.A. Oanta, *Tres sentencias claves para la delimitación del contorno jurídico de las competencias convencionales de la Unión Europea en el ámbito pesquero*, *Revista de Derecho Comunitario Europeo*, 53, 2016, pp. 210-218.

[32] Opinion of Advocate General Sharpston in the joined cases European Parliament and Commission v Council, C-103/12 and C-165/12, ECLI:EU:C:2014:334, para. 108.

[33] *Ibid*.

Guiana's EEZ.[34] The Court considered that the offer made to Venezuela was not a technical implementing measure, but rather a measure involving the adoption of an autonomous decision, which should be made in the light of the EU policy interests pursued through its common policies, particularly its CFP.

In this judgment,[35] the Court once again decided on a very broad concept of agreement. Indeed, as noted in its case law, on the one hand, it is irrelevant whether a treaty consists of a single document or several related legal instruments, and, on the other hand, the term "agreement" must be understood in a general sense to designate any kind of binding commitment expressed by a subject of international law regardless of its formal designation.[36]

In the author's view, the Court missed an excellent opportunity to rule, for the first time, on the EU's capacity to issue binding unilateral acts[37] in the field of international maritime affairs. Rather than venturing into the unchartered territory of unilateral declarations, the CJEU opted to take a more prudent position, that is, to benefit from the broad notion of "international agreement" that it defends in its case law and that perhaps best fits the factual context in which the case unfolded.

3.2. *The possible responsibility of the European Union before an international court or tribunal for non-compliance with an international fisheries agreement*

The European Commission's capacity to present allegations before an international court or tribunal without prior authorisation from the Council had been first addressed by the CJEU in the case *Council v European Commission* (C-73/14).[38] The central point of this case was, however, to establish who would

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[34] Later, on 26 March 2012, the European Commission adopted Decision C (2012) 2162, which authorised 38 fishing vessels flying the Venezuelan flag to fish in French Guiana's EEZ.

[35] Judgment of 26 November 2014 in the joined cases *European Parliament and European Commission v Council of the European Union*, joined cases C-103/12 and C-165/12, ECLI:EU: C:2014:2400.

[36] The first position of the Luxembourg Count in this regard was on the occasion of the Opinion 1/75 (ECLI:EU:C:1975:145). This Opinion has been repeatedly recalled on different occasions. See, amongst others, Opinion 2/92 (EU:C:1995:83), para. 8; EU:C:2014:334, para. 83.

[37] D. De Petri, *Comentario a la sentencia de la Gran Sala del Tribunal de Justicia de 26 de noviembre de 2014, Asuntos acumulados C-103/2012 y C-165/2012, Parlamento Europeo y Comisión/Consejo*, in *La Ley Unión Europea*, 24, 2015, pp. 22-32. On the issue of unilateral acts under the international law, see, e.g., V-D. Degan, *Unilateral act as a source of particular international law*, in *Finnish Yearbook of International Law*, 5, 1994, pp. 149-266; C. Tomuschat, *Unilateral acts under international law*, in K. Meziou (dir.), *Droit et culture: Mélanges en l'honneur du Doyen Yadh Ben Achour*, Centre de Publications Universitaires, Tunis, 2008, pp. 1487-1507.

[38] Judgment of 6 October 2015, *Council v European Commission*, C-73/14, ECLI:EU:C:

be responsible for a breach, by European fishing vessels, of a fishing agreement concluded by the EU: the EU Member State acting as the flag State or the EU itself?

This judgment is related with the legality of the European Commission's Decision of 29 November 2013 regarding the submission of written comments on behalf of the EU to the International Tribunal for the Law of the Sea (ITLOS) in the framework of Case No 21 on the request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC).[39] In that case, the ITLOS was asked, *inter alia*, whether the flag State or an international agency—such as the EU—would be responsible for the violation of the fisheries legislation of a coastal State by a fishing vessel with a fishing licence granted under an international fisheries agreement signed with that coastal State. The European Commission considered that the responsibility of the flag State or "international agency"—as would be its case—for infringement of the national fisheries legislation of a coastal State depended on the content of the applicable international agreement and that, in the absence of such a conventional act, the general rules concerning the international responsibility of the State would apply. Specifically, it argued that the flag State of a fishing vessel operating in the EEZ of a third State would be responsible for any violations of the coastal State's national legislation carried out by said vessel.[40]

Regarding *Council v European Commission* (C-73/14), the Council claimed infringement of the principle of conferral of powers and of the principle of institutional balance, on the one hand, and of the principle of sincere cooperation, on the other hand. The CJEU considered that EU law allowed the European Commission to represent the EU before the ITLOS[41]. It also added that the European Commission had respected all the procedural aspects set out in Article 335 TFEU and had not therefore infringed the principle of sincere

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2015:663. For an extensive analysis of this judgment, see: A. Kornezov, *EU Representation in International Litigation: Council v Commission (International Tribunal for the Law of the Sea*, in G. Butler-R.A. Wessel (eds), *EU External Relations Law: The Cases in Context*, Hart Publishing, Oxford, 2022, pp. 805-814; Oanta, *Tres sentencias claves …*, cit., pp. 208-216.

[39] The SRFC is a RFMO created on 29 March 1985. It is formed by seven African countries, namely: Cape Verde, Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra Leona; it is based in Dakar (Senegal). The request for an advisory opinion brought before the ITLOS was prepared in February 2013 in the framework of "Atelier sur la lutte contre les pêches illicites, non déclarées et non règlementées (PINN)", which took place in Dakar on 25-26 February 2013. See: http://www.spcsrp.org/medias/csrp/comm/at_PINN_publication_web.pdf. Accessed 29 April 2016.

[40] *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Written Statement by the European Commission on Behalf of the European Union, 29 November 2013, ITLOS*, paras 83 and 92.

[41] Council v European Commission, C-73/14, cit., para. 59.

cooperation[42]. In the author's view, this case stressed the power struggle between the Commission and the Council in a context with profound consequences for the EU's treaty practice on fisheries, i.e., the EU can no longer hide behind the shield of the vessel, shifting the responsibility to the flag State.

3.3. *The legal scope of an international fisheries agreement*

The issue of the legal scope of an international fisheries agreement concluded by the EU with a third country has so far given rise to numerous disputes, which have been extensively dealt with by the CJEU in its case law. They have all stemmed from the fisheries relations between the EU and Morocco[43] and, in particular, the EU's fishing activity in the waters off Western Sahara.

First, mention should be made to the CJEU's judgment of 9 October 2014 in *Ahlström and others* case (C-565/13),[44] which refers to a question submitted under the provisions of Article 267 TFEU in the context of criminal proceedings before a Swedish court, in which the defendants had been accused of engaging in illegal fishing practices in Western Sahara waters between April 2007 and May 2008.[45] This judgment addresses the interpretation of the fisheries agreement concluded between the EU and Morocco, which entered into force on 1 April 2007.[46]

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[42] *Ibid*, paras. 86-88.

[43] For a detailed analysis of the different fishing agreements signed between the EU and Morocco, see, e.g., A. Lahlou, *Une nouvelle approche de la relation halieutique Union européenne – Maroc: d'un accord de dimension politique à une convention à vocation économique*, in R. Casado Raigón (dir.), *L'Europe et la mer. Pêche, navigation et environnement marin / Europe and the Sea, Fisheries, Navigation and Marine Environment*, Bruylant, Bruxelles, 2005, pp. 39-46; E. Milano, *The new fisheries partnership agreements between the European Community and the Kingdom of Morocco: Fishing too south?*, in *Leiden Journal of International Law*, 1, 2006, pp. 1-33; J.M. Sobrino Heredia, *Les relations euro-marocaines concernant la pêche*, in A. Del Valle Gálvez (dir.), *Inmigración, seguridad y fronteras*, Dykinson, Madrid, 2012, pp. 235-261.

[44] Judgment of 9 October 2014, *Ahlström and others*, C-565/13, ECLI:EU:C:2014:2273. For a larger study of this judgment, see: G. Andreone, *Jurisprudence*, in *Annuaire du Droit de la Mer*, 19, 2014, pp. 680-686; Oanta, *Tres sentencias claves ...*, cit., pp. 216-219.

[45] For an overview of the illegal fisheries phenomena, see. G.A. Oanta, *Illegal fishing as a criminal act at sea*, in K-N. Trapp and E. Papastavridis (eds), *Criminalité en mer / Crimes at Sea*, Martinus Nijhoff Publishers, Leiden-Boston, 2014, pp. 149-197.

[46] It has been the fourth fishing agreement signed between these two subjects under international law: the first one was signed on 25 May 1988, the second one on 1 May 1992, the third on 1 December 1995. The Protocol in force of the 2006 Agreement was published through Council Decision 2013/720/EU of 15 November 2013 on the signing, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, OJ L 328, 7 December 2013, p. 1.

One of the most relevant aspects—addressed by the CJEU in this case—is related to the so-called "exclusivity clause" that accompanies the public access fisheries agreements. According to this clause, any type of fishing carried out by EU Member States' vessels outside the framework of the said fisheries agreements is excluded. Consequently, the European fleet's fishing activities in the waters covered by the agreements must be carried out solely and exclusively within the framework of the agreements signed by the EU with the partner country. Concretely, the CJEU was essentially asked whether Article 6 of the fisheries agreement concluded by the EU with Morocco in 2006 had to be interpreted as precluding any possibility for EU vessels to carry out fishing activities in waters under the sovereignty or jurisdiction of Morocco on the basis of a licence issued by Moroccan authorities without the intervention of the EU's competent authorities.

It is argued that the exclusivity clause seeks to prevent EU vessels from fishing outside the framework of a public access fisheries agreement[47] or failing to contribute to the long-term conservation of fisheries resources.[48]

The CJEU found that "it cannot be accepted that Community vessels should be able to access Moroccan fishing zones in order to carry out fishing activities" through the conclusion of a specific contract "with a Moroccan company holding a licence issued by the Moroccan authorities to Moroccan owners [...] or by using any other legal instrument in order to access those fishing zones for the purpose of carrying out such activities there outside the scope of the Fisheries Agreement and, consequently, without the intervention of the competent European Union authorities".[49]

In the author's view, this judgment reinforces the value of the SFPAs concluded by the EU with more than thirty countries as necessary instruments for responsible and sustainable fishing. These agreements contain the same obligations for the EU vessels fishing in third-country waters as those imposed on all EU fishing vessels fishing in EU waters as it is set out by Articles 8-13 of Regulation (EU) No 2017/2403 on the sustainable management of external fishing fleets.[50]

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[47] This clause is also provided for in art. 31(6)(b) Regulation (EU) 1380/2013.

[48] *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC). Second Written Statement by the European Commission on Behalf of the European Union, 13 March 2014, ITLOS*, para. 27.

[49] Ahlström and others, cit., paras. 33-35.

[50] Regulation (EU) No 2017/2403 of the European Parliament and of the Council of 12 December 2017 on the sustainable management of external fishing fleets, and repealing Council Regulation (EC) No 1006/2008, OJ L 347, 28.12.2017, p. 81. See also: *Fishing outside the European Union. The external dimension of the common fisheries policy*, European Parliamentary Research Service, January 2025.

Second, the legal scope of the fisheries agreements concluded by the EU with Morocco is addressed from the perspective of the legality of the EU's international agreements signed with a third State, which includes those covering occupied territories, as is the case of Western Sahara.[51] Thus, the CJEU analysed these complex issues in the *Western Sahara Campaign UK* case (C-266/16)[52] as well as in several cases brought by the Front Polisario before the General Court against the Council: *Front Polisario v Council* (T-180/14),[53] *Front Polisario v Council* (T-376/18),[54] and *Front Polisario v Council* (T-344/19),[55] among others. These, in turn, have led to a number of appeals before the Court of Justice, which were brought by the Commission, such as *Commission v Front Polisario* (C-778/21 P) and *Commission v Front Polisario* (C-798/21 P)[56]. In the author's view, the above-mentioned cases refer specifically to the SFPA EU-Morocco, while the other part of this case law is related to either the Euro-Mediterranean Agreement establishing an association between the EU and its Member States and Morocco,[57] or the Euro-Mediterranean Aviation Agreement between the EU and its Member States with Morocco.[58]

One of the first arguments used by Front Polisario in these cases is that the fisheries agreement concluded by the EU with Morocco is contrary to the objectives of the CFP and also represents an infringement of the UNCLOS provisions, as Morocco sets fishing quotas for waters not under its sovereignty, as well as authorising EU vessels to exploit fisheries resources that are under the sole sovereignty of the Saharawi people.

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[51] For a detailed analysis of these complex issues of public international law, see: E. Kassoti, *The Complexity of EU International Agreements Extending to Occupied Territories with International Law: Front Polisario and Western Sahara Campaign UK*, in G. Butler-R.A. Wessel (eds), *EU External Relations Law: The Cases in Context*, Hart Publishing, Oxford, 2022, pp. 817-828.

[52] Judgment of 27 February 2018, *Western Sahara Campaign UK*, C-266/16, ECLI:EU:C:2018:118.

[53] Order of 19 July 2018, *Front Polisario v Council*, T-180/14, ECLI:EU:T:2018:496.

[54] Order of 8 February 2019, *Front Polisario v Council*, T-376/18, ECLI:EU:T:2019:77.

[55] Judgment of 29 September 2021, *Front Polisario v Council*, joined cases T-344/19 and T-356/19, ECLI:EU:T:2021:640.

[56] Judgment of 4 October 2024, *Commission v Front Polisario*, joined cases C-778/21P and C-778/21P, ECLI:EU:C:2024:833.

[57] Before the General Court: judgement of 10 December 2015, *Front Polisario v Council*, T-512/12, ECLI:EU:T:2015:953; judgment of 29 September 2021, *Front Polisario v Council*, T-279/19, ECLI:EU:T:2021:639. Before the Court of Justice: judgment of 21 December 2016, *Council v Front Polisario*, C-104/16P, ECLI:EU:C:2016:973; judgment of 4 October 2024, *Commission v Front Polisario*, joined cases C-779/21P and C-799/21P, ECLI:EU:C:2024:835.

[58] Order of 30 November 2018, *Front Polisario v Council*, T-275/18, ECLI:EU:T:2018:869.

In the author's view, a glance at the judgments handed down by the General Court and the Court of Justice in these cases shows that three main questions have been referred to the CJEU by Front Polisario and subsequently by the Commission and/or the Council: firstly, the Polisario Front's standing to bring actions before the CJEU; secondly, the legal status of Western Sahara under international law; and thirdly, the consent of the Saharawi people in relation to the fisheries agreement under scrutiny.

As for Front Polisario's active legitimacy to bring actions before the CJEU, it was considered that Front Polisario had international legal personality, was not a national liberation movement, that it aimed to protect the self-determination of the people of Western Sahara, and was a privileged interlocutor that was affected directly and individually in the sense of Article 263 TFEU. In addition, it was affirmed that the fisheries agreement EU-Morocco had a direct effect on the legal situation of the people of Western Sahara, as it affected their rights as a people.[59]

Regarding the legal status of Western Sahara under international law, the CJEU considers that Western Sahara is a non-self-governing territory, and the exploitation of its natural riches is therefore covered by Article 73 of the United Nations Charter and by the principle of permanent sovereignty over natural resources. The exploitation of the natural resources of a non-self-governing territory, including the fishing of the waters adjacent to that territory, must therefore benefit its people.[60] In this way, the CJEU underlines that Western Sahara is not part of Morocco's territory and considers this State to be an administrative *de facto* power. In addition, the application of the fisheries agreement to the waters off Western Sahara affects the self-determination principle of this territory and is a breach of Article 34 of the Vienna Convention on the Law of Treaties, according to which a treaty does not create either obligations or rights for a third State without its consent.[61]

Finally, in relation to the consent of the Saharawi people for the fisheries agreement concluded by the EU with Morocco, the CJEU underlined the necessity for the Saharawi people to consent to any agreement between the EU and Morocco that would be implemented in that territory.[62] In the author's view,

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[59] *Ibid*, paras. 89-100.

[60] *Ibid*, para. 121.

[61] *Ibid*, para. 160. The principle of relative effect of international treaties concluded by the EU on occupied and disputed territories has also been addressed by the judgment of 25 February 2010, *Brita*, C-386/08, EU:C:2010:91, para. 44. For an extensive analysis of this case, see: P.J. Cardwell, *The Application of EU International Agreements to Occupied and Disputed Territories: Brita*, in G. Butler-R.A. Wessel (eds), *EU External Relations Law: The Cases in Context*, Hart Publishing, Oxford, 2022, pp. 609-616.

[62] *Ibid*, para. 163.

it is relevant that the CJEU found that the consent of the Saharawi people for such an agreement can be presumed.[63]

This case law allows us to affirm that the international fisheries agreements concluded by the EU with third countries occupied the attention of the CJEU at the beginning of the second decade of the 21st century. While the CJEU did not analyse whether these agreements are sustainable or not in relation to the marine environment, it has, however, indirectly made a commitment to sustainability of the fishing activity of the EU's vessels in third country waters. As largely addressed in Section 2 of this book chapter, sustainability is the backbone of the CFP and of the activities carried out by fishing vessels in waters under the sovereignty or jurisdiction of third countries under the SFPAs. It is therefore argued that the international fisheries agreements represent a tool of the EU's external relations law.

4. *Some Final Remarks*

The EU's treaty-based activities, in general, and the fisheries agreements concluded with third countries, in particular, are a key aspect of the EU's external projection. This context allows the EU to assert the fisheries interests of its Member States on the international fisheries scene, and therefore to bring its concern for responsible and sustainable fisheries to a wide range of maritime areas.

In the author's view, a comprehensive fishing treaty-based activity—which is based on the EU's exclusive competence regarding the conservation of fisheries resources, and respectful with the environment and attentive to the needs of developing countries—is a suitable instrument to strengthen the EU's presence in a not always peaceful international maritime arena. Therefore, the SFPAs are necessary to promote the principle of sustainable and responsible fishing internationally as well as to maintain the essential presence of the EU's fleet in non-EU waters.

As we have stated throughout this book chapter, one of the essential elements for internationalising sustainable and responsible fishing has been the presence of the EU fleet in third-country waters. These are countries that, on the one hand, do not have the human and material resources to control fishing in their national waters, and, on the other hand, can easily be seduced by private companies from other countries that are less scrupulous than the EU Member States in this area.

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[63] *Ibid*, paras. 193-194.

LA PROMOZIONE DEGLI STANDARDS DI LAVORO NELLA POLITICA COMMERCIALE DELL'UE: TRA BILANCI E PROSPETTIVE[*]

Rosita Silvestre

SOMMARIO: 1. Introduzione. – 2. L'importanza dei valori sociali nell'agenda europea sulla sostenibilità. – 3. La protezione dei diritti dei lavoratori nella politica commerciale dell'UE. – 3.1. Le incongruenze dei *TSD chapters* negli accordi commerciali dell'UE: tra politica commerciale e politiche sociali. – 4. Il nuovo orizzonte della politica commerciale europea attraverso i DCFTA. – 4.1. La promozione degli standards lavorativi nel controverso caso ucraino: limiti e ambizioni della politica di allargamento. – 5. Conclusioni.

1. *Introduzione*

L'Unione Europea si adopera attivamente nella promozione dei propri valori fondanti – democrazia, Stato di diritto e diritti umani – oltre i propri confini, servendosi degli accordi commerciali come strumento strategico. La politica sociale esterna dell'UE, che poggia su un approfondito impegno all'europeizzazione dei valori [1], è volta a diffondere un ordine globale basato su principi etici e sociali [2].

Il principio che assiologicamente meglio tratteggia questo intenso attivismo

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[1] L'espressione "europeizzazione" è usualmente utilizzata in riferimento alla dimensione sociale delle politiche europee, oltre che a quella istituzionale, alle dinamiche sociali di sviluppo del processo di integrazione europea e alla capacità di influenza dell'UE sui sistemi di protezione sociale nazionali. È, invero, una declinazione della nozione di modello sociale europeo. Cfr. A. Martelli, *L'Europeizzazione dei diritti sociali: caratteri e sfide*, in C. Golino-A. Martelli (a cura di) *Un modello sociale europeo? Itinerari dei diritti di welfare tra dimensione europea e nazionale*, Collana del Dipartimento di Sociologia e Diritto dell'economia Alma Mater Studiorum, Università di Bologna, 2023, pp. 32-45.

[2] F. Amtenbrink, *The multidimensional constitutional legal order of the European Union – A successful case of cosmopolitan constitution building?*, in *Netherlands Yearbook of International Law*, 39, 2008, pp. 3-68.

è quello di sostenibilità sociale, che la Commissione europea, già nel 2015, con la sua strategia "*Commercio per tutti*" [3] per una politica commerciale e di investimento più responsabile, aveva annunciato quale componente centrale e sempre più rilevante dei suoi programmi nel settore.

Concepita come bene pubblico globale, la sostenibilità sociale comprende, invero, tutte quelle politiche dell'UE che sono orientate a promuovere condizioni sociali giuste, inclusive e sostenibili non solo all'interno del proprio ordinamento, ma anche negli Stati partner. A tal riguardo, l'UE agisce in veste di *policy maker* nel campo della giustizia, dell'equità e del benessere sociale, garantendo che i cittadini godano di pari opportunità e condizioni [4].

Con il Trattato di Lisbona e la transizione da una visione puramente economica del commercio internazionale sotto l'egida dell'Organizzazione Mondiale del Commercio (OMC) a una visione che incorpora valori sociali e ambientali, la liberalizzazione degli scambi è parsa bilanciata con la tutela dell'ambiente e i diritti dei lavoratori, determinando, in effetti, un'espansione dell'ambito di negoziazione degli accordi commerciali dell'UE.

In specie, l'art. 207 TFUE, che sancisce la competenza esclusiva UE in materia di politica commerciale comune, unitamente all'art. 21 TUE, nel cui disposto figura la promozione dello sviluppo sostenibile tra gli obiettivi dell'azione esterna dell'UE, costituisce la base giuridica degli Accordi di Libero Scambio (ALS) c.d. di "nuova generazione" che superano il vecchio schema delle riduzioni tariffarie e includono disposizioni sulla sostenibilità.

Detti accordi, sin dal 2009, prevedono clausole di condizionalità sociale e di essi sono parte integrante ed essenziale i *TSD chapters* (capitoli su commercio e sostenibilità), che incorporano norme ambientali e standards lavorativi specifici [5].

Un aspetto cruciale dei capitoli dedicati allo sviluppo sostenibile è la revisione dei regimi lavorativi nei paesi terzi, in linea con gli standards internazionali del lavoro, in particolare con il quadro legale dell'Organizzazione Internazionale del Lavoro (OIL). L'adesione agli standards di lavoro, anzi, è espressione di una

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[3] Commissione europea, Comunicazione della Commissione europea al Parlamento europeo, al Consiglio, al Comitato economico e sociale europeo e al Comitato delle Regioni, *Verso una politica commerciale e di investimento più responsabile*, COM(2015) 497 def., 14 ottobre 2015.

[4] Documento di lavoro dei servizi della Commissione: *Promote decent work worldwide*, SWD(2020) 235 final. Comunicazione della Commissione europea al Parlamento europeo, al Consiglio, al Comitato europeo economico e sociale, su *un "lavoro dignitoso" in tutto il mondo per una transizione globale giusta e una ripresa sostenibile*, COM(2022) 66 def., 23 febbraio 2022.

[5] Per una dettagliata analisi sull'introduzione degli standards di lavoro negli accordi commerciali UE, cfr., recente, G. Gruni, *Labour Standards in EU Free Trade Agreements: Substantive Issues and Recent Developments Concerning Their Enforcement*, in G. Vidigal-K. Claussen (a cura di), *The Sustainability Revolution in International Trade Agreements*, Oxford University Press, Oxford, 2024.

politica concreta volta all'adozione di un sistema istituzionale socio-compatibile ad opera dei partners europei, ma l'allineamento di questi ultimi alle Convenzioni internazionali sul lavoro è anche il salvacondotto per approvare la loro integrazione nel mercato unico europeo.

Sulla stessa traccia, le politiche di vicinato, che mediante gli accordi di associazione *ex* art. 217 TFUE hanno consentito all'UE di introdurre la condizionalità sociale nei capitoli sul commercio, sono finalizzate ad assicurare una risposta globale positiva alla domanda delle istituzioni di una maggiore attenzione sociale. Paradigmatico è il caso dei *Deep and Comprehensive Free Trade Agreement* (DCFTA), stipulati dall'UE in seno agli Accordi di Associazione con Georgia, Moldavia e Ucraina, che mirano alla piena integrazione sul mercato dei paesi firmatari. Oggetto di detti accordi, in cui sono iscritti i capitoli sul commercio e la sostenibilità sociale, è da un lato l'abbattimento delle barriere sul mercato, e dall'altro una maggiore armonizzazione con l'*acquis* comunitario (comprensivo in specie delle direttive europee sul lavoro). Attraverso i DCFTA l'aspirazione delle istituzioni europee è, prioritariamente, quella di ottenere dai contraenti riforme interne sui regimi di lavoro e l'implementazione dei diritti umani e delle libertà fondamentali negli ordinamenti domestici.

Tutto quanto premesso induce a riflettere sulla presenza di un forte modello sociale europeo e sulla posizione dell'UE come leader normativo in grado di influenzare gli standards lavorativi a livello globale. La ricerca in questa sede condotta mira, infatti, a rintracciare all'interno della politica commerciale dell'UE gli strumenti per il *trasplant* negli ordinamenti domestici del modello sociale prima evocato, basato su alti livelli di protezione sociale, dialogo sociale e diritti dei lavoratori, in quanto componente fondamentale dell'identità politica ed economica europea. In parallelo, si propone di verificare in che modo l'UE possa contribuire a diffondere un *welfare State* di rilevanza internazionale, considerate le sfide pur sempre associate a questo obiettivo.

D'altra parte, malgrado la complessità dell'implementazione e dell'attuazione delle clausole sociali – tematica già oggetto di esaustiva analisi da parte della dottrina e che in questa sede sarà richiamata –, i capitoli sulla sostenibilità sembrerebbero definire i valori di riferimento per una politica che funge da banco di prova strategico. Tale quadro mira sia a facilitare il progresso istituzionale dei partners commerciali attraverso l'allineamento agli standards democratici europei, sia a consolidare ed espandere la capacità normativa dell'UE nel critico settore sociale e occupazionale. L'intento del presente contributo è, invero, quello di esaminare l'evoluzione progressiva del potere regolatorio dell'UE in materia di lavoro e delle modalità del suo esercizio attraverso la politica commerciale. A partire dagli ALS, che hanno positivamente formalizzato l'inserimento dei diritti dei lavoratori nel diritto commerciale internazionale, fino ai DCFTA, nei quali, quand'anche parzialmente, l'efficacia applicativa delle clausole lavorative negli accordi commerciali appare potenziata, si discuterà di come l'UE tenda a un sempre maggiore affinamento degli strumenti normativi utilizzati per promuovere un commercio orientato all'equità e alla giustizia sociale, con la finalità ultima di istituire un sistema normativo coerente che rifletta un impegno duraturo per la sostenibilità.

Per garantire una trattazione esaustiva, dunque, il contributo sarà articolato in tre sezioni. Nella prima sezione sarà esaminata l'importanza della dimensione sociale della sostenibilità nell'agenda sullo sviluppo sostenibile, il ruolo proattivo e le iniziative concrete dell'UE finalizzate alla diffusione dei suoi valori sociali (par. 2). Nella seconda sezione sarà esaminata la politica commerciale come canale strategico per la promozione degli standards di lavoro nei paesi terzi e le difficoltà attuative delle clausole sociali presenti negli ALS (parr. 3 e 3.1). Nella terza e ultima sezione si tenterà di dimostrare come anche attraverso la politica di vicinato l'UE possa trapiantare un modello di sviluppo sociale al di fuori del suo territorio, passando anche in questo caso per la promozione degli standards di lavoro (par. 4). In ultimo, si porrà l'attenzione sull'avanzamento della strategia europea dalle politiche di vicinato alle politiche di allargamento, valutando la portata effettiva di tale transizione nell'assicurare prospettive di integrazione più ampie. In tale sede, sarà posto l'accento sui profili critici delle riforme dei sistemi istituzionali nonostante l'impegno profuso dai partners (par. 4.1). L'accordo UE-Ucraina sarà descritto come il caso di studio delle ambiguità e delle potenzialità del complesso processo di europeizzazione dei valori sociali. Detto accordo, in effetti, funge da "ponte" per il passaggio dalla cooperazione commerciale a un processo strutturato di integrazione normativa profonda, poiché incorpora obiettivi e meccanismi più mirati e vincolanti. Sostenuto da assistenza e incentivi politici, esso supera il linguaggio conciliante del partenariato economico e geostrategico per proiettarsi verso l'effettiva implementazione degli standards dell'UE.

2. *L'importanza dei valori sociali nell'agenda europea sulla sostenibilità*

La sostenibilità sociale è un concetto multidimensionale e in continua evoluzione, pilastro fondamentale dello sviluppo sostenibile. Sebbene per anni abbia ricevuto scarsa considerazione rispetto alla sostenibilità ambientale ed economica, il suo ruolo è, ad oggi, riconosciuto come essenziale per uno sviluppo equo e duraturo [6].

[6] J. Bebbington- J. Dillard, *Social Sustainability: An Organizational-Level Analysis*, in J. Dillard-V. Dujon-M.C. King (a cura di), *Understanding the Social Dimension of Sustainability*, Routledge, New York-London, 8, 2008.

Fin dal Rapporto Bruntland del 1987, pubblicato dalla Commissione Mondiale per l'Ambiente e lo Sviluppo (WCED), la sostenibilità sociale è stata identificata come uno dei tre pilastri dello sviluppo sostenibile [7]. Essa rappresenta l'insieme delle precondizioni sociali necessarie affinché i sistemi possano svilupparsi in chiave sostenibile.

Le difficoltà a positivizzare il principio derivano, tuttavia, dal fatto che esso decodifica un concetto dinamico, mutevole nel tempo e nello spazio [8], non sussumibile in una nozione statica né inquadrabile in un modello teorico rigido. La sua funzione principale, più che tecnica, è organizzativa: orienta, cioè, l'azione politica verso la realizzazione degli interessi individuali e la soddisfazione dei bisogni sociali [9].

Per converso, negli ultimi decenni, la sostenibilità sociale ha guadagnato sempre più spazio nei programmi politici, pur essendo ricompresa nel *framework* integrato e olistico dello sviluppo sostenibile, in stretta interrelazione con gli altri pilastri.

La rigenerata consapevolezza del ruolo della sostenibilità sociale è stata, dunque, prodromica per il suo inquadramento sul piano europeo e per la sua definizione in quattro dimensioni interconnesse, di seguito tratteggiate.

La prima dimensione concerne la cornice legale entro cui prende corpo il concetto di sostenibilità sociale.

Il legame tra sostenibilità sociale, economica e ambientale è principalmente radicato nel quadro giuridico internazionale dell'ONU. Dapprincipio, la sostenibilità sociale era concepita come una sfumatura della sostenibilità economica. Nel tempo, si è progressivamente evoluta fino a diventare un fenomeno indipendente, incentrato su fattori sociali cruciali come la disoccupazione, la povertà, il diritto a una vita dignitosa, la giustizia sociale intergenerazionale e intragenerazionale, e l'educazione allo sviluppo sostenibile [10].

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[7] Segretariato generale delle Nazioni Unite, *Report of the World Commission on Environment and Development: Our Common Future*, 1987. Si legga: I. Borowy, *The social dimension of sustainable development at the UN: from Brundtland to the SDGs*, Cambridge University Press, Cambridge, 2023.

[8] E. Szyszczak, *The new paradigm for social policy: A virtuous circle?*, in *Common Market Law Review*, 2001, 38, 5, pp. 1125-1170. T. Novitz, *The paradigm of sustainability in a European social context: Collective participation in protection of future interests?*, in *The International Journal of Comparative Labour Law and Industrial Relations*, 2015, 31, 3, pp. 243-262.

[9] Lavoro di ricerca dell'European Investment Bank Group, *Environmental and Social Standards*, 2022, disponibile a: EIB Environmental and Social Standards.

[10] I. Sachs, *Social Sustainability and Whole Development: Exploring the Dimensions of Sustainable Development*, in *Sustainability and the Social Sciences: A Cross-Disciplinary Approach to Integrating Environmental Considerations into Theoretical Reorientation*, Unesco-Director General 1987-1999, 1999, pp. 25-36.

A tali fruttuosi sviluppi si sono ampiamente ispirate le istituzioni europee. Tanto che all'interno dell'ordinamento giuridico dell'UE, la sostenibilità sociale ha acquisito le caratteristiche di obiettivo autonomo ai sensi dell'art. 3, par. 3, TUE, nonché di pietra angolare del modello economico europeo, in linea con l'Agenda 2030 delle Nazioni Unite e la strategia *Europe-2020* [11]. Del canto loro, i Trattati, che proclamano, a più riprese, il perseguimento degli obiettivi di integrazione sociale, in un'ottica cooperativa tra istituzioni nazionali e sovranazionali, hanno offerto al legislatore europeo precise basi giuridiche nei settori del mercato interno e della politica sociale (artt. 150 ss. TFUE) per adottare una legislazione sociale più solida, quand'anche nei limiti imposti dal diritto primario, che circoscrive le competenze sociali dell'UE ad azioni residuali e complementari (art. 145 TFUE) rispetto a quelle degli Stati membri (art. 147 TFUE), titolari, invece, di una primaria responsabilità nella tutela dei diritti sociali.

Ciò si è tradotto nel perseguimento da parte dell'UE di politiche volte a rafforzare la sua dimensione sociale e in un correlato programma politico finalizzato a promuovere la coesione sociale, economica e ambientale, mediante la riduzione delle disparità territoriali e la garanzia del benessere dei cittadini [12].

Contributo decisivo al quadro legale innanzi delineato e azione di rilievo in direzione della sostenibilità sociale è rinvenibile nell'adozione del Pilastro Europeo dei Diritti Sociali (2017-2021) [13], sebbene questo stesso rechi più lo scopo di un percorso verso un'Europa sociale che obiettivi specifici di sviluppo sociale sostenibile.

Il Pilastro europeo dei diritti sociali, in effetti, mette in pratica la clausola sociale orizzontale contenuta nell'art. 9 TFUE, che impone un obbligo di risultato all'UE, consistente nell'integrazione degli aspetti sociali all'interno delle sue politiche.

Infatti, in aperta sfida alle limitate competenze dell'UE in materia sociale, l'impostazione sistemica e di principio del Pilastro ne conferma la natura di iniziativa che consolida e rafforza a livello europeo l'obiettivo di promuovere un futuro del lavoro equo e inclusivo, ispirandosi a principi e diritti radicati in

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[11] Commissione europea, Comunicazione della Commissione al Parlamento europeo, al Consiglio, al Comitato economico e sociale europeo e al Comitato delle regioni Europa 2020-*Una strategia per una crescita intelligente, sostenibile e inclusiva*, COM 2010/2020, 3 marzo 2020. Per un'analisi intersezionale del fenomeno si veda: K.A. Polomarkakis, *The European Pillar of Social Rights and the Quest for EU Social Sustainability*, in *Social and Legal Studies*, 29, 2, 2020, pp. 183-200.

[12] Studio del Parlamento europeo, Direzione generale delle Politiche interne, *Social Sustainability, Concept and Benchmarks*, 2020, disponibile a: https://www.europarl.europa.eu/.

[13] Raccomandazione della Commissione europea sul *Pilastro europeo dei diritti sociali*, UE 2017/761, 26 aprile 2017 disponibile a: https://eur-lex.europa.eu/. Comunicazione al Parlamento europeo, al Consiglio, al Comitato economico e sociale e al Comitato delle regioni *il Piano d'azione per il Pilastro europeo dei diritti sociali*, COM 2021/102, 4 marzo 2021.

strumenti internazionali consolidati, come le Convenzioni dell'OIL, con cui la connessione è teleologicamente evidente e innegabile [14].

Invero, i 20 principi del Pilastro, pur non essendo giuridicamente vincolanti *per se*, orientano l'azione politica dell'UE e degli Stati membri, che dovranno adottare misure concrete volte a favorire le pari opportunità e l'accesso al mercato del lavoro, condizioni di lavoro eque, protezione sociale e inclusione, in sintonia con il concetto di "lavoro dignitoso" promosso dall'OIL.

L'OIL medesimo ha applaudito l'impegno dell'UE per un'Europa sociale forte, sottolineando come l'attuazione del Pilastro rafforzi il modello sociale europeo e rappresenti un passo avanti verso la giustizia sociale ed economica [15].

In tale contesto, la dichiarazione interistituzionale di *La Hulpe* del 2024 ha confermato il ruolo del Pilastro come bussola della politica sociale dell'UE, ha evocato l'importanza dell'OIL e dei suoi valori e ha ribadito l'impegno dell'UE ad applicare le norme internazionali del lavoro nella sua azione esterna [16].

Seguendo la linea *supra* tracciata, la Commissione europea ha stabilito, quale priorità strategica, che il quadro finanziario pluriennale europeo (2028-2034), peraltro in corso di negoziazione, sia indirizzato all'integrazione delle questioni sociali nelle politiche di sviluppo UE, a fronte di un maggiore impegno anche a definire in maniera più nitida e netta il concetto di sostenibilità sociale [17].

Infatti, benché il monitoraggio dei progressi verso la sostenibilità e lo sviluppo sociale all'interno degli Stati membri sia demandato al Quadro globale di indicatori delle Nazioni Unite [18], è indiscutibile la concentrazione di un significativo potere di verifica in capo all'UE.

La seconda dimensione è quella sostanziale-contenutistica.

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[14] Libertà di associazione e diritto alla contrattazione collettiva: Convenzioni OIL n. 87 (1948) e n. 98 (1949); Eliminazione di tutte le forme di lavoro forzato o obbligatorio: Convenzioni OIL n. 29 (1930) e n. 105 (1957); Effettiva abolizione del lavoro minorile: Convenzioni OIL n. 138 (1973) e n. 182 (1999); Eliminazione della discriminazione in materia di impiego e professione: Convenzioni OIL n. 100 (1951) e n. 111 (1958).

[15] Comunicato OIL sulla Comunicazione della Commissione al Parlamento europeo, Consiglio e al Comitato europeo economico e sociale, su un lavoro dignitoso in tutto il mondo per una transizione globale giusta e una ripresa sostenibile, COM 2022/66 def. cit., *ILO welcomes renewed EU focus on decent work worldwide for a just transition and a sustainable recovery*, 22 febbraio 2022, disponibile a: ILO welcomes renewed EU focus on decent work worldwide for a just transition and a sustainable recovery | International Labour Organization.

[16] Consiglio dell'UE, *Dichiarazione di La Hulpe sul futuro del pilastro europeo dei diritti sociali*, 10676/24, 16 aprile 2024, approvata il 20 giugno 2024.

[17] Commissione europea, *The 2028-2034 EU budget for a stronger Europe- Strategy and policy*, del 16 luglio 2025 disponibile a: https://commission.europa.eu/.

[18] Risoluzione dell'Assemblea generale sul lavoro della Commissione statistica riguardante l'Agenda per lo sviluppo sostenibile 2030, A/RES/71/313.

Per una definizione più robusta di sostenibilità sociale, il principio di equità sociale appare fondamentale, in quanto principio cruciale per il conseguimento di obiettivi come l'occupazione, la parità salariale, l'uguaglianza, l'inclusione, il progresso sociale e un'economia sociale di mercato.

In aggiunta ai predetti fattori, ulteriori componenti della sostenibilità sociale, come la democrazia e la salvaguardia dei diritti umani, civili, politici e sociali, della cui promozione è pioniera l'UE, contribuiscono ulteriormente a chiarire l'operatività all'interno dell'ordinamento UE del concetto di sostenibilità sociale.

La terza dimensione, ovvero, quella attuativa, definisce, invece, la portata della sostenibilità sociale nell'ordinamento UE, portata che si estende oltre i confini territoriali e involge anche l'azione esterna.

L'universalità del suddetto principio comporta, in effetti, l'allineamento delle politiche esterne dell'UE con gli obiettivi di sostenibilità, includendo la promozione di standards internazionali del lavoro, del benessere sociale, dei diritti umani nelle interazioni con i paesi terzi. Ciò avviene attraverso la diplomazia, gli aiuti allo sviluppo, gli accordi commerciali e i partenariati politici, consolidando la necessità di integrare la sostenibilità nelle politiche europee con gli Stati terzi ai sensi degli artt. 3, par. 5 e 21, TUE, 11 e 191 TFUE [19].

Il quarto e ultimo profilo della sostenibilità sociale è dato dal "lavoro dignitoso" (SDG n. 8) e dalle politiche delle quali esso è obiettivo, politiche in cui si rinviene la rappresentazione emblematica della dimensione applicativa del principio in richiamo.

Il "lavoro dignitoso", nato nel contesto della *Decent Work Agenda* dell'OIL [20], si riferisce all'occupazione e include, altresì, i diritti dei lavoratori in termini di sicurezza e salute, retribuzione equa, benessere psicofisico, integrazione sociale, crescita personale, non discriminazione e abolizione del lavoro minorile.

Il "lavoro dignitoso" è associato a quattro pilastri fondamentali dello sviluppo sostenibile. Ovvero, 1. la creazione di posti di lavoro, 2. la protezione sociale, 3. i diritti sul lavoro e 4. il dialogo sociale, i quali costituiscono il presupposto per un mercato del lavoro che non solo generi stabilità economica, ma promuova anche un crescente benessere sociale, riducendo le disparità, garantendo giustizia sociale e rafforzando la coesione e la resilienza sociale. In tale ambito, emerge l'importanza delle strategie adottate dall'UE al

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[19] R.A. Wessel-J.B. Mata Diz-J.P.T. Társia-S.E. Akdogan, *EU External Relations Law and Sustainability, The EU, Third States and International Organizations*, Springer, The Hague, 2024.

[20] Assemblea generale delle Nazioni Unite settembre 2015. L'agenda è divenuta parte integrate dei c.d. Millenium Development Goals e dell'Agenda sullo sviluppo sostenibile 2030 delle Nazioni Unite. Consulta: https://sdgs.un.org/.

fine di ottimizzare la complementarità tra il sistema di protezione sociale e le restanti aree cruciali dell'Agenda per il Lavoro Dignitoso [21].

Nonostante l'assenza di una concettualizzazione giuridica autonoma di lavoro sostenibile nell'ordinamento UE, dopo la pandemia di COVID-19, si è evidenziata chiara la ricerca di un nuovo paradigma da parte della Commissione Europea. L'esecutivo europeo ha, in effetti, puntato al rafforzamento della condizionalità del "lavoro dignitoso" nel commercio internazionale, sviluppando una strategia globale per promuoverne i requisiti minimi sia nelle politiche interne che esterne [22].

Tale strategia è basata da un lato sull'implementazione delle norme internazionali dell'OIL, dall'altro sull'integrazione dei principi del rispetto dei diritti dei lavoratori nelle catene di approvvigionamento. Completa, poi, il quadro il principio di sicurezza sul lavoro, che trova spazio nelle iniziative orizzontali e settoriali già vigenti nell'UE, nelle politiche regionali, multilaterali e di partenariato globale, comprese le politiche di allargamento e di vicinato, cooperazione allo sviluppo, accanto alle politiche di integrazione economica, volte alla creazione di aree di libero scambio.

Con la descritta strategia, in sostanza, l'UE ha posto al centro l'obiettivo di una ripresa inclusiva, sostenibile e resiliente dopo la pandemia, ma ha anche gettato le basi per ampliare il discorso sulla politica commerciale e sulla messa al bando di quei prodotti che hanno accesso al mercato UE, derivanti da forme di sfruttamento del lavoro [23].

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[21] Per un'analisi dettagliata si veda: J.V. Ongevalle-H. Huyse-K. Lenaerts, *Strategies and policies to promote decent work in EU partner countries*, report pubblicato da SOCIEUX+ Expertise on Social Protection, Labour and Employment, gruppo di ricerca presso KU Leuven, cofinanziato dalla Commissione europea, dicembre 2024, disponibile a: Strategies and policies to promote decent work in EU partner countries – SOCIEUX+.

[22] Si veda anche il rifacimento del regime di preferenze generalizzate che ha introdotto un meccanismo di incentivazione rivolto a quegli Stati, tra essi, che appaiano allineati alla condizionalità degli standards di lavoro. Regolamento UE 2012/978 del Parlamento europeo e del Consiglio del 25 ottobre 2012, relativo all'applicazione di un sistema di preferenze tariffarie generalizzate e che abroga il regolamento (CE) n. 732/2008 del Consiglio. Detto regime è stato prorogato fino al 2027.

[23] Commissione europea, Comunicazione della Commissione della Commissione al Parlamento europeo, al Consiglio, al Comitato economico e sociale europeo e al Comitato delle regioni sul *"lavoro dignitoso" in tutto il mondo per una transizione giusta globale e una ripresa sostenibile*, COM 2022/66, 23 febbraio 2022.

3. *La protezione dei diritti dei lavoratori nella politica commerciale dell'UE*

L'introduzione di clausole sociali nell'agenda del commercio internazionale è stata a lungo un tema dibattuto, spesso percepita dai grandi partners commerciali come una forma velata di consenso al protezionismo economico da parte dei paesi in via di sviluppo. Per diversi anni, la collocazione della legislazione internazionale sul lavoro all'interno dell'OMC e il suo sviluppo possono essere tracciati lungo un doppio binario: da un lato, la separazione tra i percorsi legislativi di liberalizzazione commerciale e quelli di promozione degli standards del lavoro, dall'altro, il rafforzamento della cooperazione tra l'OMC e l'OIL, organismo di punta per la salvaguardia del lavoro a livello internazionale [24].

In un clima di generale riluttanza ad attribuire una dimensione sociale al commercio, l'UE ha adottato una strategia proattiva. Concludendo ALS su basi giuridiche autonome rispetto al sistema multilaterale dell'OMC, l'UE ha reso gli ALS il meccanismo privilegiato per integrare i diritti dei lavoratori nella sua politica commerciale e patrocinarne il rispetto con gli strumenti dell'azione esterna [25].

I sistemi unilaterali di preferenze generalizzate e gli accordi di cooperazione con i paesi in via di sviluppo sono stati i precursori della politica sociale esterna dell'UE, consolidando il dialogo tra l'UE e l'OIL e impegnando l'UE a promuovere e proteggere gli standards indicati dall'organismo internazionale [26]. Questo modello sociale si è esteso anche alle politiche di vicinato, con l'obiettivo primario di ottenere la ratifica delle 8 Convenzioni fondamentali dell'OIL da parte dei firmatari degli accordi.

Con il rafforzamento del ruolo del Parlamento Europeo nella politica commerciale e la Strategia di Lisbona che ha enfatizzato il legame tra commercio e lavoro, il supporto attivo delle istituzioni europee alle Convenzioni sul lavoro e all'Agenda per il Lavoro Dignitoso dell'OIL si è tradotto nell'inclusione di meccanismi condizionali e clausole sul lavoro negli ALS. Queste clausole

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[24] Dal Singapore Ministerial Meeting nel 1996 al Seattle Ministerial Meeting del 1999-WTO. M. Jansen-E. Lee, *Trade and Employment Challenges for Policy Research*, Studio congiunto dell'Ufficio Internazionale del Lavoro e il Segretariato dell'OMC, WTO, 2007.

[25] G. Gruni, *Labor Standards in the EU-South Korea Free Trade Agreement Pushing Labor Standards into Global Trade Law?*, in *Korean Journal of International and Comparative Law*, 5, 2017, pp. 100–121; C. Barnard, *The External Dimension of Community Social Policy: the Ugly Duckling of External Relations*, in N. Emiliou-D. O'Keefe (eds), *The European Union and World Trade Law after the GATT Uruguay Round* (*European Law Series*), John Wiley and Sons, Regno Unito, 1996.

[26] Si veda l'accordo di Cotonou e il Fondo per lo Sviluppo europeo firmato il 23 giugno 2010 dall'UE con il gruppo di 79 paesi di Africa, Caraibi e Pacifico, disponibile a: http://ec.europa.eu/europeaid/where/acp/overview/cotonou-agreement/index_en.htm.

mirano non solo alla ratifica delle Convenzioni e all'implementazione dei programmi OIL tramite strumenti di controllo, ma anche alla creazione di un quadro normativo ispirato agli standards europei di protezione sociale [27].

Fino al 2009, la Commissione Europea tendeva ad accordare preferenza all'impianto normativo del commercio internazionale rispetto alle politiche sociali. Tuttavia, la firma dell'Accordo di libero scambio UE-Corea del Sud ha segnato una nuova era nel campo giuslavoristico [28].

Tale accordo ha incorporato gli standards del lavoro nella politica di sviluppo sostenibile, confermando l'importanza del principio di sostenibilità sociale accanto alla crescita economica e alla protezione ambientale. La rinnovata rilevanza del principio *de qua* ha, invero, dato impulso a un progetto più ampio di globalizzazione dei valori europei, confermando, dunque, la correlazione tra standards di lavoro e sostenibilità sociale, che la Commissione aveva inserito per la prima volta nel contesto delle negoziazioni commerciali.

Nello scenario del 2006, la revisione della strategia europea sullo sviluppo sostenibile [29] aveva condotto al riconoscimento dell'importanza delle normative sul lavoro su due livelli: il primo europeo, confermando l'ingaggio dell'UE nella realizzazione dello sviluppo sostenibile anche nei suoi profili sociali; il secondo internazionale, certificando il legame, invero intrinseco, tra commercio e sviluppo sostenibile. Di seguito, detto legame è apparso traslitterato in specifici capitoli all'interno degli ALS, denominati capitoli su commercio e sviluppo sostenibile (*TSD chapters*), contribuendo, almeno in linea di principio,

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[27] Commissione europea, Comunicazione della Commissione al Parlamento europeo, al Consiglio, al Comitato economico e sociale europeo e al Comitato delle regioni sulla *promozione delle norme fondamentali del lavoro e il miglioramento della governance sociale nel quadro della globalizzazione*, COM 2001/416, 17 luglio 2001; Comunicazione della Commissione al Parlamento europeo, al Consiglio, al Comitato economico e sociale europeo e al Comitato delle regioni sulla dimensione sociale della globalizzazione-*Il contributo della politica dell'UE perché tutti possano beneficiare dei vantaggi*, COM 2004/383, 18 maggio 2004. I primi risultati della nuova governance europea nelle politiche sociali sono rinvenibili nella decisione del Consiglio 2008/805/EC del 15 luglio 2008, relativa alla firma e all'applicazione provvisoria dell'accordo di partenariato economico tra gli Stati del CARIFORUM, da una parte, e la Comunità europea e i suoi Stati membri, dall'altra.

[28] Decisione del Consiglio 2011/265/UE del 16 settembre 2010 relativa alla firma, a nome dell'UE, e all'applicazione provvisoria dell'accordo di libero scambio tra l'UE e i suoi Stati membri, da una parte, e la Repubblica di Corea, dall'altra.

[29] Commissione europea, Comunicazione della Commissione al Parlamento europeo, al Consiglio, al Comitato economico e sociale europeo e al Comitato delle regioni, *Commercio, crescita e affari mondiali – La politica commerciale quale componente della strategia 2020 dell'UE*, COM 2010/612, 9 novembre 2010. Comunicazione della Commissione al Parlamento europeo, al Consiglio, al Comitato economico e sociale europeo e al Comitato delle regioni, *Commercio, Crescita e Sviluppo- Ripensare le politiche commerciali e d'investimento per i paesi più bisognosi*, COM 2012/22, 27 gennaio 2012.

a garantire il rispetto degli obblighi giuridici internazionali preesistenti degli Stati e a colmare contemporaneamente il divario tra i diversi regimi internazionali (di lavoro e commercio).

In particolare, i capitoli su commercio e sviluppo sostenibile, armonizzati in tutti gli ALS dell'UE, contengono la normativa sostanziale dell'OIL, gli obblighi procedurali per la sua attuazione e le informazioni dell'OIL nelle controversie commerciali relative alle norme del lavoro [30]. Il loro contenuto tripartito può, pertanto, essere suddiviso in una parte sostanziale, una procedurale e una relativa alla risoluzione delle controversie.

Quanto alla disciplina sostanziale, l'UE indirizza le parti contraenti al rispetto delle Convenzioni fondamentali dell'OIL, incluse la Dichiarazione dei principi e diritti fondamentali del 1998 (libertà di associazione, contrattazione collettiva, abolizione del lavoro forzato e minorile, repressione della discriminazione) e le dichiarazioni politiche delle Nazioni Unite sulla piena occupazione e sul "lavoro dignitoso" [31]. Oggetto delle negoziazioni sono, parimenti, gli impegni al monitoraggio dell'impatto dell'accordo sulla sostenibilità; al mantenimento di un adeguato livello di protezione interna degli standard del lavoro; all' implementazione della normativa sul lavoro per evitare forme occulte di protezionismo e incoraggiare investimenti e commercio.

Quanto alle procedure, i *TSD chapters* prevedono l'istituzione di organismi dedicati alla promozione del dialogo e della cooperazione sull'attuazione delle disposizioni sostanziali. Oltre al Comitato Congiunto, che supervisiona il rispetto reciproco degli impegni, la società civile (ONG, rappresentanti imprenditoriali e sindacali) è parte integrante dei Gruppi Consultivi Nazionali di ciascun partner commerciale, arricchendo il dialogo internazionale.

Quanto alla risoluzione delle controversie, il meccanismo preposto elude lo strumento generale di risoluzione delle controversie commerciali e ha carattere prevalentemente consultivo e diplomatico. I reclami relativi all'attuazione dei capitoli sul commercio e lo sviluppo sostenibile non comportano conseguenze sanzionatorie né la sospensione delle preferenze commerciali per il partner inadempiente. Ciò significa che la maggior parte delle controversie ha un potenziale prevalentemente simbolico, mentre in termini di *enforcement*, il rispetto delle norme sul lavoro si basa su un approccio che l'OIL ha definito "promozionale", in quanto, malgrado vincolatività degli obblighi OIL, le disposizioni

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[30] J. Harrison-M. Barbu-L. Campling-B. Richardson-A. Smith, *Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters*, in *Journal of Common Market Studies*, 2018.

[31] Dichiarazione ministeriale del Consiglio economico e sociale dell'ONU su piena occupazione e "lavoro dignitoso", E/2006/L.8, 5 luglio 2006.

nei capitoli «*forniscono* [esclusivamente] *un quadro per il dialogo, la cooperazione e il monitoraggio*» [32].

Benché tradizionalmente siano in disuso le sanzioni commerciali dirette per la mancata osservanza delle clausole condizionali, gli accordi commerciali moderni, successivi al 2017, sembrano aver segnato un cambio di passo, frutto delle critiche sulla debolezza dei meccanismi di applicazione dei capitoli *TSD*. Paradigmatico è l'accordo con il Regno Unito (*The EU-UK Trade and Cooperation Agreement*) [33], nella misura in cui include un meccanismo che consente a una delle parti di imporre sanzioni o "misure correttive" adeguate ed effettive [34] in caso di violazioni dei diritti dei lavoratori e delle norme ambientali. Di recente, anche l'accordo con la Nuova Zelanda [35] introduce la possibilità di "misure correttive temporanee" per la mancata applicazione degli standards di sostenibilità, nonché la facoltà della parte attrice di chiedere la sospensione degli obblighi [36]. Per converso, l'accordo modernizzato con il Cile [37], pur riferendosi agli obblighi giuridicamente rilevanti come stabiliti dagli accordi multilaterali sul lavoro e alla dovuta conformità del paese stipulante agli standards del diritto internazionale [38], prescrive un più generico dovere di applicazione, da parte del panel designato alla risoluzione di un'eventuale controversia insorta tra le parti dell'accordo, delle regole consuetudinarie di interpretazione del diritto internazionale, comprese quelle codificate nella Convenzione di Vienna sul diritto dei Trattati [39].

Ciò è il frutto di un ampliamento, perlomeno nello scopo, delle obbligazioni a carico dei contraenti, riflettendo una modifica nell'approccio alla politica commerciale da parte dell'UE, orientata all'introduzione di clausole più esecutive

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[32] Rapporto dell'Organizzazione Mondiale del Lavoro, *La dimensione sociale degli ALS,* Ginevra, 6 novembre 2013, edizione rivisitata nel 2015.

[33] Accordo sugli scambi commerciali e la cooperazione tra l'UE e la Comunità europea dell'energia atomica, da una parte, e il Regno Unito di Gran Bretagna e Irlanda del Nord, dall'altra, 1° dicembre 2021, OJ L, 149, 30 aprile 2021, p. 10, che ha sostituito *ab initio* 22020A1231(01).

[34] Cfr. Artt. 388 e 394, par. 1, lett. a).

[35] Accordo di libero scambio tra UE e Nuova Zelanda del 9 luglio 2023, OJ L, 2024/866, 25 marzo 2024.

[36] Art. 26.16, par. 2 e 26.16 par. 3 relativamente 19.3, par. 3 (Norme e accordi multilaterali in materia di lavoro).

[37] Accordo di libero scambio tra UE e Repubblica del Cile, in vigore sin dal 2003 e revisionato il 17 novembre 2023 nella forma di Accordo ad Interim tra UE e Repubblica del Cile, 2023/0259 (NLE), in vigore dal 1° febbraio 2025.

[38] Cfr. Artt. 26.15 ss.

[39] Art. 31 della Convenzione di Vienna sul Diritto dei Trattati proclamata a Vienna il 23 maggio 1969 ed entrata in vigore il 27 gennaio 1980: Nazioni Unite, Serie dei Trattati, vol. 1155, p. 331.

(*enforceable*) negli accordi di nuova generazione. Chiarificante è l'accordo UE-NZ, il quale contiene un più specifico vincolo al rispetto dell'Agenda sul "lavoro dignitoso" dell'OIL, nonché all'implementazione effettiva degli standards delle Nazioni Unite sull'abolizione delle discriminazioni e sull'uguaglianza di genere sul luogo di lavoro [40].

Quand'anche includano obblighi di mero risultato, le clausole condizionali sono, alternativamente, validi strumenti di interpretazione per l'esecuzione conforme degli accordi.

E ancora. Dal punto di vista dell'interpretazione funzionale dei *TSD chapters*, una parte della letteratura attribuisce all'UE un nuovo potere strategico rispetto ai partners commerciali, ritenendo però che gli effetti delle clausole sulla sostenibilità sociale siano circoscritti ai patti negoziali vigenti [41]. Al contrario, dato il potenziale espansivo di tali accordi, gli obblighi in essi iscritti sono altresì estesi agli *stakeholders* che operano al di fuori della giurisdizione degli Stati firmatari, in quanto parimenti coinvolti in un impegno globale di responsabilità sociale in tutti i settori produttivi di beni e servizi.

Beninteso, attraverso le disposizioni sugli standards del lavoro negli accordi commerciali, le istituzioni europee sono in grado di esercitare un monitoraggio costante sull'impatto sociale delle regole di mercato. Tale approccio, che privilegia lo sviluppo sostenibile rispetto alla mera promozione di scambi commerciali, garantisce all'UE un'importante e non vincolato potere extraterritoriale di influenza sui processi sociali interni.

3.1. *Le incongruenze dei* TSD chapters *negli accordi commerciali dell'UE: tra politica commerciale e politiche sociali*

La letteratura giuridica esprime unanime perplessità riguardo all'efficacia degli standards *TSD* negli accordi commerciali dell'UE, in particolare per quanto concerne la revisione delle leggi interne sul lavoro e le riforme sulla politica interna come logica conseguenza. La criticità principale risiede nella scarsa, se non assente, capacità delle disposizioni dei *TSD* di produrre effetti giuridici concreti, conformemente al principio di legalità [42].

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[40] Cfr. rispettivamente, artt. 19.3.8 e 19.3.9; art. 19.4.6 UE-NZ. Sul punto si veda: J. Ballingal, *Sustainability and the free trade agreement between New Zealand and the EU: a step forward in responsibility*, Analisi delle politiche dell'Istituto Internazionale per lo Sviluppo Sostenibile (IISS), 2023, disponibile a: Free Trade Agreement between the European Union and New Zealand – European Sources Online.

[41] J. Orbie, *Promoting Labour Standards through Trade*, in R. Whitman, (a cura di), *Normative Power Europe*, Palgrave Macmillan, Basingstoke, 2009, pp. 161-84.

[42] I. Diamjanovic-N.de Sadeleer, *Labour Standards in International Trade Agreements: A*

Gran parte della problematica deriva dalla natura stessa dei suddetti capitoli, tendenzialmente inseriti negli accordi come sezioni non vincolanti. La strategia adottata riflette l'esercizio di un *soft power* europeo, per natura persuasivo e non cogente, che limita gli impegni delle parti contraenti a mere attività interpretative e di cooperazione, piuttosto che a obblighi legalmente azionabili.

A ben vedere, l'implementazione dei diritti del lavoro, pur richiamando le 8 convenzioni fondamentali dell'OIL [43], è caratterizzata da un linguaggio conciliante e generico, che affievolisce la vincolatività delle prescrizioni internazionali di protezione minima che, al contrario, dovrebbero configurare un autentico obbligo di risultato per i paesi partner, in linea con il loro carattere esecutorio. Né la ratifica delle Convenzioni OIL rappresenta una condizione preliminare per la conclusione degli ALS, in contraddizione con altri meccanismi dell'UE, come il SPG, dove la ratifica è prodromica alla concessione di benefici tariffari [44].

Inoltre, gli accordi non prevedono forme di armonizzazione o standardizzazione delle leggi nazionali sulla protezione minima del lavoro, né alcuna forma di ravvicinamento legislativo sui principi di libertà di associazione, sul riconoscimento della contrattazione collettiva, sull'eliminazione del lavoro forzato o del lavoro minorile, tampoco sulla non discriminazione nel campo dell'occupazione.

Il mandato dei partners è limitato a un generico e non vincolante «*impegno ad attuare efficacemente*» gli obblighi internazionali. Questioni cruciali come salari e protezione sociale sono, peraltro, rinviate, perché ostacolate dalle divergenze tra gli Stati membri dell'UE in merito a un'armonizzazione sociale onerosa, seppur necessaria.

Al fine di garantire piena parità tra le parti, i capitoli descritti introducono i principi di non regressione sul piano interno dei diritti giuslavoristici e di non derogabilità delle leggi nazionali. Tuttavia, l'applicazione di questi principi è condizionata dai potenziali effetti sugli scambi e sugli investimenti, nella misura in cui incoraggino il loro incremento e ottimizzazione [45].

Questo significa che la limitazione delle clausole può essere ammessa a patto che i contraenti dimostrino che lo scopo della deroga è la promozione degli investimenti e del commercio interno. Tuttavia, detta prassi solleva interrogativi

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Rule of Law Perspective, *A Rule of Law Perspective*, in *European Journal of Risk Regulation*, Cambridge University Press, Cambridge, 2024, 15, pp. 551-571.

[43] Cfr. art. 13.3.2, Accordo di libero scambio UE-Vietnam; art. 12.3.2, Accordo di libero scambio UE-Singapore; art. 13.4, Accordo di libero scambio UE-Corea del Sud.

[44] Art. 9, par. 1, lett. b), Regolamento (UE) n. 978/2012 del Parlamento europeo e del Consiglio, del 25 ottobre 2012, relativo all'applicazione di un sistema di preferenze tariffarie generalizzate.

[45] Cfr. Art. 13.7, Accordo di libero scambio UE-Corea del Sud; art. 12.12 Accordo di libero scambio UE-Singapore. Art. 13.3.1 Accordo di libero scambio UE-Vietnam. Quanto alla clausola di *non eforcement* cfr. art. 13.3.2; artt. 23.4.2 e 23.4.3 dell'Accordo CETA.

sui benefici effettivi che una restrizione dei diritti sociali apporterebbe al commercio, nonché sui criteri da applicare per individuare la violazione del capitolo *TSD*, avendo a riferimento il medesimo requisito dell'impatto effettivo sugli scambi [46].

Non va, poi, trascurato che gli impegni sociali imposti nei capitoli *TSD* sono descritti come eminentemente promozionali, per quanto ambiziosi. Essi pongono enfasi sulla capacità istituzionale dei partners di assicurare alti livelli di salvaguardia dei diritti del lavoro, riflettendo l'aspirazione europea a trapiantare un modello valoriale, basato, tuttavia, su una "mera retorica". La presenza di obiettivi volti alla promozione della "consapevolezza" degli obblighi [47] o di dichiarazioni d'intenti, in cui le parti, ad esempio, «*riaffermano l'impegno*» ad attuare le convenzioni OIL [48], rafforza la percezione dello scarso peso giuridico di tali obiettivi [49].

La fallacia della condizionalità sociale negli ALS dell'UE si manifesta anche nell'assenza di obblighi chiari e precisi per i paesi terzi sin dalla fase di preconfezionamento degli accordi, il che si ripercuote, *quam ob rem*, sul loro *enforcement*, come dimostra il sostanziale immobilismo di alcuni paesi firmatari nel soddisfare progressivamente gli standards e nell'elevare il livello di protezione, anche per evitare che le clausole sui diritti dei lavoratori possano essere percepite come un'obiezione alle linee argomentative contro il protezionismo emerse nella Dichiarazione di Singapore [50].

A fronte di questa blanda condizionalità sociale, la risoluzione di eventuali controversie si basa su meccanismi altrettanto inadeguati. A differenza degli strumenti di protezione degli investimenti, non vi sono diritti azionabili in caso di violazione delle prescrizioni *TSD*, né la comminazione di sanzioni; al contrario, sono privilegiati la diplomazia commerciale e un approccio cooperativo e consultivo [51].

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[46] Si veda il caso USA-Guatemala nell'ambito del CAFTA, il quale evidenzia la difficoltà di stabilire una soglia per l'accertamento di un «vantaggio competitivo» derivante da una violazione. Panel Arbitrale istituito su questioni riguardanti gli obblighi ai sensi dell'art. 16.2.1(a) Del CAFTA-DR, Rapporto Finale Del Panel, 14 giugno 2017, par. 190.

[47] Cfr. art. 23.6 dell'Accordo CETA cit.

[48] Cfr. art. 13.4 dell'Accordo UE-Corea del Sud cit.

[49] R. Zandvliet, *Trade, Investment and Labour: Interactions in International Law*, citato in M. Bronckers-G. Gruni, *Taking the Enforcement of Labour Standards in the EU's Free Trade Agreements Seriously*, in *Common Market Law Review*, 2019, pp. 1591-1622.

[50] Conferenza ministeriale di Singapore del 13 dicembre 1996; G. Gruni, *op. cit.*, pp. 100-121.

[51] Un meccanismo di enforcement dagli effetti giuridicamente vincolanti è, invece, previsto nell'accordo di libero scambio UE-Nuova Zelanda, privo però di effetti sanzionatori tranne che in caso di violazione dell'impegno relativo alle norme fondamentali multilaterali del lavoro e alle convenzioni dell'OIL. Cfr. art. 26 *ibidem*; art. 28 dell'Accordo globale e progressivo per il

Invero, l'implementazione dei capitoli *TSD* è monitorata da comitati specifici e coordinata da Gruppi di consulenza nazionale composti da rappresentanti della società civile. Questi soggetti possono richiedere consultazioni sulle questioni attinenti all'attuazione delle clausole sul lavoro. Solo in ultima istanza e in caso di fallimento delle consultazioni, l'eventuale risoluzione delle controversie è affidata, tramite un meccanismo *sui generis*, a un panel di esperti chiamati a pronunciare soluzioni rilevanti in caso di violazione. La decisione del panel non è, però esecutiva: contiene, piuttosto, raccomandazioni, che, di fatto, sono strumenti di mera deterrenza politica.

Un caso paradigmatico della linea, comunque, coerente tra la via del dialogo politico prescelta per il contenzioso sui *TSD chapters* e l'introduzione di prescrizioni dichiarative e non coercitive negli ALS dell'UE, è la decisione del panel di esperti invocato dall'UE nella controversia con la Corea del Sud, relativa alla ratifica delle convenzioni fondamentali OIL [52]. Nonostante il panel abbia giudicato gli sforzi del governo coreano «*tutt'altro che ottimali*», la conclusione è stata favorevole alla Corea, limitando gli effetti delle norme del lavoro a un impatto interpretativo e circoscrivendo l'applicazione della normativa a un chiarimento del suo valore giuridico all'interno degli accordi commerciali.

Quanto descritto ha spinto la Commissione europea a rilanciare nel 2022 la discussione sul rafforzamento dei capitoli sulla sostenibilità negli ALS [53]. Tuttavia, persiste un significativo *gap* riguardo alla previsione di sanzioni commerciali in ultima istanza. Sebbene le nuove proposte accolgano l'idea di sanzioni, non è chiara la *roadmap* da negoziare e restano esclusi, per il momento, meccanismi espliciti di *enforcement*.

4. *Il nuovo orizzonte della politica commerciale europea attraverso i DCFTA*

La politica commerciale dell'UE, nel corso di un decennio, ha subito una profonda trasformazione, a fronte dell'intensificarsi degli sforzi verso la creazione di un sistema che coniuga l'approccio mercantile, basato sul perseguimento di

partenariato transpacifico (CTPP) ma limitatamente a quelle violazioni che hanno un *impatto* effettivo sul commercio e sugli investimenti bilaterali.

[52] Report del Panel UE-Corea del Sud del 25 gennaio 2021.

[53] Commissione europea, Comunicazione della Commissione al Parlamento europeo, al Consiglio, al Comitato economico e sociale europeo e al Comitato delle regioni, *Il potere dei partenariati commerciali: insieme per una crescita economica verde e giusta*, COM 2022/409, 22 giugno 2022. Si veda Risoluzione del Parlamento europeo del 6 ottobre 2022 sull'esito del riesame della Commissione del piano d'azione in 15 punti in materia di commercio e sviluppo sostenibile, 2022/2692(RSP).

obiettivi economici, con riforme politiche e istituzionali nei paesi partner. Detto sistema rispetto al passato evidenzia chiara quella visione olistica della sostenibilità, che conferisce centralità alla dimensione sociale dello sviluppo sostenibile, oltre che a quella economica e ambientale, visione che, ad oggi, appare intrinsecamente legata alle politiche di mercato.

Questa evoluzione è incarnata nei DCFTA, accordi di libero scambio globale e approfondito, che segnano il superamento delle ormai obsolete politiche di abbattimento di dazi e barriere commerciali e favoriscono una maggiore integrazione dei partners nel sistema di regole europeo. Essi, dunque, rappresentano lo strumento attuativo di una strategia istituzionale volta a modellare gli ordinamenti giuridici e sociali dei partners commerciali dell'Unione, promuovendo al contempo valori e principi in un'ottica di integrazione profonda e sviluppo sostenibile.

I DCFTA si inseriscono nel più ampio contesto delle politiche di vicinato, in particolare degli accordi di associazione, e si traducono in un modello contrattuale nuovo in cui gli obblighi sociali e le politiche commerciali sono strettamente legati a sostanziali riforme domestiche. Questo approccio offre ai contraenti un'opportunità unica di ravvicinamento legislativo concreto, superando i vecchi paradigmi di coordinamento e collaborazione che caratterizzavano i precedenti ALS.

La fioritura dei DCFTA è avvenuta, in specie, nell'ambito della politica di vicinato e stabilizzazione dell'Europa orientale. Esempi emblematici sono gli accordi che l'UE ha siglato nel 2014 con Ucraina, Georgia e Moldova. Questi accordi, parte integrante degli accordi di associazione con i medesimi paesi e operativi dal 2016, non si limitano a liberalizzare il commercio di beni e servizi. Al contrario, propongono un'armonizzazione completa di normative, standards e pratiche amministrative in settori cruciali come la concorrenza, gli appalti pubblici, la proprietà intellettuale, la tutela ambientale e sociale, con un chiaro orientamento al ravvicinamento all'*acquis communautaire* [54].

La natura degli accordi è triplice: 1. pro-competitiva, in quanto volta a favorire l'integrazione economica tra UE e paese partner, 2. promozionale, in quanto mira, accanto a obiettivi propriamente commerciali, anche a promuovere riforme strutturali, con l'intesa che queste ultime possano accelerare l'ottenimento del vantaggio competitivo derivante dall'implementazione dell'area di libero scambio; 3. supportiva, nella misura in cui, favorendo lo sviluppo economico sostenibile, facilitano la stabilizzazione del vicinato orientale dell'Unione [55].

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[54] A. Adarov-P. Havlik, *Challenges of DCFTAs: How can Georgia, Moldova and Ukraine succeed?*, in *Policy Notes and Reports*, The Vienna Institute for International Economic Studies, 18, 2017.

[55] P. Van Elsuwege-G. Van der Loo, *Continuity and Change in the Legal Relations Between the EU and Its Neighbours: A Result of Path Dependency and Spill-over Effects*, in D. Bouris-

L'istituzione dei DCFTA all'interno degli accordi di associazione valorizza indubbiamente il partenariato commerciale rispetto agli accordi tradizionali di libero scambio. L'UE, attraverso questi strumenti, approfondisce l'associazione politica con i suoi partners, puntando a un'ampia apertura reciproca del mercato attraverso un allineamento normativo graduale e progressivo con la legislazione commerciale dell'UE. Sebbene lo scopo formale e prioritario rimanga l'integrazione economica – con l'abbattimento delle barriere commerciali e una maggiore attrattività per gli investimenti esteri diretti –, l'implementazione delle riforme istituzionali rappresenta la componente distintiva dei DCFTA. A differenza degli ALS di "nuova generazione" che spesso si limitano a capitoli descrittivi sugli impegni di sostenibilità, i DCFTA si affidano al ravvicinamento legislativo come meccanismo attuativo, garantendo il coordinamento degli ordinamenti interni e il raggiungimento degli obiettivi comuni di mercato. L'elemento differenziale è l'assistenza tecnica e finanziaria europea, fondamentale per supportare il rafforzamento delle istituzioni democratiche e coprire gli elevati costi di adeguamento legislativo.

Nei DCFTA è riservata un'attenzione particolare al settore giuslavoristico, a riprova della consapevolezza europea delle inevitabili ripercussioni delle politiche di mercato integrate sugli aggiustamenti del mercato del lavoro. Come negli ALS, anche nei DCFTA la sostenibilità sociale ha acquisito un'importanza capitale, essendo il frutto di un accordo tra le parti sulla promozione e realizzazione degli obiettivi di sviluppo sostenibile e sull'impatto sociale e ambientale della liberalizzazione degli scambi.

Dal punto di vista strutturale, le clausole sociali, contenute nei capitoli dedicati al commercio e allo sviluppo sostenibile (Cap. 13), sono ispirate a principi fondamentali come, *ex pluribus*, l'ammodernamento del diritto del lavoro, il rafforzamento delle istituzioni in chiave democratica (trasparenza, *accountability* e stato di diritto), e l'accesso a standards di tutela più elevati in materia di sicurezza sul lavoro, parità di genere ed equità sociale.

Un dato incontrovertibile che segna il cambio di paradigma è l'obbligo per i firmatari di attuare le direttive UE nel campo dell'occupazione, della politica sociale e delle pari opportunità [56], ferma restando la primazia del regime normativo sul lavoro dell'OIL tra le fonti eteronome vincolanti. Le parti contraenti si impegnano, dunque, preliminarmente all'attuazione efficace degli standards

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T. Schumacher (eds), *The Revised European Neighbourhood Policy*, Palgrave Macmillan, Londra, 2017.

[56] Si vedano gli allegati XXX dell'Accordo di associazione UE-Georgia; XL Accordo di associazione UE-Ucraina; III Accordo di associazione UE-Moldova relativamente alla legislazione UE sulle politiche attive del lavoro, lotta alla discriminazione e parità di genere, nonché sicurezza sul luogo di lavoro.

fondamentali dell'OIL, come risultanti dalle principali Convenzioni e dalla Dichiarazione OIL sulla giustizia sociale (2008), ma sono altrettanto obbligati ad implementare la legislazione secondaria UE.

Inoltre, l'UE concede agli Stati un'ampia discrezionalità interna nella legiferazione, pur vincolandoli a garantire un elevato livello di protezione, attraverso l'astensione da deroghe alle leggi nazionali che potrebbero incentivare investimenti e commercio a scapito dei diritti.

La natura "rivoluzionaria" dei DCFTA è ulteriormente confermata dalla presenza di meccanismi di monitoraggio più solidi e dal coinvolgimento della società civile nel processo di sorveglianza, spesso tramite gruppi consultivi e forum di dialogo dedicati allo sviluppo sostenibile (capo 13).

Parallelamente, per rafforzare il legame tra mercato e accesso sostenibile ad esso, è previsto un peculiare meccanismo di risoluzione delle controversie in caso di inadempimento delle clausole sullo sviluppo sostenibile. Pur basandosi sull'intesa relativa alla risoluzione delle controversie dell'OMC, il meccanismo *supra* prevede una procedura più celere.

A tal riguardo, i DCFTA contemplano un sistema di misure correttive e possibili sanzioni, la cui natura flessibile dipende dal contenuto specifico dell'accordo [57].

Innanzitutto, è prediletta la via dialogica attraverso consultazioni bilaterali. L'intervento di un panel arbitrale è previsto, pertanto, solo nel caso che con dette consultazioni le parti non addivengano a immediata risoluzione.

L'imputazione della violazione di obblighi fondamentali da una parte contrattuale alla sua controparte potrebbe, invero, culminare nell'adozione ad opera della prima di contromisure temporanee, come la sospensione delle preferenze tariffarie, restrizioni commerciali, la sospensione parziale o totale dell'accordo, nonché ritorsioni diplomatiche come il blocco degli aiuti finanziari e di cooperazione e limitazioni agli investimenti o all'accesso ai programmi UE.

Nei casi più gravi di violazione di "*essential elements*" dell'accordo o di "*Gross violation*" relative ai principi democratici e ai diritti umani, la parte lesa può sospendere gli obblighi per intero. Un sistema simile dovrebbe essere applicato alla mancata esecuzione delle clausole sociali, permettendo alla parte di sospendere l'accordo o ottenere un indennizzo temporaneo.

A garanzia della protezione della parte danneggiata, i lodi del collegio arbitrale sono, comunque, vincolanti. Ciò significa che le parti sono tenute ad eseguire le misure prescritte, oltre che a disporre della legittimazione ad agire in sede OMC, dove si instaura un procedimento autonomo.

In aggiunta, se la controversia riguarda l'interpretazione e l'applicazione delle disposizioni dell'accordo «*che impongono a una Parte un obbligo definito*

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[57] Cfr. art. 267 dell'Accordo Ue-Georgia cit.; art. 403 dell'Accordo UE-Moldova cit.; art. 322 dell'Accordo UE-Ucraina cit.

tramite riferimento a una disposizione del diritto dell'Unione» [58], il collegio arbitrale ha l'obbligo di richiedere una pronuncia pregiudiziale interpretativa vincolante alla Corte di giustizia dell'UE. Siffatto meccanismo assicura l'interpretazione e l'applicazione uniforme della legislazione europea, salvaguardando la giurisdizione esclusiva della Corte di giustizia come interprete del diritto UE [59].

4.1. *La promozione degli standards lavorativi nel controverso caso ucraino: limiti e ambizioni della politica di allargamento*

La politica europea di vicinato (PEV) è stata un veicolo chiave per l'UE per integrare gli standards di lavoro nei suoi rapporti con i partners esteri.

Benché le sfide legate alla diversità strutturale dei paesi limitrofi abbiano storicamente indirizzato l'UE ad assegnare alla politica commerciale un ruolo primario come strumento d'azione esterna [60], l'introduzione dei DCFTA ha, invero, perfezionato il modello bilaterale di integrazione normativa, il cui grado di avanzamento è già comprovato dagli ALS [61], al fine di sviluppare una più adeguata regolamentazione del lavoro.

I DCFTA, come detto, promuovono un'integrazione più profonda, esigendo un graduale allineamento normativo dei partners anche in settori extra-commerciali, con particolare riguardo a quello istituzionale. La proposizione di riforme di più ampia portata ha, senz'altro, rinforzato l'impegno a rispettare gli standards di lavoro, collegandoli a precisi parametri della normativa UE di settore, oltre le convenzioni OIL, in linea con il principio di armonizzazione [62]. La ragione è da rinvenirsi nel fatto che i DCFTA, benché istituiti nell'ambito della PEV, sono attualmente incanalati nel quadro della politica di allargamento. Essi, di fatto, sono divenuti parte integrante del processo di adesione, implicando una condizionalità più rigorosa rispetto a quella prevista dal principio PEV «*more for more*» [63].

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[58] Cfr. art. 267 dell'Accordo UE-Georgia cit.; art. 322 dell'Accordo UE-Ucraina cit.; art. 403 dell'Accordo UE- Moldova cit.

[59] Cfr. la giurisprudenza sulla legittimazione del collegio arbitrale a sollevare un rinvio pregiudiziale: Corte giust. UE, 23 marzo 1982, C-102/81, *Nordesse*; 1° giugno 1999, C-126/97, *Eco Swiss*; 25 gennaio 2022, C-638/19 P, *Commissione c. Micula et al*.

[60] W. Koeth, *The 'DCFTA': an Appropriate Response by the EU to the Challenges in its Neighbourhood?*, in *EIPASCOPE*, 2014.

[61] L. Pantaleo-F. Seatzu, *Protecting Workers' Rights and Freedoms under the Eu-Mercosur Trade Agreement: a Dream Coming True?*, in *Diritto dell'Unione europea*, 2, 2023.

[62] T. Pál-F. Maduko-L. Bruszt, *Promoting Labour Standards through the European Neighbourhood Policy*, in *Working Paper EUI-Robert Schuman Centre for Advanced Studies*, 76, 2021.

[63] A. Łazowski, *Enhanced multilateralism and enhanced bilateralism: Integration without membership in the European Union*, in *Common Market Law Review*, 45,4, 2008, pp. 1433-1458.

In particolare, l'approccio di *governance* normativa adottato dalle istituzioni europee nei confronti dell'Ucraina, oltre a patrocinare una maggiore apertura al mercato interno, con la prospettiva di un miglioramento delle prestazioni economiche, ha costituito uno stimolo verso l'efficientamento istituzionale del paese e una maggiore aderenza alle politiche sociali dell'UE.

Malgrado le difficoltà di allineamento dell'Ucraina alla condizionalità europea, determinate dal contesto bellico, nello scenario di un reale e, non più aspirazionale, *do ut des*, gli obblighi imposti dal DCFTA sembrerebbero non rispondere più a una logica *soft*. La strategia *Best Endeavours*, nonché gli impegni al mero mantenimento degli standards sociali, propugnati negli ALS tradizionali, appaiono superati in favore di un vero e proprio obbligo coercitivo che subordina al rispetto dei criteri condizionali la prospettiva dell'adesione del paese all'UE.

Si è osservato che l'incremento dell'efficacia dell'accordo commerciale, quale leva per il cambiamento, è indotto indirettamente dalla pressione della condizionalità meritocratica, la cui presenza è rilevabile sin dalla convergenza dell'Ucraina verso la candidatura [64]. Nello specifico, il rispetto dei requisiti sociali e la responsabilità reciproca si collocano nel più ampio spettro della scelta pur sempre condizionale del paese di aderire ai valori universali europei, della democrazia, del rispetto dei diritti umani, dello stato di diritto, ottenendo contestualmente maggiori incentivi e assistenza in ragione dell'assertività dimostrata nel percorso di riforma.

Dunque, l'approccio europeo, non più apparentemente oltre le logiche di mercato e finalizzato a una più approfondita integrazione, ha introdotto elementi di notevole innovazione, in quanto ha fornito un concreto ancoraggio giuridico per il diritto del lavoro, con particolare riguardo all'ordinamento ucraino. Tale processo ha mirato a favorire l'armonizzazione con l'*acquis* dell'UE, soprattutto in settori cruciali come la salute e sicurezza sul lavoro, la parità di trattamento e la non discriminazione.

Nondimeno, il processo di riforme interne ha evidenziato criticità di notevole entità, risalenti a una fase antecedente all'attuale congiuntura. Queste vulnerabilità evidenziano come la ricostruzione post-bellica sia un fattore imprescindibile per conseguire una più effettiva convergenza tra il quadro normativo ucraino e quello dell'UE [65].

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[64] M. Rabinovych, *EU Enlargement Policy Goes East: Historical and Comparative Takes on the EU's Rule of Law Conditionality vis-à-vis Ukraine*, in *Hague Journal on the Rule of Law*, 16, 2024, pp. 715-737.

[65] Note critiche sull'inadeguatezza della legislazione relativa alle riforme socioeconomiche del periodo 2020-2021 cfr.: Consiglio, 7° meeting dei membri, del 2 febbraio 2021, sull'implementazione dell'accordo UE-Ucraina, 5272/1/REV. Consiglio europeo, *Dichiarazione congiunta a seguito del*

Malgrado l'impegno proattivo dello Stato ucraino a conformarsi alle prescrizioni sul lavoro dell'OIL [66], la deflagrazione del conflitto con la Federazione russa ha, infatti, acuito le significative difficoltà amministrative e operative nelle istituzioni ispettive e di controllo precedentemente emerse per quanto riguarda l'applicazione delle leggi sul lavoro. Contemporaneamente, ha reso manifesti i limiti della condizionalità del DCFTA come strumento per la risoluzione definitiva delle questioni in materia sociale e occupazionale [67].

Ciò a dimostrazione che le aspettative dei paesi terzi non sempre sono automaticamente aggregate a quell'obiettivo di integrazione che gli accordi comunque sembrano suggerire. Talora, i firmatari dei DCFTA nutrono l'illusoria speranza di una futura *membership* all'UE, caldeggiando l'adesione ai valori europei come un trampolino di lancio verso una maggiore integrazione [68].

La realizzabilità di tali aspirazioni dipende da due fattori, altresì rilevanti. Il primo è che, sebbene l'introduzione dei diritti del lavoro, in specie, nel programma di sviluppo sostenibile dell'UE abbia contribuito alla positivizzazione degli standards sociali in apposite disposizioni negoziali [69], l'effettiva implementazione di tali standards è spesso bilanciata da altri obiettivi concorrenti [70]. Nonostante gli obiettivi sociali siano stati cruciali per rafforzare i legami con i

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24º vertice UE-Ucraina, 3 febbraio 2023, disponibile a: Joint statement following the 24th EU-Ukraine Summit – Consilium. Sui limiti delle riforme interne al paese in assenza di condizioni di pace v. R. Petrov, *Bumpy Road of Ukraine towards the EU membership in time of war: "Accession Through War" vs "Gradual Integration"*, in *European Papers*, 8, 3, 2023, pp. 1057-1065.

[66] L'Ucraina ha ratificato 72 Convenzioni OIL, di cui 61 in vigore, come attestato dall'organizzazione internazionale nel suo Country Report, disponibile a: Ukraine | International Labour Organization.

[67] Gruppo di studio del Consiglio d'Europa, *Social rights in Ukraine in time of war. Report on the needs assessment*, dicembre 2022, disponibile a: https://rm.coe.int/n. Sul deterioramento della politica occupazionale e la pressoché totale assenza di dialogo sociale nelle riforme si veda altresì: Commissione europea, *Rapporto analitico a seguito della Comunicazione della Commissione al Parlamento Europeo, al Consiglio Europeo e al Consiglio, Parere della Commissione sulla domanda di adesione dell'Ucraina all'UE*, del 1° febbraio 2023, SWD(2023) 30 def. Sull'assenza di un codice del lavoro, di una adeguata normativa sindacale e sulla violazione dei diritti individuali al lavoro si veda l'analisi dettagliata di A. Fedorova-O. Hamuľák, *The approximation of the Ukrainian social legislation to the EU acquis in times of war: the key challenges for reforms*, in *Eastern Journal of European Studies*, 15, 2024.

[68] P. Manoli, *Political Economy aspects of DCFTA*, in *Eastern Journal of European Studies*, 4, 2, 2013. J. Kelley, *New wine in old wineskins: Promoting political reforms through the new European Neighbourhood Policy*, in *Journal of Common Market Studies*, 44,1, 2006, pp. 29-55.

[69] L. Van Den Putte-J. Orbie, *EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions*, in *International Journal of Comparative Labour Law*, 31, 3, 2015, pp. 263-284.

[70] T.A. Börzel-V. Van Hüllen, *One voice, one message, but conflicting goals: cohesiveness and consistency in the European Neighbourhood Policy*, in *Journal of European Public Policy*, 21,7, 2014, pp. 1033-1049.

partners democratici e legittimare le relazioni commerciali dell'UE, la priorità riservata alle azioni in campo politico ed economico ha talvolta ridotto l'enfasi sulla promozione specifica degli standards lavorativi. Tale dinamica critica coinvolge anche l'Ucraina, la cui integrazione nell'UE sembra correlata in misura maggiore a finalità geostrategiche che non a una dimostrabile progresso sociale e democratico interno.

Il secondo riguarda l'efficacia della *governance* transnazionale del lavoro, la quale non dipende solo dalla volontà dei partners di aderire ai valori dell'UE, ma è strettamente legata alla loro effettiva capacità interna e alla solidità delle istituzioni governative e sindacali [71].

L'analisi ha evidenziato, infatti, che sul lungo termine l'avanzamento degli strumenti normativi europei non è sufficiente a garantire i prescritti livelli di convergenza e ravvicinamento legislativo in presenza di governi instabili e organizzazioni del lavoro deboli. Anzi, non di rado, l'entità dei progressi nel settore del lavoro è misurata in base ai vantaggi commerciali, piuttosto che su un reale miglioramento della capacità istituzionale dei contraenti nel promuovere la tutela dei lavoratori [72].

Ciononostante, alla prova dei fatti, la firma del DCFTA tra UE e Ucraina è avvenuta sotto l'impulso di un già avanzato modello sociale europeo e l'accordo è, in linea di continuità, orientato a un ulteriore sviluppo [73]. Si prevede che la revisione del DCFTA con l'Ucraina, proclamata il 13 ottobre 2025, avrà un sostanziale impatto anche sul capitolo relativo alla sostenibilità [74], nonostante buona parte degli aspetti revisionati riguardino la liberalizzazione tariffaria e quindi siano elementi strettamente connessi alla politica commerciale.

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[71] D. Berliner-A. Greenleaf- M. Lake-J. Noveck, *Building Capacity, Building Rights? State Capacity and Labor Rights in Developing Countries*, in *World Development*, 72, 2015, pp. 127-139.

[72] Ad esempio, da Commissione europea *ENP Country Report on Moldova* (del 2004 SEC 2004/567; del 2007 SEC 2008/399; del 2019 SWD 2019/325), emerge un quadro positivo sulla ratifica da parte della Moldova con riguardo alle Convenzioni internazionali sui diritti umani. Pál *et al.* sottolineano, invece, che i più importanti progressi sono stati registrati in altre aree di assistenza da parte dell'UE. Evidenziano, altresì, che l'idoneità per l'assistenza finanziaria dei paesi non dipende dai progressi realizzati in settori di minore priorità per l'UE.

[73] Si rammenta il recente accordo di partenariato tra UE e OIL relativamente al supporto alla trasformazione del mercato del lavoro in Ucraina: Comunicato stampa della Delegazione dell'UE in Ucraina, *L'UE e l'ILO lanciano una nuova iniziativa per sostenere la trasformazione del mercato del lavoro ucraino*, 22 ottobre 2025, disponibile a: EU and ILO Launch New Initiative to Support Ukraine's Labour Market Transformation | EEAS.

[74] Comitato di associazione UE-Ucraina riunito nella formazione commercio, decisione 3/2025, *relativa alla riduzione e alla soppressione dei dazi doganali a norma dell'articolo 29, paragrafo 4, dell'accordo di associazione tra l'UE e la Comunità europea dell'energia atomica e i loro Stati membri, da una parte, e l'Ucraina, dall'altra*, 14 ottobre 2025, 2025/2130.

Accompagnata a un robusto sostegno finanziario e tecnico per la modernizzazione del mercato del lavoro in Ucraina e il rafforzamento del dialogo tra le parti sociali fino al 2028, la revisione dell'accordo di libero scambio prospetta, invero, una maggiore focalizzazione sull'effettiva implementazione degli standards lavorativi e ambientali. Si tratta di un passo critico per la tutela dei diritti in un contesto di ripresa e stabilizzazione che vedrà un'intensificazione dei progetti infrastrutturali e della domanda di manodopera, nonché l'inclusione di temi emergenti, come il lavoro dignitoso nell'economia digitale o aspetti di *due diligence* per le catene di approvvigionamento.

Dal lato dell'UE e della sua politica sociale esterna, l'effetto leva generato dal DCFTA risulta indubbio sin d'ora. Questo *momentum* di integrazione opera come un meccanismo di *enforcement* politico decisamente più incisivo di qualsivoglia intervento sanzionatorio diretto, in quanto l'accesso privilegiato al mercato interno, secondo le linee direttive emerse dall'accordo di revisione, costituisce un fattore di condizionalità strutturale, non negoziabile, per promuovere la *governance* democratica, la *rule of law* e la sostenibilità globale. Sebbene la riorganizzazione della politica commerciale all'interno del DCFTA – mirata all'allineamento dell'Ucraina per la piena integrazione nel mercato unico – possa non facilitare il pieno riconoscimento dell'accordo quale strumento primario per l'avanzamento dei valori europei, essa segnala comunque una ferma intenzione di elevare il commercio a pilastro della sostenibilità, in piena coerenza con il principio di autonomia strategica aperta dell'Unione [75].

5. *Conclusioni*

L'UE si trova in una posizione complessa e a tratti contraddittoria nel promuovere gli standards del lavoro sia internamente che esternamente, mentre la natura multidimensionale della sostenibilità rende particolarmente difficile l'integrazione dei valori sociali in pratiche condivise.

Nonostante la crescente attenzione verso politiche integrate e sostenibili, l'interesse dell'UE per il sociale è rivolto prevalentemente alla creazione di un mercato interno socialmente integrato, la cui edificazione è, tuttavia, fortemente influenzata dalla supremazia legislativa degli Stati membri nei settori sociali, in specie del lavoro e dell'occupazione.

E non solo. Dall'analisi in questa sede condotta è emerso come l'approccio giuridico dell'UE agli obiettivi di sostenibilità sociale si basi, sul piano attuativo, più su una *moral suasion* che su norme vincolanti, condizione che riflette

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[75] C. Beaucillon, *Strategic Autonomy: A New Identity for the EU as a Global Actor*, in *European Papers*, 8,1, 2023, pp. 417-428.

la titolarità di quelle competenze deboli, che caratterizzano le politiche europee in materia sociale e del lavoro e che debilitano considerevolmente gli sforzi dell'UE nel proiettare i propri valori sociali a livello globale attraverso il commercio, con il rischio di azzerarne l'efficacia.

In primis, si è osservata la quasi totale assenza, nei *TSD chapters*, di riferimenti alle disposizioni interne dell'UE in materia di lavoro, a vantaggio delle disposizioni dell'OIL, che costituiscono il solo parametro normativo rilevante. Poiché la politica occupazionale e sociale interna dell'UE non è soggetta ad armonizzazione o a un regime normativo sovranazionale vincolante (l'articolo 9 TFUE aggancia la dimensione sociale delle politiche UE a criteri orizzontali e trasversali), la conseguenza è la netta asimmetria tra le politiche interne e quelle esterne. Questa contraddizione rende difficile convincere i partners ad adottare riforme legislative e istituzionali decisive, dato che il quadro normativo europeo è indiscutibilmente frammentato.

In secundis, l'UE ha scelto di utilizzare la politica commerciale come canale privilegiato per indurre i partners a emanare leggi socialmente sostenibili. Tuttavia, l'approccio dell'UE è prevalentemente *soft*, in quanto basato sulla diplomazia, su azioni persuasive e su regole non vincolanti. Mancano un regime sanzionatorio efficace e un meccanismo di risoluzione delle controversie le cui decisioni siano esecutive. L'assenza di un apparato coercitivo, dunque, indebolisce notevolmente la capacità dell'UE di assicurare l'implementazione e l'attuazione effettiva delle clausole sociali.

In tertiis, benché gli accordi di associazione, grazie alla loro monolitica struttura giuridica, favoriscano il modellamento degli ordinamenti interni basandosi su una forte condizionalità sociale nei capitoli commerciali, si è osservato uno scarso entusiasmo, quando non anche difficoltà insite nei sistemi istituzionali, da parte dei paesi interessati nell'attuare riforme normative globalmente condizionate dall'UE.

In effetti, i costi elevati di implementazione incoraggiano una convergenza selettiva da parte dei governi, ingenerando esitazioni nell'intraprendere un percorso di riforma democratico e completo. La perseguibilità dell'obiettivo di introdurre la normativa europea negli ordinamenti interni di questi Stati attraverso riforme interne di vasta portata rimane, pertanto, in discussione.

Nonostante le evidenti limitazioni, l'utilizzo della politica commerciale come mezzo per promuovere la dimensione sociale della sostenibilità a livello internazionale è stata una mossa strategica dell'UE per introdurre obiettivi normativi specifici. Coniugare lo scopo commerciale degli accordi dell'Unione, pur sempre prioritario, con le preoccupazioni sociali dell'integrazione nel mercato è al centro di una politica moderna, che, in effetti, si è insinuata in tutti i partenariati europei. Politica al cui centro diritti come quello a un lavoro paritario e dignitoso, insieme al benessere sociale generale, sono ormai conciliati con mercati aperti e competitivi.

Specularmente, l'impegno dell'Unione, insieme ai suoi partners esteri, all'ampliamento trasversale della dimensione sociale del mercato unico europeo, attraverso il modello di sviluppo sostenibile dell'OIL e le relative Convenzioni, ma anche attraverso il contenuto progressista dei suoi piani d'azione, come il più volte menzionato Pilastro europeo dei diritti sociali, potrà favorire la sua affermazione di leader nell'elevazione degli standards sociali e nella loro preservazione a livello globale. Potrà, poi, in lunga prospettiva, incoraggiare la sua abilitazione ad attore di punta nel vasto panorama della governance internazionale e del commercio, superando lo schema delle relazioni bilaterali, ormai divenuto prassi in un periodo di profonda crisi del multilateralismo.

Del resto, l'esercizio di influenza normativa da parte dell'UE è basato sulla proposizione di modelli di *governance* sostenibile e, quindi, di un preciso quadro istituzionale che integra politica commerciale e politiche sociali. Proprio la presenza del completo *toolbox* normativo di cui l'UE dispone consentirebbe alle istituzioni europee di assicurare il delicato equilibrio tra le parti del mercato, evitando che il modello sociale europeo – un modello basato su un unico linguaggio valoriale e normativo – quand'anche, attualmente, ancora solo ambizioso, continui a essere percepito da buona parte dei contraenti come ostacolo alle trattative.

È indubbio che dovrà essere fatto di più, in quanto l'assenza di concreti strumenti di attuazione, a vantaggio, invece, di un mero incoraggiamento al rispetto di determinati diritti sociali ed economici ad opera dei partners, insieme alla ancora scarsa attrattività degli elevati standards europei, troppo onerosi perché questi stessi possano rispondere proattivamente alla domanda di conformità normativa, rischia di confinare il ruolo dell'UE a una *sponsorship* più che a una *leadership* estera in questo ambito, confermando ulteriormente il suo già vacillante potere regolatore nel settore.

Non può, però revocarsi in dubbio che i vincoli ai partners a politiche basate su solidarietà sociale, uguaglianza e sviluppo sostenibile per l'accesso al mercato europeo impongono una condizionalità commerciale con connotati sociali molto rassicurante per la scelta di futuri contraenti, escludendo *ipso iure* chi non intenderà allinearsi al sistema dei valori europeo come precondizione per i negoziati.

STILL JUST «A CATCHWORD»? ASSESSING THE (RENEWED) COMMITMENT TO SOCIAL SUSTAINABILITY IN THE EU FREE TRADE AGREEMENTS

Francesca Tammone[*]

1. *Introductory Remarks*

In 2015, the United Nations General Assembly 2030 Agenda left no doubt on the inextricable link between environmental concerns, social advancement, and economic growth. The interdependence of the three pillars of sustainable development – social, economic, and environmental [1] – is reflected in the wording of almost all Sustainable Development Goals (SDGs), where environmental concerns are deeply intertwined with both societal well-being and economic progress. [2] This integrated approach underscores that shaping environmental and economic policies around social rights is essential to «meet the needs of the

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[1] See, among others, B. Purvis-Y. Mao-D. Robinson, *Three pillars of sustainability: in search of conceptual origins*, in *Sustainability Science*, vol. 14, 2019, pp. 681-695. This paper is based on a tripartite conception of sustainability, which has been predominant in the scholarly debate. However, it is important to stress that recent studies deal with a "fourth pillar" of sustainable development, referring to the "cultural" dimension of sustainable development. On this topic, see the United Cities and Local Governments (UCLG) policy statement *Culture: Fourth Pillar of Sustainable Development*, 17 November 2010, at: https://www.agenda21culture.net/sites/default/files/files/documents/en/zz_culture4pillarsd_eng.pdf.

[2] More details on this topic are provided *infra*, Section 2.

present without compromising the ability for future generations to meet their own needs». [3]

Although a tripartite conception of sustainability has historical roots dating back to the 1972 Stockholm Declaration [4] and the 1987 Brundtland Report, [5] the "social" dimension of sustainability has long remained less explored than its environmental and economic counterparts. [6] The reasons for this disparity are complex, including competing interests in public policy, sociological differences across states, and the impact of the 2008 financial crisis. [7] These factors have contributed to the perception that the social pillar of sustainable development is particularly difficult to define and implement. In this context, as early as 2005, Littig and Grießler had already called for a deeper institutional and conceptual grounding of social sustainability, warning against the reduction to a mere «catchword». [8] However, today, strengthening the normative foundation of social sustainability is more urgent than ever for the achievement of the 2030 Agenda, especially within the European Union (EU). Despite sustainable development being an integral part of the EU policies since the adoption of the Treaty of Lisbon, [9] recent policies have marked a renewed and stronger

[3] These words are borrowed from the Brundtland Report, which describes sustainable development as «development that meets the needs of the present without compromising the ability of future generations to meet their own needs» (Report of the World Commission on Environment and Development, *Our Common Future*, 4 August 1987, UN Doc. A/42/427). This report was the result of the work of the United Nations World Commission on Environment and Development (WCED), established in 1983 by the United Nations General Assembly (*Process of preparation of the Environmental Perspective to the Year 2000 and Beyond*, 19 December 1983, UN Doc. A/RES/38/161) and came to be known as the «Brundtland Report», after the Commission's chairwoman Gro Harlem Brundtland.

[4] Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, UN Doc. A/CONF.48/14/Rev.1.

[5] Brundtland Report, cit. See more details on the progressive affirmation of sustainable development in public international law in the Chapter of L. Pantaleo-F. Tomazini de Souza-A. Brusca, in this Volume.

[6] A.K. Polomarkakis, *The European Pillar of Social Rights and the Quest for EU Social Sustainability*, in *Social & Legal Studies*, 2020, Vol. 29(2), pp. 184-185.

[7] *Ibidem*.

[8] B. Littig-E. Grießler, *Social sustainability: a catchword between political pragmatism and social theory*, in *International Journal for Sustainable Development*, vol. 8, 2005, pp. 65-79.

[9] The principle of sustainable development was first incorporated in the EU legislation in the 1992 Maastricht Treaty, which referred to the objective of sustainable growth, notably by linking economic development with environmental protection in the context of the EU's aims (Treaty on European Union, OJ C 191, 29.7.1992, pp. 1-112, Title II, Article G). The relevance of sustainable development was later reaffirmed in Article 37 of the Charter of Fundamental Rights of the European Union (in this regard, S. Villani, *I capitoli in materia di sviluppo sostenibile*

commitment to these objectives. Starting with the Green Deal, [10] the EU has launched important initiatives aimed at reinforcing the sustainable dimension of its policies, such as the Corporate Sustainability Due Diligence Directive [11] and the Regulation on prohibiting products made with forced labour on the EU internal market. [12] At the same time, the EU has made clear its intention to align its external action – particularly, its trade policy – with its internal sustainability objectives. In the 2015 Strategy *Trade for All: Towards a more responsible trade and investment policy*, the EU Commission emphasized the EU being «in the lead on using trade policy to promote the social and environmental pillars of sustainable development», [13] and reaffirmed that the goal of ensuring that economic growth goes hand in hand with social justice, respect for human rights, high labour and environmental standards, health and safety protection, both internally and in trade and investment policies. [14] More recently, in 2021, the Commission reiterated these objectives, stressing that reshaping EU trade policy, in line with contemporary environmental and social challenges, was essential to advance the political ambition of building «a stronger Europe in the world». [15]

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negli accordi commerciali dell'Unione europea: prove di rilevanza sistemica, in *Diritto del commercio internazionale*, 2022, pp. 707-742, with references at notes 13 and 14). However, it was the Lisbon Treaty that consolidated the principle of sustainable development as a commitment to be upheld not only within but also outside the territory of the Union. This is made clear by several provisions included in Treaty on the European Union (TEU). In its Preamble, the EU members commit themselves «to promote economic and social progress of their peoples, taking into account the principle of sustainable development ...». Articles 3 (5) and 21 TEU respectively establish that the EU contributes to sustainable development *in its relations with the wider world,* and that the organization fosters the sustainable economic, social and environmental development of developing countries in its external action. This provision is deeply connected with Article 207(1) of the Treaty on the Functioning of the EU (TFEU), establishing that the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

[10] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, 11 December 2019, COM/2019/640 final.

[11] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence.

[12] Regulation on prohibiting products made with forced labour on the EU internal market (Regulation (EU) 2024/3015 of the European Parliament and of the Council of 27 November 2024 on prohibiting products made with forced labour on the Union market and amending Directive (EU) 2019/1937, OJ L, 2024/3015, 12 December 2024).

[13] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Trade for All: Towards a more responsible trade and investment policy*, 14 October 2015, COM(2015) 497 final, para. 4.2.2., p. 16.

[14] *Ibidem*, p. 15.

[15] Communication from the Commission to the European Parliament, the Council, the

It is therefore evident that the EU is seeking «to assert itself as a global human rights actor», [16] with significant developments in the revision of the EU Free Trade Agreements (FTAs) as cooperation tools with third States. The majority of these agreements, often seen as a vehicle to promote social rights in the EU partner countries, usually include environmental protection duties coupled with commitments to workers' rights and labour standards. [17] Although specific Chapters on sustainability provisions being an integral part of EU trade policy since the second half of 2000, [18] the most recent practice of the EU demonstrates significant evolution, as TSD Chapters having been recently expanded in scope and enforceability. On the substantive side, especially labour-related provisions have become more comprehensive, now encompassing a wide range of aspects of human well-being; on the procedural side, the EU has attempted to address longstanding criticism of the perceived weakness of the sustainability provisions in its FTAs through a reform of 2022.

Against this background, this Chapter aims to assess whether these recent developments in the EU trade policy concretely and adequately reflect the evolving international legal understanding of social sustainability, which increasingly recognizes its interconnection with trade and economic governance. Whilst contributing to the broader and ongoing debate on the role of trade policy in achieving social sustainability, [19] it only focuses on non-environmental

European Economic and Social Committee and the Committee of the Regions, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, 18 February 2021, COM(2021)66 final, para. 1, p. 3.

[16] S. Velluti, *The EU's social dimension and its external trade relations*, in A. Marx-J. Wouters-G. Rayp-L. Beke (eds.) *Global Governance of Labour Rights. Assessing the Effectiveness of Transnational Public and Private Policy Initiatives*, Edward Elgar Publishing, Cheltenham, 2015, p. 42. These policies are coherent with the CJEU Opinion 2/15, ECLI:EU:C:2017:376, stating that «the objective of sustainable development (…) forms an integral part of the common commercial policy» (para. 147).

[17] On this topic, among others, L. Bartels, *Human Rights and Sustainable Development Obligations in EU Free Trade Agreements*, in *University of Cambridge Faculty of Law Research Paper* No. 24/2012, 2012, pp. 1-19; S. Gstöhl-D. Hanf, *The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context*, in *European Law Journal*, 2014, pp. 733-748; G. Adinolfi, *A Cross-Cutting Legal Analysis of the European Union Preferential Trade Agreements' Chapters on Sustainable Development: Further Steps Towards the Attainment of the Sustainable Development Goals?*, in C. Beverelli-J. Kurtz-D. Raess (Eds) *International Trade, Investment, and the Sustainable Development Goals: World Trade Forum*, Cambridge University Press, Cambridge, 2020, pp. 15-49.

[18] European Parliamentary Research Service, *Labour rights in EU trade agreements. Towards stronger enforcement*, January 2022, www.europarl.europa.eu, p. 1.

[19] For a comprehensive and recent study on this topic, T. Novitz, *Trade, Labour and Sustainable Development. Leaving No One in the World of Work Behind*, Elgar Studies in Labour Law, Cheltenham, 2024.

clauses in the TSD Chapters. Related topics, such as the revision of the Generalised Scheme of Preferences, fall outside the scope of this analysis. [20]

Against this background, this paper is structured as follows. Section 2 makes some clarifications on the current legal understanding of social sustainability, highlighting the growing need to bridge trade and human rights through equality, inclusion, and civil society's participation. Moving from these premises, Section 3 evaluates whether, and to what extent, this integrated approach has been incorporated into the EU practice, with a specific focus on the evolution of the scope (3.1.) and enforceability (3.2.) of TSD provisions in EU FTAs. Finally, some conclusions are drawn in Section 4.

2. *Setting the stage. The Conundrum of Social Sustainability and Labour-Trade Linkage in the Evolving Legal Debate*

The attempts to conceptualize social sustainability [21] at the academic and policy-making level have so far struggled to find robust consensus in international law, also due to the plurality of disciplines and perspectives involved in the study of global social standards. [22] Part of these difficulties stems from the Brundtland Report itself, which initially intentionally refrained from offering sharp definitions to ensure adaptability – and thus, broader applicability – across diverse temporal, geographical and socio-economic contexts. [23]

As a result, the social dimension of sustainability has over time taken a backseat, often overshadowed by economic and environmental considerations. [24] The deep connection between the growth of economic resources and the creation of decent jobs has been largely neglected in international policy debates, particularly because of the rising inequalities and social insecurities generated

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[20] For a brief and updated overview, see EU Commission, *Generalised Scheme of Preferences*, at www.policy.trade.ec.europa.eu. On the impact of GSP in this area, A. Tyc, *Global Trade, Labour Rights and International Law. A Multilevel Approach*, Routledge, Milton Park, Abingdon (Oxon), UK-New York, 2021, Chapter 4.

[21] References to the principal researchers conducted in this field can be found in J. McGuinn *et al.*, *Social Sustainability: Concepts and Benchmarks (study requested by the EMPL committee)* March 2020, available online at www.europarl.europa.eu.

[22] A.K. Polomarkakis, *The European Pillar of Social Rights and the Quest for EU Social Sustainability*, *cit.*, p. 186.

[23] I. Borowy, *The social dimension of sustainable development at the UN: from Brundtland to the SDGs*, in C. Deeming (Ed.) *The Struggle for Social Sustainability: Moral Conflicts in Global Social Policy*, Bristol University Press, Bristol, 2021, p. 90.

[24] A.K. Polomarkakis, *The European Pillar of Social Rights and the Quest for EU Social Sustainability*, *cit.*, p. 184.

by globalization and the 2008 financial crisis. [25] In the rise of awareness on the impact of globalization on social issues – potential increase or decrease in wages, change of working hours, and so on – the potential of free trade agreements in promoting social advancement at the international level has gained momentum over the Nineties. [26] However, the translation of human rights, including workers' rights, into trade agreements has tended to be a controversial and widely debated issue. The efforts to link trade liberalization with social clauses during the Uruguay Round and the 1996 World Trade Organization (WTO) Ministerial Conference failed due to strong opposition from developing countries, who saw the inclusion of labour rights as disguised protectionism. [27] In parallel, while consensus on a "social clause" was not reached, countries agreed to respect core labour standards, with the International Labour Organization (ILO) recognized as the responsible body for setting and monitoring them. [28] Given its tripartite structure, putting together governmental, employers' and workers' representatives, the ILO has been considered a unique forum to translate social objectives into concrete global policies and social standards, now collected in several ILO Conventions and Recommendations. [29] This «labour conditionality» was intended as a vehicle to partially erode the «global divide between international trade law and international labour law». [30]

After the 1996 WTO Singapore Ministerial Declaration consolidated this approach, [31] Free Trade Agreements concluded by WTO Parties, including EU Free Trade Agreements, began to include the standards provided by the ILO Conventions and Recommendations as conditions for access to trade benefits, development aid, or economic cooperation. [32] Within the EU trade policy, especially the "core" ILO Conventions have served as a benchmark for labour standards promoted through free trade agreements (see *infra*, Section 3). These

[25] ILO, *Decent work and the 2030 agenda for sustainable development*, Geneva, 2017, p. 2.

[26] ILO, International Institute for Labour Studies, *Social Dimensions of Free Trade Agreements*, 2013, on www.ilo.org, p. 11.

[27] S. Velluti, *The EU's social dimension and its external trade relations*, *cit.*, pp. 44-45.

[28] *Ibidem*.

[29] T. Novitz, *Social Sustainability, Labour and Trade: Forging Connections*, in M. Pieraccini-T. Novitz (eds.), *Legal Perspectives on Social Sustainability*, Bristol University Press, Bristol, 2020, p. 168.

[30] L. Pantaleo-F. Seatzu, *Protecting Workers' Rights and Freedoms under the Eu-Mercosur Trade Agreement: a Dream Coming True?*, in *Il diritto dell'Unione Europea*, n. 2/2023, p. 285.

[31] See the WTO Singapore Ministerial Declaration, 18 December 1996, WT/MIN(96)/DEC, Article 4.

[32] European Parliamentary Research Service, *Trade and sustainable development in EU free trade agreements*, November 2023, at www.europarl.europa.eu, p. 2.

Conventions deal with subjects considered to be *fundamental* pursuant to Article 2 of the ILO Declaration on Fundamental Principles and Rights at Work: [33] elimination of all forms of forced and compulsory labour (covered by the ILO Conventions Nos 29 and 105), [34] freedom of association and the effective recognition of the right to collective bargaining (covered by the ILO Conventions Nos 87 and 98), [35] effective abolition of child labour (ILO Conventions Nos 138 and 182) [36] and elimination of discrimination in respect of employment and occupation (ILO Conventions Nos 100 and 111). [37]

However, alongside the growing interconnections between the ILO's action and social sustainability, the concept of «decent work» has significantly evolved over time. According to the ILO's Decent Work Agenda, the concept of decent work has been built around the four pillars enshrined in the 1998 ILO Declaration on Fundamental Principles and Rights at Work: employment creation, social protection, rights at work, and social dialogue. [38] Accordingly, decent work now entails not only implementation of the ILO's core Conventions but also implies the development of sustainable measures of social protection and social dialogue. [39] In this context, the ILO's Global Commission on the Future of Work also emphasized the important role of corporations in ensuring these values, thus recommending reshaping business incentives to encourage

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[33] ILO Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998, ILO (092)/D295/ENG, Art. 2.

[34] ILO, Convention concerning Forced or Compulsory Labour (No 29), adopted in Geneva on 28 June 1930; Convention concerning the Abolition of Forced Labour (No 105), adopted in Geneva on 25 June 1957.

[35] ILO, Convention concerning Freedom of Association and Protection of the Right to Organise (No 87), adopted in San Francisco on 9 July 1948; Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (No 98), adopted in Geneva on 1 July 1949.

[36] ILO, Convention concerning Minimum Age for Admission to Employment (No 138), adopted in Geneva on 26 Jun 1973; Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No 182), adopted in Geneva on 17 June 1999.

[37] ILO, Equal Remuneration Convention (No 100), adopted in Geneva on 29 June 1951; Convention concerning Discrimination in Respect of Employment and Occupation (No 111), adopted in Geneva on 25 June 1958.

[38] The ILO's Decent Work Agenda is a comprehensive framework promoting fair and productive employment conditions globally. It is based on ILO's conventions, recommendations, and declarations, including, among others, the International Labour Organization Declaration on Social Justice for a Fair Globalization (adopted by the International Labour Conference, 97th Session, Geneva, 10 June 2008), and, more recently, the 2019 ILO Centenary Declaration for the Future of Work (adopted in Geneva at the ILC 108th session, 21 June 2019).

[39] T. Novitz, *Social Sustainability, Labour and Trade: Forging Connections*, *cit.,* p. 161.

long-term and responsible investment.[40] Furthermore, increasing awareness of workers' rights is reflected in the International Labour Conference (ILC) Resolution of 10 June 2022, by which the Declaration on Fundamental Principles and Rights at Work was amended to encompass «a safe and healthy working environment».[41] As a result, the Occupational Safety and Health Convention (No. 155) and the Promotional Framework for Occupational Safety and Health Convention (No. 187) were designated as the fundamental conventions associated with this new principle.[42]

Against this backdrop, it is clear that labour is increasingly linked to a wide range of human well-being aspects, not only including the eradication of forced labour and child labour, but also encompassing equal and safe work environment, freedom of association and the right to organise and collective bargaining, adequate living wages, working time adequate to physical and mental health, work-private life balance, and social protection.[43] In this perspective, labour is only one facet of the broad, multidimensional and dynamic concept of social sustainability that needs to find recognition in trade policies. This interpretation aligns with the SDGs. While the sole SDG Goal 8 explicitly references «decent work»,[44] thus closely aligning SDGs with the contemporary legal understanding of the ILO's Work Agenda, social sustainability is a cross-cutting topic. This is reflected in other – distinct but intertwined – aspects of development, such as eradication of poverty (SDG Goal 1), promotion of health and education (SDG Goals 3 and 4), gender equality (SDG Goal 5), reduction of inequalities within and among countries (SDG Goal 10), access to justice for all and inclusive institutions at all levels (SDG Goal 16).[45]

Accordingly, the ongoing academic discourse – despite the persistent lack of

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[40] ILO, *Work for a brighter future – Global Commission on the Future of Work International Labour Office*, Geneva, 2019, pp. 45-51.

[41] ILO, *Resolution on the inclusion of a safe and healthy working environment in the ILO's framework of fundamental principles and rights at work*, adopted by the International Labour Conference at its 110th Session, 10 June 2022, ILC.110/Resolution.

[42] ILO, Convention concerning Occupational Safety and Health and the Working Environment (No 155) adopted in Geneva on 22 June 1981; Convention concerning the promotional framework for occupational safety and health (No 187), adopted in Geneva on 15 June 2006.

[43] T. Ferraro-N. Rebelo Dos Santos-L. Pais-L. Monico, *Historical landmarks of decent work*, in *European Journal of Applied Business Management*, 1, 2016, p. 88.

[44] In this regard, *infra*, Sub-section 3.1.

[45] See the global indicator framework for the Sustainable Development Goals and targets of the 2030 Agenda for Sustainable Development, developed by the Inter-Agency and Expert Group on Sustainable Development Goal Indicators, as annexed to the United Nations Resolution adopted by the General Assembly on 6 July 2017, UN Doc. A/RES/71/313 of 10 July 2017, Table 2, pp. 30-31.

a universally accepted definition [46] – has also gradually shaped social sustainability around a range of interrelated dimensions of societal well-being. These dimensions include equal access to basic needs, fair distribution of income, equality of rights, inter-and intragenerational justice, access to social and health services and to education, social cohesion and inclusion, empowerment, and participation in policy-making. [47] Scholarly efforts to conceptualise social sustainability have also highlighted its intrinsic link to the inclusion of culturally and socially diverse groups or communities. [48] Among others, the above-mentioned proposal of Littig and Grießler – recently revisited by other scholars [49] – stands out for bringing attention to «the normative claims of social justice, human dignity and participation» as fundamental needs and drivers of sustainable development. [50] Critically, the realisation of these needs demands more than the mere substantiation of commitments; rather, robust procedural mechanisms are required to adopt, implement, and monitor sustainability provisions. [51] In this regard, Boström has identified some key procedural steps, such as communication to stakeholders about potential risks, access to participation and decision-making in different stages, consultation throughout the process, empowerment of affected groups through their participation in the process, and social monitoring. [52]

These emerging issues inevitably intersect policy-making at all levels and all sectors, including trade policy. Goal 17 SDG, requiring to strengthen and revitalise the global partnership for sustainable development and collaboration between governments, the private sector, civil society, and individuals, recognises the trading system as a critical vehicle for achieving all the SDGs. [53] In this light, it is therefore timely and necessary that the trade policies promote inclusion, equality and participation for all segments of society – including but

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[46] For a recent and comprehensive reconstruction of the multiple approach to social sustainability, see J. McGuinn *et al.*, *Social Sustainability: Concepts and Benchmarks*, *cit.,* especially at pp. 18-26.

[47] *Ibidem*, p. 12.

[48] *Ibidem*, p. 25.

[49] B. Littig-E. Grießler, *Social sustainability: a catchword between political pragmatism and social theory*, cit., recently revisited by T. Novitz, *Social Sustainability, Labour and Trade: Forging Connections*, cit., and A.K. Polomarkakis, *The European Pillar of Social Rights and the Quest for EU Social Sustainability*, *cit.*

[50] B. Littig-E. Grießler, *Social sustainability: a catchword between political pragmatism and social theory*, cit., p. 11 (Emphasis added).

[51] M. Boström, *A missing pillar? Challenges in theorizing and practicing social sustainability: introduction to the special issue*, in *Sustainability: Science, Practice and Policy*, 1, 2012, pp. 5-6.

[52] *Ibidem*, pp. 11-12.

[53] T. Novitz, *Trade, Labour and Sustainable Development. Leaving No One in the World of Work Behind*, *cit.,* pp. 24-25.

not limited to work environment – in a human-rights-centred perspective. The following Section examines the extent to which the current EU trade policy has evolved to align with these objectives.

3. *The Evolution of Social Sustainability Commitments in the EU FTAs: an Overview of the Practice*

To date, the number of EU FTAs counts approximately 46, out of which 16 include TSD Chapters. [54] Although these agreements may differ in scope and language depending on the partner country, some significant common features could be analysed to show current trends. By focusing on the sustainability provisions in the TSD Chapters, with a specific focus on the social pillar, two aspects are particularly worth examining here: the expansion of their scope (subsection 3.1) and the strengthening of their enforceability (subsection 3.2), all requiring specific considerations.

3.1. *Scope*

The earliest explicit – albeit sporadic [55] – references to international social standards can be traced back to the Preamble of the 1999 Trade, Development and Cooperation Agreement with South Africa, [56] promoting cooperation in ensuring basic workers' rights. In the Preamble, the Parties established a commitment to economic and social development and the respect for the fundamental rights of workers, «[…] by promoting the relevant International Labour Organisation (ILO) Conventions covering such topics as the freedom of association, the right to collective bargaining and non-discrimination; the abolition of forced labour and child labour». [57]

[54] European Parliamentary Research Service, *Trade and sustainable development in EU free trade agreements*, cit., p. 3.

[55] Following a first phase in which earlier FTAs were limited to sporadic references to migrant workers' rights, the EU started to include social rights clauses in its commercial policy especially after the global financial crisis of 2008 and the adoption of the Treaty of Lisbon of 2009. For a comprehensive reconstruction of this practice, A. Tyc, *Global Trade, Labour Rights, and International Law. A multilevel approach*, *cit.*, pp. 141-142.

[56] Agreement on Trade, Development and Cooperation between the European Community and Its Member States, of the One Part, and the Republic of South Africa, of the Other Part with Protocol 1 and 2, signed in Pretoria on 11 October 1999, entered into force 1 May 2004, OJ L 311, 4.12.1999, pp. 3-415.

[57] *Ibidem*, Preamble.

Following this, similar general commitments to fundamental ILO Labour standards appeared in the Cotonou Partnership Agreement [58] and the EU-Cariforum Partnership Agreement, [59] both emphasising mutual cooperation in upholding core labour standards. A cautious mention of the promotion of social development and the respect for basic social rights among the objectives of the treaty is also present in the 2003 FTAs agreement between EU and Chile, [60] which has been lately modernised.

A significant shift occurred with the EU-South Korea FTA, signed in 2010 and provisionally applied from 2011. [61] This agreement marked a watershed moment by dedicating an entire chapter – entitled Trade and Sustainability Chapter – to environmental and labour commitments. As to the latter, Article 13.4.3, in a nutshell, provides that Parties commit to respect, promote and effectively implement the core ILO standards, also requiring them to «make *continued* and *sustained* efforts» to ratify the fundamental ILO Conventions that underpin these principles. [62] However, a specific deadline for the ratification was not set.

This Article – formulated as a best-effort clause – has served as a model for labour commitments in TSD Chapters, that have started to be included in nearly all the EU subsequent agreements. [63] In an attempt at systematization, it is generally argued that TSD Chapters are based on a common template, including parties' commitment to sustainable development and its promotion through

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[58] Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (entered into force 1 April 2003), OJ L 317, 15.12.2000, p. 3, Article 50.

[59] Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, signed in Bridgetown on 15 October 2008 (provisionally applied from 29 December 2008), OJ L 289, 30.10.2008, p. 1.

[60] Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, signed on 16 November 2002 (entered into force 1 February 2003), OJ L 352, 30.12.2002, pp. 3, Article 16, par. 1, lett. B).

[61] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, signed in Brussels on 6 October 2010 (provisionally applied from 1 July 2011 and entered into force 13 December 2015), OJ L 127, 22.5.2013, pp. 1.

[62] *Ibidem*, Article 13.4.3 (emphasis added).

[63] As the EU-Korea agreement has served as a model for these treaties, it is convened that it has inaugurated a "new generation" of EU FTAs, that much has been written about. In this regard, *inter alia*, G. Adinolfi (Ed.), *Gli accordi preferenziali di nuova generazione dell'Unione europea*, Giappichelli, Torino, 2021; E. Baroncini, *Promoting and Enforcing Sustainability: The Dispute Settlement Practice in the New Generation of EU Trade Agreements*, in *Archivio giuridico online*, vol. IV, 1, 2025, pp. 64-106.

trade relations and the implementation of the FTAs into national policies. [64]

Notably, however, the recent practice signals an increasing trend toward stronger and more detailed commitment to sustainable development. [65] A growing body of literature deals with innovations in the realm of environmental protection, including provisions on climate change, greenhouse emission reduction, deforestation, and other ecological concerns. [66] However, less attention has been paid to the parallel – but equally significant – developments concerning the social pillar of sustainability. Increasingly, social commitments extend far beyond the obligations of members of the International Labour Organization (ILO) to respect, promote and realise the fundamental principles and rights at work of the ILO and to effectively implement the fundamental ILO Conventions that they have ratified. For instance, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) imposes explicit obligations to workplace safety, minimum wage standards, and non-discrimination. [67] It also requires the Parties to ensure maintenance of labour inspections systems and access to remedies for violations of workers' rights. [68] Furthermore, Article 8.10 of the EU-UK Trade and Cooperation Agreement (TCA), concluded after Brexit, recognises the importance of responsible supply chain management and corporate social responsibility (CSR) practices. [69] Specifically, the EU and the UK must encourage responsible business conduct through adherence and implementation of relevant international instruments (among others, OECD Guidelines for

[64] G. Adinolfi, *A Cross-Cutting Legal Analysis of the European Union Preferential Trade Agreements' Chapters on Sustainable Development: Further Steps Towards the Attainment of the Sustainable Development Goals?*, *cit.,* p. 24, with references at notes 28-34.

[65] *Ibidem*. See also, J.C. Bustamante-V.Y. Pacheco, *EU Unilateral and Bilateral Approaches in Anti-deforestation Efforts: Analysis of Trade Agreements with Chile and the Andean Community*, in *European Foreign Affairs Review*, 2025, pp. 61-86.

[66] See, for instance, Article 16.4.4 of the Agreement between the European Union and Japan for an Economic Partnership (EU–Japan EPA), signed on 17 July 2018 in Tokyo and entered into force on 1 February 2019 (OJ L 330, 27.12.2018, pp. 3-899), which commits both parties to the effective implementation of the Paris Agreement, including mitigation and adaptation measures. This was the first time the EU included such a clear and binding reference to the Paris Agreement in a trade agreement.

[67] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, signed in Brussels on 30 October 2016, provisionally applied as of 21 September 2017, OJ L 11, 14.1.2017, pp. 23-1079, Article 23.3.2.

[68] *Ibidem*, Article 23.5.

[69] Trade and cooperation agreement between the European Union and the European Atomic Energy Community, of the one part and United Kingdom of Great Britain and Northern Ireland, of the other part, signed on 30 December 2020, (provisionally applied from 1 January 2021 and entered into force 1 May 2021), OJ L 149, 30.4.2021, pp. 10-2539.

Multinational Enterprises and the UN Guiding Principles on Business and Human Rights). Commitments to promote responsible business conduct, which acknowledge the importance of internationally recognized principles and guidelines in this context, also appear in the modernised version of the EU-Ukraine Association Agreement of 2023. [70] Notably, gender equality and inclusion are recurrent issues in this agreement as well. Indeed, the Parties acknowledge the significance of an inclusive economic development and equal opportunities for all, thereby affirming their commitment to implement the international agreements pertaining to gender equality and non-discrimination that they have ratified. However, in this regard, a particularly notable advancement came with the EU-New Zealand FTA, entered into force in 2025. [71] For the first time in the EU Trade policy, a TSD Chapter included a dedicated article to trade and gender equality, [72] while previous references to gender were limited and usually embedded within discussions on decent work and labour standards. [73] After explicitly recognising the need to promote gender equality and women's economic empowerment in both international trade and national labour markets, [74] it commits the Parties to effective implementation of their international obligations under instruments such as United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), especially in areas concerning women's participation in economic life and equal employment opportunities. [75] This is coherent with the EU's third Action Plan on Gender Equality and Women's Empowerment in External Relations 2020-2025, establishing that the EU trade policy should align with gender equality goals for EU external action. [76]

[70] Ukraine Deep and Comprehensive Free Trade Area (DCFTA), Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, signed in Brussels on 27 June 2014, (entered into force 1 September 2017, DCFTA provisionally applied from 1 January 2016), OJ L 161, 29.5.2014, pp. 3-2137, Chapter 13.

[71] Free Trade Agreement between the European Union and New Zealand, signed in Brussels on 9 July 2023, entered into force 1 May 2024, OJ L 2024/866, 25.3.2024.

[72] *Ibidem*, Article 19.4.1. In this regard, U. Carrillo, *Breaking the mold: An evaluation of the EU-New Zealand Free Trade Agreement as a new "gold standard" for Trade and Sustainable Development chapters*, in *Beiträge zum Transnationalen Wirtschaftsrecht*, 189, 2024, p. 17.

[73] C. La Macchia, *The Formulation of the Trade and Sustainable Development Chapter in the European Union-New Zealand Free Trade Agreement: Novel Aspects and Likely Effectiveness Issues*, in *BlogDue*, 22 January 2025, p. 4.

[74] Free Trade Agreement between the European Union and New Zealand, *cit.,* Article 19.4.1.

[75] *Ibidem*, Article 19.4.6.

[76] Joint Communication to the European Parliament and the Council: EU Gender Action Plan (GAP) III – An ambitious Agenda for Gender Equality and Women's Empowerment in EU External Action, Brussels, 25 November 2020, JOIN(2020) 17 final. On this topic, see also the

This «positive trend pointing toward a more gender-sensitive EU trade policy» [77] also relies on the Kenya Economic Partnership Agreement (EPA), [78] described as «the most ambitious EU trade deal with a developing country when it comes to sustainability provisions such as climate and environmental protection and labour rights». [79] Article 4 of the Annex V to the Agreement, devoted to trade and gender equality, obliges Parties to effectively implement their obligations under international agreements addressing gender equality and women's rights. [80] In this respect, these provisions are deeply interrelated with labour commitments provided by Article 3 of Annex V, recalling a concept of decent work which is inclusive of the «inter-linkages between trade and full and productive employment, labour market adjustment, core labour standards, decent work in global supply chains, social protection and social inclusion, social dialogue and gender equality». [81]

3.2. *Enforceability*

Unfortunately, the progressive expansion of the scope of the TSD Chapters has not always been matched by the effective enforcement of their provisions. One key reason for this limited impact lies in the predominantly hortatory language of the sustainability provisions, which led to practical non-enforceability of these agreements. [82]

Undisputedly, however, the most criticised aspect is the dispute settlement mechanism applied to the TSD Chapters, which has frequently proved unsatisfactory. Under most of the EU FTAs, this mechanism provides a two-step

European Parliament briefing, *Gender mainstreaming in EU Trade Agreements*, March 2024, at www.europarl.europa.eu.

[77] U. Carrillo, *Breaking the mold: An evaluation of the EU-New Zealand Free Trade Agreement as a new "gold standard" for Trade and Sustainable Development chapters*, *cit.,* p. 18.

[78] For an explanation of the innovative features of this agreement, which is part of the agreements with ACP countries, regulated at first by the 1975 Lomé Convention, the 2000 Cotonou Agreement and the Samoa Agreement, G. Rugani, *The Economic Partnership Agreement between the European Union and the Republic of Kenya: an example of "variable geometry" approach*, in *BlogDue*, 2, 2024, pp. 1-9.

[79] European Commission, *EU-Kenya Economic Partnership Agreement*, at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/east-african-community-eac/eu-kenya-agreement_en. The agreement entered into force on 1 July 2024.

[80] Economic Partnership Agreement (EPA) between the European Union, of the one part, and the Republic of Kenya, Member of the East African Community, of the other part, signed in Nairobi on 18 December 2023, entered into force 1 July 2024, OJ L 1648, 1.7.2024.

[81] *Ibidem*, Annex V, Article 4.

[82] *Ibidem*, Annex V, Article 3.9.

procedure involving initial consultations between the Parties, followed – if not resolved – by the establishment of a Panel of Experts. [83] However, until 2022, the TSD chapters have been *exempted* from the general dispute settlement mechanism of EU FTAs, which resembles the one provided by the WTO. [84] The key distinction lied in the consequences of non-compliance with the panel of experts' findings, given that the possibility to undertake remedies or adopted sanctions was not foreseen. This not only marked a profound demarcation line with other parts of the agreement, but has long been criticised as a structural weakness of the EU's TSD model. [85]

However, the debate over the weak enforceability of the TSD Chapters – initially raised by scholars – has prompted institutional response, leading to significant developments from 2021 in advance. [86] On the one hand, efforts have been made to reinforce the normative strength of sustainability provisions (Sub-section 3.2.1); on the other hand, mechanisms for civil society participation in monitoring and implementation have been progressively expanded (Sub-section 3.2.2.).

3.2.1. *Normative strength*

Amidst an underway academic debate on the weak enforceability of the TSD Chapters, the first ever made dispute in relation to EU trade and sustainable development provisions [87] gave a significant boost to a concrete review process of the FTAs. This case arose in 2019 when the EU filed two complaints against Korea under Articles 13.14 and 13.15 of the EU-Korea FTA, [88] which enables either party to seek consultations with the other party in relation to any matter under the TSD Chapter and provides that a Panel of Experts could be established if these matters have not been resolved through government consultations

[83] European Parliamentary Research Service, *Trade and sustainable development in EU free trade agreements*, cit., pp. 3-4.

[84] *Ibidem*, p. 3.

[85] Among others, M. Bronkers-G. Gruni, *Retooling the Sustainability Standards in EU Free Trade Agreements*, in *Journal of International Economic Law*, 2021, pp. 25-51; K. Hradilovà-O. Svoboda, *Sustainable Development Chapters in the EU Free Trade Agreements: Searching for Effectiveness,* in *Journal of World Trade*, 2018, pp. 1019-1042.

[86] European Parliamentary Research Service, *Labour rights in EU trade agreements. Towards stronger enforcement*, cit.

[87] J. Murray-J. Lee, *The EU/Korea FTA Panel Decision: An Overview and Some Personal Reflections*, in *International Journal of Comparative Labour Law and Industrial Relations*, vol. 41, 2, 2025, cit., p. 104.

[88] Republic of Korea – compliance with obligations under Chapter 13 of the EU-Korea Free Trade Agreement – Request for the establishment of a Panel of Experts by the European Union, 5 July 2019, available at www.policy.trade.ec.europa.eu.

within 90 days after the request of consultation. [89]

In a first complaint, the EU contended that Korea's Trade Union and Labour Relations Act failed to grant the principles of freedom of association and right to collective bargaining in Korean industrial relations, in sharp contrast with the obligations stemming both from the FTA and Korea's ILO membership. [90] Moreover, the second set of issues raised by the EU concerned Korea's compliance with the final sentence of Article 13.4.3 of the FTAs, which, as said *supra*, ensure that the Parties make continued and sustained efforts towards ratifying the fundamental ILO Conventions.

The Panel's findings, handed down in 2021, [91] were nuanced and revealed a mixed outcome. On the jurisdictional front, the Panel rejected South Korea's objections, which claimed that the EU's submissions fell outside the scope of the FTA for lacking a sufficient nexus with trade-related aspects of labour. [92] Contrary to Korea's position, the Panel held that the Parties to FTA were bound to uphold and promote the ILO's fundamental principles, *regardless* of whether a direct link to trade could be established. [93] At the same time, although the Panel finding that Korean labour law was partially not consistent with Korea's FTA obligations, it clarified the reference to «continued and sustained efforts» imposed a mere *standard of conduct* to be framed as «best endeavours». [94] Consequently, the obligation to ratify ILO's Convention was deemed as indicating a *flexible* and open-ended obligation, lacking a specific timeframe to comply with. According to two authors, this case «indicates the limited value of these best-efforts obligations to ratify ILO conventions», leading to the conclusions that «ratification deadlines in FTAs would be preferable». [95] However, despite the great impact of this arbitration award in the EU Trade policies, specific deadlines have not yet been incorporated in the EU FTAs concluded after the arbitration award.

This case sparked renewed debate on the weak enforcement of the EU-FTAs. Trade unions, NGOs, and institutions to advocate for a stricter conditionality, through full ratification of all ILO fundamental conventions a binding prerequisite

[89] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, *cit.,* Articles 13.14 and 13.15.

[90] Report of the Panel of Experts, Panel of Experts Proceeding Constituted Under Art. 13.15 of the EU Korea FTA, 20 January 2021, available at www.policy.trade.ec.europa.eu.

[91] *Ibidem*, pp. 16-27.

[92] *Ibidem*, p. 27.

[93] *Ibidem*.

[94] *Ibidem*, p. 74.

[95] See M. Bronkers-G. Gruni, *Retooling the Sustainability Standards in EU Free Trade Agreements*, *cit.,* p. 27.

for the conclusion of trade agreements. [96] After announcing the review of TSD Chapters in a «15-point action plan» of 2018, [97] in 2022 the EU Commission adopted a reform, explicitly aimed at using FTAs as «tools […] to pursue sustainability objectives and the contribution of trade agreements towards these objectives». [98] To this end, a new dispute settlement mechanism was introduced, to include the possibility to apply temporary sanctions *as a matter of last resort* in cases of non-compliance with *serious* TSD commitments. [99]

This reform has been already integrated into the Chapter 26 of the EU-New Zealand FTA, which subjects sustainability provisions to the FTA's general dispute settlement mechanism, thus aligning the TSD Chapter with the other part of the agreement for the first time. [100] In one of the two Parties is found in breach of the agreements, sanctions could take the form of compensation by the party who complained against, or even suspension of treaty. [101] In any case, it is provided that the party found in breach of the agreement has to implement the Panel's report within a certain timeframe, contextually reporting progress on this process. [102]

According to the decision of the Parties, this procedure should be soon implemented in the EU-Chile Interim Trade Agreement (ITA) and in the EU-Kenya Agreement, which, despite containing a dedicated TSD chapter in the trade part of the agreement, have not yet integrated the possibility of applying sanctions in their dispute mechanisms. [103]

Considering the possible follow-up of the EU-New Zealand FTA, it is thus important to stress significant limitations of its approach. First, coherent with

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[96] This plan was announced in the European Commission's Communication *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, cit.

[97] EU Commission non-paper, *Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements* (the 15-point action plan), 26 February 2018, at www.politico.eu.

[98] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The power of trade partnerships: together for green and just economic growth*, Brussels, 22 June 2022, COM(2022) 409 final, p. 12.

[99] Free Trade Agreement between the European Union and New Zealand, *cit.*, Chapter 26.

[100] For further details on this procedure, U. Carrillo, *Breaking the mold: An evaluation of the EU-New Zealand Free Trade Agreement as a new "gold standard" for Trade and Sustainable Development chapters*, *cit.*, pp. 20-23.

[101] Free Trade Agreement between the European Union and New Zealand, *cit.*, Article 26.16.

[102] *Ibidem*, Articles 26.3.2. and 26.3.3.

[103] In this regard, G. Rugani, *The Economic Partnership Agreement between the European Union and the Republic of Kenya: an example of "variable geometry" approach*, *cit.*, pp. 7-8.

the reform, the threshold for sanctionable breaches is still high. [104]

Furthermore, Article 26 of the agreement has a limited scope, as it applies only when a Party has violated either labour standards or climate commitments (specifically by taking or failing to take actions that undermine the Paris Agreement). This could limit the enforceability of the most innovative provisions, such as those related to gender equality (in this regard, *supra*, Subsection 3.1.). Moreover, some authors noted that the formulation of this clause only partially addressed the criticism raised by some scholars and NGOs, according to which the generic language used in the agreement limited its enforceability. [105]

3.2.2. *Participation of civil society in the monitoring system*

As the TSD Chapters discipline has evolved, it has also become possible to observe an increase in the participation of civil society in the implementation of sustainability provisions. Clauses promoting public participation are not a novelty in the EU Trade policies, which have rather long been a feature of the TSD Chapters, with many modelled on Article 13.12.4 of the EU-South Korea FTA. This Article established a Domestic Advisory Group (DAG) on sustainable development, tasked with advising the Parties on issues covered by the agreement and sharing views and recommendations about its implementation. [106] The DAG aims at providing a platform for public input, typically comprising a balanced representation of civil society, employers, and trade unions. [107]

However, earlier studies have highlighted persistent challenges, such as the underrepresentation of environmental stakeholders and insufficient resources, which concretely undermined the DAG's capacity to address TSD commitment violations. [108] The EU Commission has addressed this criticism in the 15-Point Action Plan, recognizing the essential contribution of civil society organisations to identify, prioritise, and act upon TSD matters. [109] Therefore, it called for

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[104] In this regard, M. Bronkers, *The EU's Inconsistent Approach towards Sustainability Treaties: Due diligence legislation v. trade policy*, in *EJIL!Talk*, 9 November 2022.

[105] C. La Macchia, *The Formulation of the Trade and Sustainable Development Chapter in the European Union-New Zealand Free Trade Agreement: Novel Aspects and Likely Effectiveness Issues*, *cit.,* p. 9.

[106] *Ibidem*.

[107] European Economic and Social Committee, *Non-paper: Strengthening and Improving the Functioning of EU Trade Domestic Advisory Groups*, October 2021, at www.eesc.europa.eu.

[108] See, among others, A. Oger-J. Harrison, *Enhancing sustainability in EU Free Trade Agreements: The case for a holistic approach*, IEEP, London-Brussels, 2022.

[109] EU Commission, *The power of trade partnerships: together for green and just economic growth*, cit., p. 10.

enhancing, targeting and prioritising cooperation with stakeholders in the phases of negotiation and monitoring of sustainability impact assessments. [110]

In this regard, the EU-New Zealand FTA once again represents a significant step forward in embedding civil society participation into the enforcement and oversight of sustainability commitments of the TSD Chapters. The agreement incorporated some of the recommendations of the European Economic and Social Committee (EESC). [111] Specifically, the EESC had called for a broader advisory role of the DAGs, suggesting they should not be limited to advising on the sole TSD chapters – as provided by previous agreements [112] – but should extend recommendations to the entire agreement. The EU-New Zealand FTA implements this recommendation in Article 26. [113]

Moreover, for the first time in the EU trade policy, the DAG was mentioned in the monitoring process [114] and empowered to submit observations in this procedure. [115] Similar provisions are found in the EU-Kenya EPA, which not only mandates the proactive involvement of DAGs in the monitoring process, but also requires that Parties shall meet the stakeholders once a year. [116]

Undoubtedly, these clauses represent a significant leap forward in providing civil society with unprecedented opportunity to engage in trade policies. Nevertheless, some scholars noted that these clauses remain somewhat vague and open-ended, thus preventing full and effective participation in practice. [117] In addition, the inclusion of civil society does not come with an obligation for competent bodies to consider acting upon the views expressed by stakeholders, which limits the practical impact of their contribution. [118] Hopefully, future negotiations in this area will fill these gaps.

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[110] *Ibidem*.

[111] European Economic and Social Committee, *The power of trade partnerships: together for green and just economic growth*, (REX 561, Rapporteur: Tanja Buzek), available at: www.eesc.eu, par. 5.5.

[112] U. Carrillo, *Breaking the mold: An evaluation of the EU-New Zealand Free Trade Agreement as a new "gold standard" for Trade and Sustainable Development chapters*, *cit.,* p. 19.

[113] Free Trade Agreement between the European Union and New Zealand, *cit.*, Article 24.6.1.

[114] *Ibidem*, Article 26.13.3.

[115] Free Trade Agreement between the European Union and New Zealand, *cit.*, Article 19.

[116] Economic Partnership Agreement (EPA) between the European Union, of the one part, and the Republic of Kenya, Member of the East African Community, of the other part, *cit.*, Annex V, Article 15.

[117] C. La Macchia, *The Formulation of the Trade and Sustainable Development Chapter in the European Union-New Zealand Free Trade Agreement: Novel Aspects and Likely Effectiveness Issues*, *cit.*, pp. 9-10.

[118] *Ibidem*.

4. *Conclusions*

The effective implementation and enforcement of TSD chapters in EU trade agreements is essential to step up social sustainability standards, continuously evolving at the international level.[119] This paper examined whether the EU's recent approach to FTAs achieves this ambitious goal, in line with Agenda 2030 and related international policies. In light of this analysis, it can be concluded that, taken together, these developments indicate a clear trajectory in EU trade policy toward deeper integration of sustainable development principles, particularly in the labour and social domains. References to labour-related provisions in the TSD Chapters have become more comprehensive, now encompassing occupational health and safety, coupled with emerging concerns regarding connections on gender and trade, and corporate accountability. Despite several complexities need to be further addressed (still limited application of the general dispute settlement mechanisms to TSD Chapters, weak enforceability of gender equality commitments, strengthening of DAGs), it is undeniable that notable advancements have been made in fostering equality, participation, and inclusion, at the heart of the contemporary legal understanding of social sustainability. This progress offers optimism that the EU is making meaningful efforts to bridge the gap that remains between trade and sustainable development.

[119] *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, *cit.*, p. 10.

SUSTAINABILITY AND EU ENLARGEMENT POLICY: EXPERIENCES FROM THE WESTERN BALKANS

Allan F. Tatham[*]

SUMMARY: 1. General introduction. – 2. Historical background. – 3. Sustainability and the Western Balkan enlargement process. – 3.1. Overall context. – 3.2. Treaty framework. – 3.3. Policy and legal framework. – 3.3.1. Economic and Investment Plan for the Western Balkans. – 3.3.2. Instrument for Pre-Accession Assistance. – 3.3.3. New Growth Plan for the Western Balkans. – 3.3.4. Reform and Growth Facility for the Western Balkans. – 4. National compliance with sustainability in Western Balkan enlargement. – 5. Conclusion.

1. *General introduction*

The UN's publication of the 2030 Agenda on Sustainable Development and the adoption of its sustainable development goals ("SDGs") in 2015 [1] – and more recently reaffirmed in the 2024 UN Pact for the Future [2] – has had a marked effect on the way in which the EU incorporates sustainability into all its policies, both internal and external. [3] The EU had recognised the importance of

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[1] *Transforming our world: the 2030 Agenda for Sustainable Development*, adopted 21 October 2015, UNGA Res. A/70/1.

[2] *Pact for the Future*, adopted 22 September 2024, UNGA Res. A/79/1.

[3] On the principle of sustainability and the EU, see the various contributions in M. Pallemaerts-A. Azmanova (eds), *The European Union and Sustainable Development: Internal and External Dimensions*, Vrije Universiteit Brussel Press, Brussels, 2006; S. Baker-M. Kousis-D. Richardson-S. Young (eds), *The Politics of Sustainable Development: Theory, Policy and Practice within the European Union*, Routledge, London-New York, 2005; and R.A. Wessel-J.B. Mata Diz-J. Péret T. Társia-S.E. Akdogan (eds), *EU External Relations Law and Sustainability: The EU, Third States and International Organizations*, Springer, Chem, 2024.

sustainability in its enlargement policy post-Brundtland [4] but its impact had rather been concentrated on core sectors like environmental protection. The SDGs thus represent a broader reach of sustainability with greater transversal impacts which the EU has been enthusiastic to endorse. The Union [5] regards the vision of the 2030 Agenda, including the principle of sustainable development, to be fully consistent with pursuing the objectives of its external actions. [6] Indeed, it has been observed: [7] «Enlargement must be understood as one element in a wider process of sustainable development».

Taking as its focus the experience of the Western Balkan candidate countries, the accession of which is regarded by the EU as a «geostrategic priority», [8] this work will address three issues in turn: (a) The integration of sustainability into EU enlargement policy; (b) The process by which the EU has mainstreamed compliance with the SDGs as part of its enlargement strategy; and (c) The actions of candidate countries in pursuing the SDGs as an integral part of fulfilling their pre-accession conditionality requirements.

2. *Historical background*

Elements of what are now recognised as integral parts of sustainability are occasionally encountered in the early waves of enlargement of the EU. This is because, as one of the conditions for membership, candidate countries are required to incorporate the *acquis* – the whole body of EU law [9] – into their

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[4] In 1987, the World Commission on Environment and Development ("WCED") – set up in 1983 under UN auspices – published a report that came to be known as the "Brundtland Report" after its chairperson, the former Norwegian Prime Minister: WCED, *Our Common Future*, Oxford University Press, Oxford, 1987. It developed guiding principles for sustainable development as it is generally understood today, defining it as «development that meets the needs of the present without compromising the ability of future generations to meet their own needs». The Report led to the convening of the UN Conference on Environment and Development and subsequent initiatives across the field including the establishment of the UN Commission on Sustainable Development.

[5] European Commission, Communication, Next steps for a sustainable European future – European action for sustainability, COM(2016) 739 final, p. 12.

[6] Art. 21(2)(d) and (f) TEU; and Article 11 TFEU.

[7] ECFESD, Enlargement and Environment: Principles and recommendations from the European Consultative Forum on the Environment and Sustainable Development, Office for Official Publications of the European Communities, Luxembourg, 1999, p. 2.

[8] European Commission, Communication, An Economic and Investment Plan for the Western Balkans, COM(2020) 641 final, p. 1 ("EIP Communication").

[9] A.F. Tatham, *Enlargement of the European Union*, Kluwer Law International, Alphen aan den Rijn, 2009, pp. 327-332.

domestic systems. Consequently, if a matter of internal EU law touches upon sustainability, then potential new Member States must accordingly adopt, implement and enforce it. This approach seeks to ensure that a new Member State [10] can successfully assume its responsibilities from the first day of membership on a par with existing Member States. In this sense, e.g., issues concerning the management and conservation of fish stocks [11] as well as biodiversity, [12] were included in the enlargements of the 1970s and 1980s. This type of "implicit" presence of sustainability within the enlargement process at that time may be considered as a reflection or, rather, an external projection of the increased awareness of the role of environmental protection [13] in the internal law- and policymaking of the EU. [14] Such "spillover" [15] or "normative isomorphism" [16] between internal Union matters and its external relations still remains totemic in the field of sustainability, especially the persistent underlying tension between the economic and environmental dimensions of the field, e.g., with respect to the EU's pursuit of competitiveness and productivity that seems to weigh more heavily in the balance than protecting biodiversity and promoting climate change. Into this mix, as will be seen later in this Chapter, [17] has been

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[10] Subject to the possibility of the acceding country having successfully negotiated transitional periods or temporary derogations set out in its Act of Accession.

[11] Art. 102 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties [of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland]: 1972 OJ L73/14.

[12] For example, in Annex II of the Act concerning the conditions of accession of the Hellenic Republic and the adjustments to the Treaties (1979 OJ L291/17), reference is made to the 1979 Birds Directive (Council Directive 79/409/EEC of 2 April 1979: OJ 1979 L103/1) – still one of the EU's main pieces of biodiversity secondary legislation – and the need for Greece to add a list of its bird species to the list of those protected under the terms of the Directive. Similarly, the Portuguese and Spanish equivalents of the relevant bird species were added to that Directive in their accession documents (Annex I of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties: 1985 OJ L302/23).

[13] D. Freestone, *European Community Environmental Policy and Law*, in *Journal of Law and Society*, 18/1, 1991, pp. 135-154.

[14] On 22 November 1973, the Council of Ministers approved the first multiannual Environment Action Programme (1973-1976) in Europe to «reduce pollution and nuisances; improve the environment and quality of life; and promote common community action by member states, in international organizations dealing with the environment»: 1973 OJ C112/1.

[15] B. Rosamond, *Theories of European Union Integration*, Macmillan, Basingstoke, 2000, p. 60, and discussing E. Haas, *The Uniting of Europe: Political, Social, and Economical Forces, 1950-1957*, University of Notre Dame Press, Notre Dame (IN), 1958.

[16] P.J. Dimaggio-W.W. Powell, *The iron cage revisited: Institutional isomorphism and collective rationality in organizational fields*, in *American Sociological Review*, 48/2, 1983, pp. 147-160.

[17] See Part 3 *infra*.

the recent introduction of more explicit geostrategic considerations in the Union's dealings with third countries, whether in the enlargement region or beyond.

Returning to the previous timeline, the EFTAn enlargement of 1995 [18] can be regarded as a watershed with respect to the issue of sustainability, with the potential new Member States intent on promoting the retention of their own higher standards. These included not only environmental standards *per se* but also matters related to nature conservancy and sustainable development including: the impact of transit traffic in Austria; [19] fisheries management for Norway; [20] and the continuing financial support for the viability and sustainability of rural communities in the Arctic and sub-Arctic areas of Scandinavia. [21] They also managed [22] to maintain their own environmental rules for a four-year period during which the EU committed to reviewing its *acquis* in this field, according to its normal procedures. [23] While such reviews were without prejudice and would be binding on all Member States, it was obvious that the EFTAns hoped that the review would result in a raising of standards towards their own levels. [24]

Post-Brundtland and again as a result of further internal changes in Union policy, [25] sustainability instead started to emerge more clearly vis-à-vis the enlargements towards the Central and Eastern European countries ("CEECs") of the first decade of the 21st century. [26] Concerns had long been voiced [27] about

[18] See Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded: 1994 OJ C241/21 ("AA 1994").

[19] E. Brandt-P. Schäfer, *Trans-Alpine transit traffic: Towards sustainable mobility*, in *Common Market Law Review*, 33/5, 1986, pp. 931-972.

[20] C. Preston, *Enlargement and Integration in the European Union*, Routledge, London, 1997, p. 105.

[21] F. Granell, *The European Union's Enlargement Negotiations with Austria, Finland, Norway and Sweden*, in *Journal of Common Market Studies*, 33, 1995, pp. 117-141, p. 129.

[22] C. Preston, *op. cit.*, p. 104.

[23] Joint Declaration on standards for the protection of the environment, health and product safety, Declaration 6, AA 1994, *op. cit.*, p. 382.

[24] F. Granell, *op. cit.*, p. 129.

[25] S. Steiner, *Global Poverty and Sustainable Development – Challenges addressed by the EU's Renewed Sustainable Development Strategy*, in D. French (ed.), *Global Justice and Sustainable Development*, Martinus Nijhoff Publishers, Leiden-Boston, 2010, pp. 291-306, pp. 291-297.

[26] See generally J. Zlinszky-B. Hidvéghiné Pulay-M. Szigeti Bonifert, *Implementation of the Sustainable Development Goals – Experience Transfer from Central and Eastern European Countries to the EU*, in Iustum Aequum Salutare, 14/4, 2018, pp. 141-156.

[27] Annex II by the European Council on the environmental imperative in European Council, Presidency Conclusions, 25 and 26 June 1990, Dublin: Bulletin of the European Communities, 6, 1990, pp. 7-24, p. 19.

the environmental degradation experienced by the CEECs during the communist era which lengthy period had been generally marked by rapid, heavy industrialisation and high levels of pollution and toxicity. Although the raising of environmental awareness represented the first spark of opposition to totalitarian rule in some countries, [28] a plethora of environmental rules [29] and lax enforcement remained characteristics of the sector in many States even after transition. [30]

In negotiating their bilateral Europe Agreements with the EU, the issue of sustainability [31] was reflected in the field of environment as well as in those traditional core areas of agriculture, fisheries, rural development and biodiversity, while also looking at ensuring sustainable development in areas such as transport, energy, telecommunications and tourism. Commitments to sustainability also led to a substantial increase of pre-accession funding and investment in infrastructure and other large projects – beyond the hitherto main instrument of Phare [32] – by two new ones, viz.: (i) the Instrument for Structural Policies for Pre-Accession ("ISPA") [33] that funded investment in the environment and transport sectors; and (ii) the Special Accession Programme for Agriculture and Rural Development ("SAPARD") [34] that sought to prepare candidate countries

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[28] This was the case, e.g., in Hungary: É. Hajba, *The rise and fall of the Hungarian greens*, in *Journal of Communist Studies and Transition Politics*, 10/3, 1994, pp. 180-191.

[29] A.F. Tatham, *European Community Law Harmonization in Hungary*, in *Maastricht Journal of European and Comparative Law*, 4, 1997, pp. 249-283, p. 269.

[30] On these issues generally in relation to the EU, see C. Demmke, *Towards Effective Environmental Regulation: Innovative Approaches in Implementing and Enforcing European Environmental Law and Policy*, in *Jean Monnet Working Paper* No. 5/01, Jean Monnet Center, NYU School of Law, New York, 2001, https://jeanmonnetprogram.org/2001-jean-monnet-working-papers/. Accessed 8 July 2025.

[31] See Art. 70(2) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part: 1993 OJ L347/2. These requirements were repeated in subsequent agreements. Thus, in the 1998 Estonia EA, the terms of Article 71(2) provided that the principle of sustainable development was to guide policies and other measures designed to bring about the economic and social development of the country. Likewise, such policies needed to ensure that environmental considerations were also fully incorporated from the outset and were linked to the requirements of harmonious social development: Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Estonia, of the other part: 1998 OJ L68/3. The Estonia EA also provided, inter alia, in Art. 82(2), for the parties to work together to ensure «efficient, sustainable and clean energy production and consumption»; the «sustainable use of non-renewable natural resources»; and «improvement of public transport, especially in cities».

[32] A.F. Tatham, *Enlargement*, cit., pp. 293-297.

[33] Council Regulation (EC) 1267/1999 of 21 June 1999 establishing an Instrument for Structural Policies for Pre-accession: 1999 OJ L161/73.

[34] Council Regulation (EC) 1268/1999 of 21 June 1999 on Community support for pre-

for participation in the Common Agricultural Policy and the Internal Market.

Consequently, prior to the adoption of the 2030 Agenda and the SDGs, EU enlargement policy had recognised implicitly from its very start the existence of certain components of those SDGs. As policy developed within the EU, [35] particularly in the field of environmental protection, then sustainability also began to receive more attention in the enlargement process beyond the "traditional core areas" of conservation of marine resources and biodiversity, agri-fisheries and regional development. Fast forward to the entry into force of the Lisbon Treaty, the pursuit of the principle of sustainable development [36] was confirmed as an integral part of all the EU's external relations, [37] including enlargement.

3. *Sustainability and the Western Balkan enlargement process*

3.1. *Overall context*

At the Thessaloniki European Council in 2003, the EU formally recognised the «European perspective» of countries from the Western Balkans and so confirmed their prospect of acceding to the Union. [38] Following the accession of Croatia in 2013, the remaining six Western Balkan States ("WB6 States") have since gained the status either as candidate countries – with most of them currently negotiating their accession (Albania, Bosnia and Herzegovina, Montenegro, North Macedonia and Serbia) – or remain as a potential or rather pre-candidate (Kosovo [39]). Building on the experience of previous enlargements, based on Article 49 TEU [40] (when

accession measures for agriculture and rural development in the applicant countries of central and eastern Europe in the pre- accession period: 1999 OJ L161/87.

[35] E. Leptien-G. Mochalova-E. Albrecht, *European Union Policy for Sustainable Development*, in M. Schmidt-D. Giovannucci-D. Palekhov-B. Hansmann (eds), *Sustainable Global Value Chains. Natural Resource Management in Transition*, vol. 2, Springer, Cham, 2019, pp. 85-106.

[36] Preamble, Recital (9) TEU; and Art. 3(3) and (5) TEU.

[37] Art. 21(2)(d) and (f) TEU; and Art. 11 TFEU.

[38] European Council, Presidency Conclusions, 19 and 20 June 2003, Thessaloniki, Ref. No. 11638/03, para. 40, p. 12.

[39] This designation is without prejudice to positions on status and is in line with UNSC Res. 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

[40] Art. 49 TEU provides, in part: «Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union… The conditions of eligibility agreed upon by the European Council shall be taken into account. The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State…».

read with Article 2 TEU [41]), the Union has more recently tailored a specific Western Balkan strategy [42] as well as set out a revised approach and methodology to the negotiations [43] that has involved, *inter alia*, grouping the various negotiating chapters of the *acquis* into a series of six clusters. [44] Of interest to the present discussion on the SDGs, e.g., is cluster 1 entitled "Fundamentals" that comprises: Judiciary and fundamental rights; Justice, Freedom and Security; Public procurement; Statistics; and Financial control. In addition, cluster 4, entitled "Green Agenda and sustainable connectivity", brings together transport, energy, trans-European networks and environment and climate change while cluster 5, "Resources, agriculture and cohesion" includes agriculture, fisheries, regional policy and food safety.

EU enlargement policy forms part and parcel of its 2016 Global Strategy on Foreign and Security Policy. [45] This document sets out, in a comprehensive manner, the strategic direction for the Union's external action and identifies clear links to the 2030 Agenda. The Strategy underlines the existence of a direct link between EU security and prosperity in its surrounding regions, including the WB6 candidate countries of the enlargement area. In taking forward and promoting its Global Strategy, the EU confirms that the SDGs have become a cross-cutting dimension of all the Union's work. [46] Consequently, echoing the SDGs, the EU has recognised [47] that «promoting resilience of states and societies at all levels is a way to promote stability and sustainable development

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[41] Art. 2 TEU provides: «The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail».

[42] European Commission, Communication, A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, COM(2018) 65 final.

[43] European Commission, Communication, Enhancing the accession process – a credible EU perspective for the Western Balkans, COM(2020) 57 final.

[44] These clusters are: (1) Fundamentals; (2) Internal Market; (3) Competitiveness and inclusive growth; (4) Green agenda and sustainable connectivity; (5) Resources, agriculture and cohesion; and (6) External relations.

[45] F. Mogherini, *Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy*, European External Action Service, June 2016, https://www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf. Accessed 8 July 2025.

[46] Council of the European Union (Foreign Affairs Council), Council Conclusions on the Global Strategy on the European Union's Foreign and Security Policy, 17 October 2016, 13202/16, Annex, point 5, p. 3.

[47] European Commission, *Communication, Next steps for a sustainable European future*, cit., p. 12.

globally, while reinforcing Europe's own security and prosperity». In this respect, enlargement policy [48] is to continue to focus efforts on the rule of law, including security, fundamental rights, democratic institutions and public administration reform, as well as on economic development and competitiveness. These fundamentals for meeting some of the main accession criteria accordingly remain fully consistent with the fundamentals of the 2030 Agenda.

This geostrategic nature of sustainability – as a further element to the typical social, economic and environmental components of sustainable development – was further reinforced in the EU's connectivity strategy, the Global Gateway. [49] Launched in 2021 as an overarching strategy for investments to further EU external relations and a practical expression of its new geostrategic bent, [50] the Global Gateway [51] – as an expression of the Union's Global Strategy – seeks to boost smart, clean and secure links in digital, energy and transport sectors as well as to strengthen health, education and research systems across the world through mobilising up to €300bn. in investments. Given its focus, the EU has ensured that the Global Gateway is accordingly aligned with the 2030 Agenda and attainment of some of the SDGs. Due to the figures involved and the broad geographical remit of its proposed operations (enlargement and neighbourhood areas as well as the Global South), the Gateway marshals together the EU, its Member States [52] and their financial and development institutions [53] (the so-called "Team Europe" approach) to mobilise the private sector to leverage investments to achieve the proposed transformations.

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[48] *Ibid*.

[49] European Commission and HR/VP, Joint Communication, The Global Gateway, JOIN(2021) 30 final. This is now formally provided for in Regulation (EU) 2021/947 of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision (EU) 466/2014 and repealing Regulation (EU) 2017/1601 and Council Regulation (EC, Euratom) 480/2009: 2021 OJ L209/1.

[50] On the effectiveness and geostrategic nature of the initiative, see S. Benaglia-C. Ergenc, *Disentangling Global Gateway: from Team Europe to the world, Task Force Report*, Centre for European Policy Studies, Brussels, 2025, https://www.ceps.eu/ceps-task-forces/disentangling-global-gateway-from-team-europe-to-the-world/. Accessed 29 July 2025.

[51] See, e.g., S. Tagliapietra, *The European Union's Global Gateway: An institutional and economic overview*, in *The World Economy*, 47, 2024, pp. 1326-1335.

[52] On national examples of the interface between bilateral and regional (German and EU) development policy and the SDGs in the Western Balkans, see T. Silberhorn, *Between Transformation and Integration: The Regional Dimension of Legal Reform in Implementing the Sustainable Development Goals*, in *World Bank Legal Review,* 7, 2016, pp. 87-102.

[53] How different IFIs organise themselves in this respect, see T. Ambrosio-S.G.F. Hall-A. Obydenkova, *Sustainable Development Agendas of Regional International Organizations: The European Bank of Reconstruction and Development and the Eurasian Development Bank*, in *Problems of Post-Communism*, 69/4-5, 2022, pp. 304-316.

In analysing how the EU has pursued the mainstreaming of sustainability in its enlargement policy, it is necessary to consider the legal and policy framework for this, starting with the treaty foundations of relations between the EU and the WB6 States.

3.2. *Treaty framework*

For the WB6 States, the legal foundations for their relations with the EU and the requirements to adopt, implement and enforce its *acquis* in particular sectors as well as to integrate Union policies into their domestic governance systems, are to be found in their bilateral agreements with the EU known as the Stabilisation and Association Agreements ("SAAs"). [54] Given the time when they were concluded and in view of the history of its presence in EU policymaking, the SAAs themselves provide few provisions related to sustainability.

The earliest SAA still in force, viz., that with North Macedonia, [55] dates from 2004 (and largely follows the terms of the EAs with the CEECs [56]) and requires [57] that policies, designed to bring about the economic and social development of the country, have to ensure environmental considerations are fully incorporated from the outset and linked to the requirements of harmonious social development. Provisions require cooperation between the EU and North Macedonia «in the vital task of combating environmental degradation, with the view to supporting environmental sustainability», [58] the «efficient, sustainable and clean production and use of energy» as well as the protection and conservation of nature: [59] consideration of the environmental effects of transport policy [60] is also included.

The much later one with Bosnia and Herzegovina ("BiH") of 2015, [61] however, expressly commits the contracting parties to the principles of sustainable

[54] A.F. Tatham, *Enlargement*, cit., pp. 167-170.

[55] Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part: 2004 OJ L84/13 ("SAA North Macedonia").

[56] Compare the provisions of the EAs with Hungary and Estonia discussed in section 2 infra.

[57] Art. 80(2) SAA North Macedonia.

[58] Art. 103(1) SAA North Macedonia.

[59] Art. 103(2) SAA North Macedonia. For energy sustainability, see also Art. 101 SAA North Macedonia regarding cooperation between the EU and North Macedonia on «the promotion of energy saving, energy efficiency, renewable energy and studying of the environmental impact of energy production and consumption».

[60] Art. 98 SAA North Macedonia.

[61] Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part: 2015 OJ L164/2 ("SAA BiH").

development. [62] In the main body of the SAA, though, similar provisions contained in SAA North Macedonia were set out, echoing earlier requirements as regards cooperation policies being designed to bring about «sustainable economic and social development»; [63] the vital task of halting further degradation and starting to improve the environmental situation with the aim of sustainable development; [64] establishing a system for efficient, clean, sustainable and renewable production and consumption of energy; [65] and recognising the environmental impact of and improving the protection of the environment related to transport and the extension of trans-European networks to BiH. [66]

Of further interest, the 2016 Kosovo SAA, [67] uniquely among the WB6 States, contains a provision that cooperation in the leisure sector must ensure a balanced and sustainable development of tourism and related issues.

Along with the SAAs, two multilateral international agreements – signed by the EU and the WB6 States – complete this treaty framework. First, the 2006 Energy Community Treaty lays the foundations for the creation of an internal market in electricity and natural gas between the parties. As part of its objectives, it aims to achieve [68] «a balanced and sustainable development through the creation of an area without internal frontiers for gas and electricity».

Further, the 2017 Transport Community Treaty ("TCT") [69] sets out gradually to integrate the transport markets of WB6 States into that of the Union, based on the candidates' adoption of the relevant EU transport *acquis*. The TCT covers various modes of transport, including road, rail, inland waterways and maritime transport, together with the associated transport networks and infrastructure while, overall, it seeks to improve connectivity across the region. In its provisions, it underlines [70] «the necessity to protect the environment and to combat against climate change, and that the development of the transport sector needs to be sustainable». In respect of extending the comprehensive and core trans-European networks to the region and identifying the priority projects

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[62] Preamble, Recital (8) SAA BiH.

[63] Art. 86(2) SAA BiH.

[64] Art. 108 SAA BiH.

[65] Art. 108 SAA BiH.

[66] Art. 106 SAA BiH; and Arts. 2(2) and 7 of Protocol 3 on land transport, SAA BiH.

[67] Art. 101(a) of the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part: 2016 OJ L71/3.

[68] Preamble, Recital (12), Energy Community Treaty: 2006 OJ L198/18.

[69] Treaty establishing the Transport Community: 2017 OJ L278/3 ("TCT").

[70] Preamble, Recital (10) TCT.

there, the TCT emphasises [71] their need to contribute «to balanced sustainable development in terms of economics, spatial integration, environmental and social impact as well as social cohesion» with special attention being given to global climate change and environmental sustainability at the stage of project definition and analysis.

While sustainability was evidently part of the general association/pre-accession treaty framework, it was not properly woven into the fabric of the enlargement tapestry in view of the time lag between the signing and entry into force of the SAAs, on the one hand, and the introduction of the SDGs, on the other. Consequently, with the increasing awareness of the need to ensure consideration of sustainable development transversally across swathes of EU policy fields, both internally and externally, [72] it became necessary to find a method to operationalise and integrate effectively the SDGs into enlargement policy. The EU did this by following the earlier experiences with the CEECs when seeking to provide binding benchmarks and mandatory results in a combination of sub-treaty legal rules and policy documents. By creating such a legal matrix of interconnected hard and soft law instruments, WB6 States would, in effect, be bound to adhere to and implements the SDGs in pursuit of progressing towards eventual Union membership, subject to monitoring by both the EU and the UN.

3.3. *Policy and legal framework*

In order to incorporate sustainability effectively into the present enlargement process, the EU has built on its existing treaty foundations with the WB6 States through a series of strategy papers, funding instruments and investment support. In this way, it has sought to operationalise the SDGs as integral elements to the association process of and pre-accession preparations for the WB6 and mainstream them across all relevant policy fields beyond the "traditional core". Further, the current EU budget, the 2021-2027 Multiannual Financial Framework ("MFF"), [73] aims at ensuring improved coherence and overall donor coordination between the EU and the Western Balkans.

This matrix of policy documents and funding instruments forms a complex, multitiered and interlinked system. This part of the paper will seek to show, through specific examples, of how the Union's plans and related funding instruments for the Western Balkans have been mobilised in fulfilment of the SDGs.

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[71] Art. 9(1) and (2)(c) TCT.

[72] Art. 3(1) and (5) TEU (internal policy); and Art. 21(2)(d) and (f) TEU (external policy).

[73] Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027: 2020 OJ L433I/11 ("MFF").

3.3.1. *Economic and Investment Plan for the Western Balkans*

In 2020, the Commission proposed a long-term Economic and Investment Plan for the Western Balkans ("EIP") [74] due to the region's lagging behind in terms of its economic convergence with the EU, further exacerbated by the impact of the Covid-19 pandemic. [75] The EIP provides a substantial investment package for the region with the aims of supporting competitiveness and inclusive growth, sustainable connectivity and the twin green and digital transition. [76] Seen as directly contributing to the implementation of the Global Gateway, the EIP recognises the Western Balkans as having a key role to play in the global value chains supplying the Union. In addition, reinforcing such role through investment would contribute to the EU's strategic autonomy in the long run. [77]

Under the EIP, the Commission has mobilised up to €9bn. under the current MFF from funding under the IPA III, [78] most of the support being directed towards key productive investments and infrastructure to support sustained growth and economic convergence with the EU. [79]

The investment aspect of the EIP is mobilising some €20bn. through the Western Balkans Guarantee Facility ("WBGF") [80] in support of increased public and private investment. For this part of the EIP, the EU has rather taken a "Team Europe" approach (affirming that of the "umbrella" Global Gateway) by bringing together various international financial institutions, [81] the development finance institutions of EU Member States, the WB6 governments and private investors. Consequently, in addition to the EU's significant grant funding to the region through the IPA III, the EU can provide guarantees to help reduce the cost of financing for both public and private investments in furthering the SDGs and to reduce the risk for investors, with support through the WBGF.

Sustainability permeates the EIP. The implementation of the 2030 Agenda

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[74] EIP Communication, cit.

[75] European Commission, Communication, Support to the Western Balkans in tackling COVID-19 and the post-pandemic recovery, COM(2020) 315 final.

[76] EIP Communication, cit., p. 1.

[77] *Ibid*.

[78] See section 3.3.2. *infra*.

[79] EIP Communication, cit., p. 1.

[80] The WBGF comes under the auspices of the Western Balkans Investment Framework ("WBIF"), a unique platform for coordination and cooperation integrating various forms of non-reimbursable and reimbursable financing for public and private sector investments in the region. Its main objective is to support socio-economic development in a collaborative and flexible manner, in line with the so-called "Team Europe" approach.

[81] For example, the European Investment Bank and the European Bank for Reconstruction and Development.

and the SDGs underlie the Plan, [82] with the EU joining forces with the WB6 in this pursuit and so providing them all with what the Union regards as «a first-mover advantage in the international economic arena, increasing their competitiveness in the growing global markets for sustainable and green technologies».

A first set of projects articulated around ten investment "flagships" (topics) are set out in the EIP Annex. The suggested projects are based on the results of preliminary consultations with the governments of the region and their political and economic reform priorities. The pursuit of sustainability is to be found across several thematic areas including transport, energy, digital, environment, production patterns and food systems, industrial value chains and tourism.

Beyond these flagship projects, several proposed focused "agendas" have been inserted into the interstices of the EIP and reflect policy developments in the EU. For example, the Green Agenda for the Western Balkans from 2020 [83] prioritises many of the main aspects of the Green Deal in the EU [84] while the earlier 2018 Digital Agenda for the Western Balkans [85] was intended to align with the digital strategy of the EU. [86]

3.3.2. *Instrument for Pre-Accession Assistance*

The Instrument for Pre-Accession Assistance ("IPA"), in its various incarnations, has been the main EU funding instrument for the WB6 and Turkey since 2006. It remains a standalone instrument in the 2021-2027 MFF. [87] Although in

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[82] EIP Communication, cit., p. 2.

[83] EIP Communication, cit., pp. 2, 6 and 10-11; and European Commission, Guidelines for the Implementation of the Green Agenda for the Western Balkans accompanying [the EIP Communication], SWD(2020) 223 final.

[84] European Commission, Communication, The European Green Deal, COM(2019) 640 final.

[85] At the Digital Assembly 2018 in Bulgaria, the EU launched the Digital Agenda for the Western Balkans. The European Commission promised €30mn in EU grants on digital infrastructure, cybersecurity and eGovernment: European Commission, European Commission launches Digital Agenda for the Western Balkans, Press Release IP/18/4242, Brussels, 25 June 2018, https://ec.europa.eu/commission/presscorner/api/files/document/print/pl/ip_18_4242/IP_18_4242_EN.pdf. Accessed 8 July 2025.

[86] European Commission, Communication, Shaping Europe's digital future, COM(2020) 67 final. This Communication has now been supplemented by another – European Commission, Communication, 2030 Digital Compass: the European way for the Digital Decade, COM(2021) 118 final – fostering an inclusive digital economy that benefits all citizens. As a result, the WBGF is to support investment and reforms that promote the WB6 States' path to the digital transformation of the economy and society in line with that Union vision for 2030. The WBGF is to strive to facilitate the WB6 States' achievement of the general objectives and digital targets vis-à-vis the Union.

[87] Under Heading 6 "Neighbourhood and the World".

initial creation it predates the EIP, the latest IPA clearly aligns with the "flagships" (topics) and priorities of the EIP. In its first iteration, [88] it barely mentioned sustainable development while, in its second, [89] although references to it were peppered across the text of a broader range of topics (e.g., transport, environment, use of natural resources), sustainability seemed to lack the necessary focus to render it more effective. This observation should however come as no surprise since these two IPAs were enacted before the 2030 Agenda and the SDGs were published.

The IPA III thus marks a clear and definite step towards engaging sustainability more actively in the enlargement context, not only to promote socio-economic development and environmental objectives but also to reinforce the need to ensure progress in meeting the accession conditionality generally.

Funds allocated to the IPA III Regulation amount to more than €14bn. over the duration of the 2021-2027 MFF, of which the great majority supports projects in the Western Balkans. Moreover, IPA III has a more strategic orientation with its objectives being aligned with the 2018 Western Balkan strategy's six flagship initiatives. [90] Its Programming Framework, [91] the overarching European Commission's strategic document for the use of these funds, focuses on the key enlargement priorities in terms of five thematic windows that mirror the relevant clusters of negotiating chapters, according to the 2020 revised enlargement methodology. [92] These windows under the IPA III all impact on the achievement of the SDGs and cover, respectively, rule of law, fundamental rights and democracy (Window 1); good governance, *acquis* alignment, good neighbourly relations and strategic communication (Window 2); green agenda and sustainable connectivity (Window 3); competitiveness and inclusive growth (Window 4); and territorial and cross-border cooperation (Window 5).

According to the IPA III Regulation, [93] actions under this funding instrument are to support the implementation of the 2030 Agenda. In order to achieve those objectives, beyond actions in which climate or biodiversity is one of the main aims, [94] other actions, whenever possible, are to «mainstream environmental

[88] Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA): 2006 OJ L210/82.

[89] Regulation (EU) 231/2014 of 11 March 2014 establishing an Instrument for Pre-accession Assistance (IPA II): 2014 OJ L77/11.

[90] European Commission, *Communication, A credible enlargement perspective*, cit., pp. 9-15, pp. 17-18.

[91] *Ibid.*, pp. 16-18.

[92] European Commission, *Communication, Enhancing the accession process*, cit.

[93] Preamble, Recital (26), to Regulation (EU) 2021/1529 of 15 September 2021 establishing the Instrument for Pre-Accession assistance (IPA III): 2021 OJ L330/1.

[94] *Ibid.*, Recital (25).

sustainability and climate change objectives across all sectors, with particular attention to environmental protection and tackling cross-border pollution, and should pursue green growth in national and local strategies, including supporting sustainability criteria in public procurement». All actions must also be consistent with the principle of «do no harm» and ensure the sustainability of investments in the WB6 States (as well as in Turkey).

The Implementing Decision [95] for the IPA III Regulation further cements the role of SDGs in the enlargement process. Reiterating that the 2030 Agenda is fully embedded in the EU's policy framework, the Commission notes that the SDGs represent for the WB6 States [96] «both a direct commitment taken at multilateral level and an additional requirement to converge on the EU policy framework in the accession process. In this context, IPA-funded activities will be consistent with and supportive of the [WB6 States'] undertakings for their achievements». This hybrid nature of SDG compliance allows, e.g., the EU and the UN to collaborate on monitoring the progress of the WB6 States.

3.3.3. *New Growth Plan for the Western Balkans*

Despite the best intentions, Western Balkan enlargement subsequently experienced another period of drift before being brought back to centre stage by the full Russian invasion of Ukraine in early 2022, putting further economic pressures on the region (especially in gas and oil imports) and creating risks to its stability. As a result, the EU decided to address the stagnation in the accession process by reinvigorating it through a new plan for the region. The 2023 Growth Plan [97] is based on four pillars, viz., enhanced economic integration with the EU single market, completion of a common regional market, fundamental reforms, and increased financial assistance through a new Reform and Growth Facility. [98] The plan specifically notes that «it is necessary to bring forward some of the advantages of Union membership before accession. Economic convergence is at the heart of those benefits». [99] By offering some of the tangible benefits of

[95] Commission Implementing Decision of 10 December 2021 adopting the Instrument for Pre-Accession Assistance (IPA III) Programming Framework for the period 2021-2027, p. 5, C(2021) 8914 final.

[96] *Ibid.*

[97] European Commission, Communication, New growth plan for the Western Balkans, COM(2023) 691 final.

[98] Half of the funds, about €3bn in the form of long-term loans, is to be released as direct support to the national budgets and the other half allocated through the WBIF in the form of €2bn in grants and €1bn in loans.

[99] Regulation (EU) 2024/1449 of 14 May 2024 on establishing the Reform and Growth Facility for the Western Balkans: 2024 OJ L, 2024/1449, 24 May 2024 ("2024 Regulation").

membership before full EU accession that will directly benefit WB6 nationals, the plan seeks to provide stronger incentives for membership preparations and acceleration of reforms. [100] In this way, the EU has accepted the idea of a gradual or phased-in accession of the WB6, as previously outlined in the Commission's new approach to enlargement. [101]

3.3.4. *Reform and Growth Facility for the Western Balkans*

As proposed in the Growth Strategy, the new Reform and Growth Facility for the Western Balkans ("RGF") has increased financial assistance to the region for the period 2024-2027 to the tune of €6bn., comprising €2bn. in grants and €4bn. in concessional loans. Payment is conditioned on the WB6 States fulfilling specific socio-economic and fundamental reforms. While the Growth Plan focuses on pursuing and in fact completing a number of sustainability issues identified in the EIP, it is the RGF that makes the direct link to the SDGs. As such, activities under the RGF [102] are to support progress towards EU social, climate and environmental standards and support progress towards the SDGs while not contributing to environmental degradation or causing harm to the environment or climate. Funding under the RGF should therefore «promote the transition towards a decarbonised, climate-neutral, climate-resilient and circular economy». [103]

4. *National compliance with sustainability in Western Balkan enlargement*

Granted that most of them have adopted compliance with the SDGs [104] into

[100] V. Zeneli-R. Grieveson-I. Ioannides-D. Bechev, *The European Union Growth Plan for the Western Balkans: A reality test for EU enlargement*, Europe Center, Atlantic Council, Washington DC, 2025, p. 2, https://www.atlanticcouncil.org/wp-content/uploads/2025/05/Zeneli-et-al-Growth-Plan-for-the-Western-Balkans-H.pdf. Accessed 8 July 2025.

[101] European Commission, Communication, *Enhancing the accession process*, cit., passim.

[102] Preamble, Recital (22), 2024 Regulation.

[103] *Ibid*.

[104] Apart from the UN Secretary-General's yearly report to the General Assembly on their implementation, annual reports on SDG compliance are published by the UN Sustainable Development Solutions Network ("SDSN") that has operated under the auspices of the UN Secretary-General since 2012. The SDSN aims to mobilise the world's largest knowledge network in higher education and research institutes to drive action on the SDGs as well as the Paris Agreement on Climate Change, by promoting integrated approaches to sustainable development through education, research, policy analysis, and global cooperation and thereby engaging

their domestic policy discourse [105] as part the 2030 Agenda to which they are committed as UN Member States, [106] all the WB6 candidates need to comply with them when blended with the demands of EU enlargement strategy for the region and their eventual membership. Candidate countries in fact face a plethora of sustainability requirements in the context of accession. [107]

In the traditional aspects of enlargement, e.g., compliance with the Union's values under Article 2 TEU (respect for which are integral to accession under Article 49 TEU) [108] form the part of the SDG goals (Goals 5, 10 and 16). In addition, the requirements to incorporate the relevant EU *acquis* (e.g., in the fields of environment, agriculture, fisheries, transport, energy or the digital economy) and establish and boost a candidate's administrative capacity to implement and enforce that *acquis* also reinforce the achievement of various SDG goals (e.g., Goals 6, 7, 9 and 13-15).

However, the candidates go even further, by accepting for themselves policies that mirror those already set up and running in the EU that have compliance with SDGs in mind. For example, bolstered by potential funding and investment within the context of the EIP, the WB6 States agreed to institute their own Green Agenda following the approach and aims of the EU's Green Deal. [109] This parallel EU-WB6 socialisation of their administrations and governance systems to the demands of the SDGs is an interesting phenomenon and it will be interesting to see from which national systems "best practices" might evolve.

In its collaboration with the WB6 States, the EU has used the SDGs as a means of better tailoring the needs of individual candidate countries in its enlargement strategy. Along with such examples of requiring a candidate country to draw up

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actively with public and private sectors: https://www.unsdsn.org/about/. Accessed 8 July 2025. Its annual Sustainable Development Report includes the SDG Index and Dashboards that rank all UN members on their performance across all the SDGs. The SDSN's work has been enhanced by the setting up in 2022 of a regional-specific SDSN Western Balkans based in Sarajevo: https://www.unsdsn.org/our-networks/western-balkans/. Accessed 8 July 2025.

[105] UN Members States can compile a voluntary national review within the context of the UN High Level Political Forum on Sustainable Development, detailing their record of SDG compliance. For the WB6 States, these reviews have included analysis of and cross-references to the EU initiatives and relevant funding that have supported their pursuance of the SDGs. Two reviews so far have been conducted by BiH and Montenegro, with one apiece from Albania, North Macedonia and Serbia: https://hlpf.un.org/countries. Accessed 8 July 2025.

[106] Kosovo, it will be recalled, is not recognised as a UN Member State.

[107] On the challenges such States face, see, e.g., M. Gjurovski-S. Jelisavac Trosic-M. Arnaudov, *Political and Institutional Stability as a Prerequisite for North Macedonia to Achieve the Sustainable Development Goals of the United Nations*, in *Balkan Social Science Review*, 24, 2024, pp. 299-320.

[108] See section 3.1 *supra*.

[109] See section 3.3.1 *supra*.

a national strategy for sustainable development, [110] more recently, as part of the Growth Plan, the EU has required that the implementation of the RGF objectives is underpinned by a coherent and prioritised set of targeted reforms and investment-related priorities in each WB6 State, brought together under an overarching framework known as the «Reform Agenda». [111] In order to ensure that the candidate countries could gain at least co-ownership over the process, the European Commission invited each WB6 State to prepare a Reform Agenda in close consultation with and reflecting the input of each country's stakeholders. Such stakeholders were drawn from a broad spectrum of interest groups, thereby including not only the usual prime motivators in enlargement – viz., the national executive and public administration – but also parliaments, local and regional representative bodies and authorities, social partners and civil society organisations. [112] These Agendas were to be clearly aligned with Union accession requirements and the fundamentals of the enlargement process. [113] Having been drawn up in consultation with the Commission, it also assessed and then adopted them. [114] In their formulation and future implementation, they promote the integration of the SDGs into WB6 policymaking, e.g., by explaining how the measures are expected to contribute to the climate and environmental objectives including sustainability and the principle of "do no significant harm" as well as the digital transformation. [115]

In 2024, the Commission formally adopted most of these Reform Agendas, [116] having assessed them according to the criteria set out in the RGF

[110] The need for a national strategy for sustainable development was highlighted in European Commission, Analytical report for the Opinion on the application from the former Yugoslav Republic of Macedonia for EU membership, Chapter 27: Environment, 9 November 2005, SEC(2005) 1425. This also implied not just budgetary considerations and acquis adoption but also setting up the necessary infrastructure, administration and monitoring bodies at various levels.

[111] Preamble, Recital (34), 2024 Regulation.

[112] *Ibid*.

[113] Preamble, Recital (36), 2024 Regulation. They include targeted reform measures and priority investment areas and include a preliminary list of planned investment projects intended for financing under the WBIF.

[114] Based on Regulation (EU) 182/2011 of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers: 2011 OJ L55/13.

[115] Preamble, Recital (38), 2024 Regulation; and Arts. 11-16, 2024 Regulation.

[116] The Reform Agendas for Albania, Kosovo, Montenegro, North Macedonia and Serbia were approved together in Commission Implementing Decision of 23 October 2024 approving the Reform Agendas and the multiannual work programme under the Reform and Growth Facility for the Western Balkans, C(2024) 7375 final. That for BiH was approved on 27 June 2025.

Regulation. [117] These assessment criteria required the Commission to determine whether the Reform Agendas, *inter alia*, further strengthened the fundamentals of the enlargement process by speeding up the transition of the WB6 States towards [118] «sustainable, climate-neutral and climate resilient and inclusive economies by improving regional connectivity, making progress on the twin transition of green and digital, including biodiversity» as well as reducing strategic dependencies.

With the Commission charged with monitoring the implementation of the RGF and assessing the achievement of its objectives, [119] it has used its delegated power under the RGF Regulation [120] to establish an RGF scoreboard [121] to display the progress of the implementation of the WB6 States' Reform Agendas. Such scoreboard is made publicly available online [122] and updated by the Commission twice a year that matches achievement of Reform Agenda priorities with disbursement (or non-disbursement) of linked EU funding. Of interest is that the RGF scoreboard is hosted not by the Commission but rather by the WB Reform and Growth Monitor, [123] a project led by civil society organisations within the TEN Network, [124] comprising think tanks and EU policy research centres across the WB region. This Monitor consequently aims to ensure transparency, accountability and civil society participation in the implementation of the RGF and thereby acts as a tool helping «[to] foster democratic oversight and public awareness in a reform process that directly links EU financial support with clearly defined reform outcomes». [125]

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[117] Art. 14, 2024 Regulation.

[118] In line with Art. 14(4)(d) and (e), 2024 Regulation.

[119] Art. 25, 2024 Regulation.

[120] Art. 26, 2024 Regulation.

[121] Commission Delegated Regulation (EU) 2025/1048 of 28 March 2025 supplementing Regulation (EU) 2024/1449 establishing the Reform and Growth Facility for the Western Balkans by setting out the elements of the scoreboard for the Reform and Growth Facility: 2025 OJ L, 23 May 2025.

[122] The scoreboard may be accessed online via European Commission, Enlargement and the Eastern Neighbourhood, Funding & Technical Assistance, Reform and Growth Facility for the Western Balkans, https://enlargement.ec.europa.eu/funding-technical-assistance/reform-and-growth-facility-western-balkans_en#reform-and-growth-facility-scoreboard. Accessed 25 November 2025.

[123] The host Reform Monitor website may be found at https://reform-monitor.org/. Accessed 26 November 2025.

[124] More information is available on its Think for Europe Network ("TEN") website, https://www.thinkforeurope.org/. Accessed 26 November 2025.

[125] EWB, "WB Reform and Growth Monitor" launched to track national Reform Agendas, 16 May 2025, European Western Balkans online, https://europeanwesternbalkans.com/2025/05/16/wb-reform-and-growth-monitor-launched-to-track-national-reform-agendas/. Accessed 26 November 2025.

In this way, the public are actively engaged – through an easily navigable website – in an exercise of popular accountability to ensure that the requisite items set out the Reform Agendas in the different WB States are addressed. These items are grouped under six policy areas that generally reflect the priorities of the SDGs: business environment and private sector development; energy and green transition; digital transition; human capital; fundamentals and rule of law; and governance, public administration and public financial management.

The WB Reform and Growth Monitor provides a different perspective in ensuring that the aims of Reform Agendas and with them, as a complementary aspect, those of the SDGs are fulfilled thereby providing another layer of supervision but one in which the general public – particularly civil society organisations and stakeholders – may play a more active and pivotal role in holding WB6 States to account for their inaction in achieving the SDGs.

5. *Conclusion*

This Chapter has shown that sustainability gradually emerged as an integral part of EU enlargement policy, largely as a by-product of its rise in importance in internal EU policies and its evolution in international arena, especially under the auspices of the UN. While somewhat amorphous in nature, once the EU had recognised the need to observe sustainable development as a principle in all its external actions and with the advent of the 2030 Agenda and the SDGs – in whose creation the EU had been an active participant – the Union needed ways in which to incorporate those goals into its enlargement policy and the pre-accession process in the Western Balkans.

Given that their bilateral and multilateral treaty framework with the WB6 States provided only a general foundation for sustainable development across specific sectors (including the traditional core like marine conservation and biodiversity while also now covering transport and energy), the EU operationalised the SDGs by incorporating their implementation via the terms of secondary legislation for their main funding instruments, e.g., IPA III and the RGF Regulations which form part of the legal, financial and political matrix that exists between the EU and the WB6 States.

The EU has accordingly harnessed the already existing responsibilities of the WB6 States under the 2030 Agenda and tied them into the Union's pre-accession strategy, not as new standalone requirements but rather to reinforce observance of established benchmarks in the negotiating clusters [126] or to pursue

[126] European Council, Presidency Conclusions, 16 and 17 December 2004, Brussels, Ref. No. 16238/04, para. 23, p. 6: «Benchmarks are a new tool introduced as a result of lessons learnt

the fulfilment of various accession criteria. By bolstering candidate countries' ability to fulfil their international commitments under the 2030 Agenda, the Union has simultaneously helped them along the way to complying with the EU accession criteria.

For candidate countries pursuing the SDGs as an integral part of pre-accession conditionality requirements, their inclusion in the enlargement process also represent an additional basis for the EU to monitor their compliance with the *acquis* and their preparations for accession. The 17 SDGs themselves break down into 169 specific targets and realisation of these targets, assumed by all UN Member States, provides the EU with a useful check list in assessing preparations for accession and in its annual reporting in its Enlargement Strategy and the accompanying country reports on each candidate. Such monitoring is further reinforced with the Union's own yearly report on SDG compliance [127] that, since 2018, has covered not only the EU Member States but also the WB6 States. To these monitoring requirements must now be added the RGF scoreboard that maps out WB6 States' progress in implementing the measures, under their individual Reform Agendas, that are expected to contribute to climate and environmental objectives (including sustainability).

The use of SDGs by the EU in the enlargement process therefore seeks to reinforce their adoption into the national policy governance structures of the region, so preparing them for the demands of membership. Not only must the WB6 States comply with adopting the necessary Union *acquis* in the different sectors covered by the SDGs and reinforce the capacity of their administrations to take on these burdens as part of membership but they must also adopt and implement various regional "agendas" in parallel with the policymaking priorities of the EU, e.g., covering the green and digital transitions.

Individually, the Union also works with the WB6 States to develop reform agendas, tailored to the specific needs of each candidate country, as part of the RGF. These involve formulation of priorities that also pursue further achievement of the SDGs. This could be seen as a "win-win" situation because the EU is able to mobilise the necessary funding and investments that otherwise would have been left to the WB6 States themselves to allocate or attract on their own while, at the same time, those States fulfil their commitments undertaken with respect to both the UN and the EU.

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from the fifth enlargement. Their purpose is to improve the quality of the negotiations, by providing incentives for the candidate countries to undertake necessary reforms at an early stage. Benchmarks are measurable and linked to key elements of the acquis chapter».

[127] This is in addition to the annual report on the field compiled by the SDSN under the auspices of the UN Secretary-General: see fn. 104 supra.

Yet there are clouds looming on the horizon. The recently proposed 2028-2034 MFF ("EU budget") [128] is a case in point: it seeks to increase external funding from the current €110bn. to some €200bn. and to merge all existing separate funding instruments (including the IPA) into one "Global Europe" instrument while continuing to promote, as its objectives, the universal commitments to the SDGs. However, the emphasis of the new budget indicates a broader shift towards an investment-driven approach to external action shaped by geopolitics, spurring such investments that serve to defend the «strategic interests and values» of the Union. [129]

Moreover, the pushback against SDGs in the EU – notably through the first "Omnibus Package" of reforms seeking to promote competitiveness and prosperity [130] – will eventually spill over into the realm of Union external relations. Consequently, on the one hand, in adopting the *acquis*, the WB6 States will now be able to lighten their burden of requirements on reporting and due diligence in corporate sustainability contained in the original EU secondary legislation [131] which requirements are now subject to amendment and simplification in this Omnibus Package. [132] On the other hand, based on the notion of «principled pragmatism» in its 2016 EU Global Strategy, [133] the promotion of the EU's strategic and economic interests in the enlargement region may come at the price of weakened promotion of the various SDGs (as most recently set out in the

[128] European Commission, Communication, A dynamic EU Budget for the priorities of the future – The Multiannual Financial Framework 2028-2034, COM(2025) 570 final/2.

[129] *Ibid*., p. 1.

[130] European Commission, Communication, A Competitiveness Compass for the EU, COM(2025) 30 final: In this first Communication, the Commission confirmed that it would propose a first "Simplification Omnibus package" which would include far-reaching simplification in the fields of sustainable finance reporting, sustainability due diligence and taxonomy; and European Commission, Communication, A simpler and faster Europe, COM(2025) 47 final: In the second one, the Commission set out an implementation and simplification agenda that delivers fast and visible improvements for people and business on the ground, requiring more than an incremental approach and underlining the need for bold action to streamline and simplify EU, national and regional rules.

[131] See, e.g., Directive (EU) 2022/2464 of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting: 2022 OJ L322/15; and Directive (EU) 2024/1760 of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859: 2024 OJ L, 2024/1760, 5 July 2024.

[132] The European Parliament passed the Sustainability Omnibus Package ("Omnibus I") on 13 November 2025, https://www.europarl.europa.eu/doceo/document/TA-10-2025-0264_EN.html. Accessed 26 November 2025.

[133] F. Mogherini, *Global Strategy*, cit., p. 8.

WB6 Reform Agendas). In this respect, the bilateral Union agreement signed with Serbia in 2024 concerning the supply of lithium [134] may thus come to exemplify the nature of the EU's "geostrategic turn" and the impact on maintaining its commitments to implementing the SDGs through its future funding and investment support in the Western Balkans.

[134] Memorandum of Understanding between the European Union and the Republic of Serbia of a strategic partnership on sustainable raw materials, battery value chains and electric vehicles, signed 19 July 2024, Belgrade, https://single-market-economy.ec.europa.eu/document/6fe0e605-9299-45c3-b846-2efb85585251_en. Accessed 30 July 2025.

THE EUROPEAN UNION DEFORESTATION REGULATION AND NATIONAL TREATMENT IN EU FTAS: BETWEEN ENVIRONMENTAL AMBITION AND TRADE FAIRNESS

Felipe Tomazini de Souza *

1. *Introduction*

The EU Deforestation Regulation (EUDR) represents a decisive step in the Union's broader strategy of aligning trade policy with environmental objectives. The Regulation responds to the perception that, although forest coverage has been increasing within Europe, deforestation linked to European consumption has remained responsible for around 10% of global deforestation. Thus, by leveraging the economic power of its internal market, and profiting from the so-called Brussels Effect, [1] the Regulation seeks to tackle extraterritorial deforestation by conditioning the access of certain commodities, such as cattle, cocoa, coffee, and palm oil, on compliance with a series of requirements attesting that they were produced in a deforestation-free manner. Balancing environmental concerns with trade liberalisation, however, has always been problematic, and outside the European context the measure has not been positively received. Developing countries such as Brazil, Indonesia and Malaysia have criticised it as

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[1] See in this Volume, C. Di Carluccio-E. Lacková, *The "Brussels Effect" Put to the Test: EU Directive 2024/1760 and the Challenges of Social Extraterritoriality*.

a disguised barrier to trade that violates core principles of international trade law. [2]

The purpose of this article is to assess the compatibility of the EUDR with the National Treatment Principle (NT), a fundamental rule of international trade law embedded in EU Free Trade Agreements (FTAs), which requires that imported and domestic products be treated equally within a domestic market. First, the article will examine the legal design of the Regulation, arguing that it must be understood as a technical regulation under the Technical Barriers to Trade (TBT) Agreement, a lex specialis incorporated into the FTAs. It then highlights certain contentious issues concerning the definitions and benchmarking system adopted by the Regulation.

In the second section, the study will investigate whether the EUDR's legal design is compatible with the NT obligation under the TBT Agreement, seeking to evaluate whether its design and implementation can withstand scrutiny. It further investigates whether, under the bilateral trade regime created by EU FTAs, the normative context established by the inclusion of sustainability clauses may influence the interpretation and compliance of such regulatory measures.

The study will argue that, although designed as an origin-neutral measure, the EUDR may *de facto* result in unequal treatment by placing disproportionate compliance burdens on foreign producers, particularly those from developing countries. Moreover, while TSD chapters may support greener interpretations of the measure's legitimacy, it remains unclear whether they can add to the exceptions regime already recognised under WTO law or validate the claim that the measure does not create less favourable treatment. The analysis ultimately seeks to contribute to the broader debate on balancing trade liberalisation with evolving sustainability objectives in the EU's external action.

2. *The EU Deforestation Regulation: Context and Objective*

The ecological balance of the planet is intrinsically linked to forests. They constitute the habitat for approximately 80 percent of the world's biodiversity

[2] *Official response to recent statements by European agrifood companies*, Governo do Brasil/Secretaria de Comunicação Social, 30 October 2024, https://www.gov.br/secom/en/latest-news/2024/10/official-response-to-recent-statements-by-european-agrifood-companies, *Malaysia says EU's deforestation risk rating based on old data*, Reuters, 28 May 2025, https://www.reuters.com/sustainability/climate-energy/malaysia-says-eus-deforestation-risk-rating-based-old-data-2025-05-28/, *Indonesia warns EU deforestation rules threaten small farmers' exports*, Indonesia Business Post, 2024, https://indonesiabusinesspost.com/4694/policy-and-governance/indonesia-warns-eu-deforestation-rules-threaten-small-farmers-exports.

and are equally essential to human subsistence, particularly for vulnerable populations such as indigenous communities. Forests are indispensable to any meaningful effort to address climate change, given their fundamental role in climate regulation and their capacity to absorb and store significant volumes of carbon dioxide, thereby functioning as the most effective natural carbon sink. It is therefore indisputable that, while forests contribute substantially to climate mitigation, the failure to preserve global forest cover constitutes a direct threat to climate governance. Indeed, emissions stemming from land use and land-use change, including those associated with deforestation, already represent the second-largest source of global greenhouse gas emissions, surpassed only by emissions from fossil fuel combustion. [3] To illustrate, data from Global Forest Watch indicate that the principal drivers of current forest cover loss include wildfires, logging and the expansion of agricultural frontiers. [4]

Hence, although forest coverage within the European Union is increasing, European consumption remains responsible for over 10 percent of global deforestation. In this context, the 2019 Communication from the European Commission entitled *Stepping up EU Action to Protect and Restore the World's Forests* already reflected the understanding that the existing legal framework, based on the Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan [5] and the EU Timber Regulation (EUTR), [6] although effective in addressing illegal logging and associated trade, was insufficient to tackle deforestation comprehensively, as it failed to address the deforestation impacts linked to commodities entering the European market, whether directly or indirectly, as a result of unsustainable production practices in third countries. [7]

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[3] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Stepping up EU action to protect and restore the world's forests (2019).

[4] Global Forest Watch, *Global* (2025), [accessed 24 July 2025].

[5] European Commission, *Communication from the Commission to the Council and the European Parliament – Forest Law Enforcement, Governance and Trade (FLEGT): Proposal for an EU Action Plan* (2003).

[6] European Commission, *Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market* (2010).

[7] European Commission, *supra*, note 3; European Commission, *Staff Working Document – Impact Assessment: Minimising the risk of deforestation and forest degradation associated with products placed on the EU market*, European Commission, Brussels, 2021, p. 4; G. Marín Durán, *Curbing the European Union's global deforestation footprint through trade*, in *Journal of Environmental Policy & Planning*, 2025, p. 1; A. Buser, *Protecting the climate through EU supply chain legislation? Two critiques and a compromise*, in *European Law Open*, 3, 2024, p. 617.

In 2021, the Commission conducted an impact assessment [8] with the aim of proposing a new regulatory framework to tackle and mitigate the risk of deforestation associated with products placed on the Union market. This legislative initiative, aligned with other broader EU strategic commitments towards sustainable development, including the European Green Deal, [9] the Biodiversity Strategy for 2030, [10] and the Farm to Fork Strategy, [11] culminated in the adoption of Regulation (EU) 2023/1115, [12] known as the EUDR. The regulation, in force since 29 June 2023, has had its application postponed once more. The original application date, initially set for December 2024 and later deferred to December 2025, is now set at 30 December 2026 for large and medium-sized operators, and at 30 June 2027 for micro and small operators. [13]

While domestic regulatory instruments aimed at mitigating the adverse effects of trade liberalisation are not a novelty, and were mostly used to tackle economic or domestic border issues, such as measures designed to offset job losses, the EUDR is more closely aligned with what has been characterised as second-generation flanking policies. In other words, it refers to the emerging use of unilateral measures adopted to address the externalities of trade liberalisation that concern non-economic costs, including environmental protection. [14]

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[8] See European Commission, above n. 7.

[9] European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – The European Green Deal* (2019).

[10] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU Biodiversity Strategy for 2030: Bringing nature back into our lives* (2020).

[11] European Union, *From Farm to Fork: Our food, our health, our planet, our future* (2020), https://www.ema.europa.eu/en/veterinary-regulatory/overview/antimicrobial-resistance/european-surveillance-veterinary-antimicrobial-consumption-esvac [accessed 24 July 2025].

[12] The EUDR repeals the previous EU Timber Regulation (EUTR), that focused on product illegality rather than on the deforestation issue itself, thus becoming the main legal instrument to deal with deforestation-free products. See: Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 – EU Deforestation Regulation, 6 September 2023, *OJ* L 150.

[13] Regulation (EU) 2024/3234 of the European Parliament and of the Council of 19 December 2024 amending Regulation (EU) 2023/1115 as regards provisions relating to the date of application, 23 December 2024; Regulation (EU) 2025/2650 of the European Parliament and the Council of 19 December 2025 amending Regulation (EU) 2023/1115 as regards certain obligations of operators and traders.

[14] N. Laurens-C. Winkler-C. Dupont, *Sweetening the liberalization pill: flanking measures to free trade agreements*, in *Review of International Political Economy*, 6, 2024, p. 1919; T.

In the following sections, this study will address a series of aspects, ranging from the regulation's legal design to its discussion.

3. *The Measure's Nature: Trade Prohibition or Trade Conditionality?*

The scope of the EUDR primarily subjects the entry into the European market of certain products conditional on their impact (or lack thereof) on deforestation. Particularly, it applies to seven commodities identified as the main drivers of deforestation linked to European consumption, namely cattle, cocoa, coffee, oil palm, rubber, soy, and wood, together with certain derived products from these commodities. It requires these products to be (a) deforestation-free, (b) produced in accordance with the relevant legislation of the country of production, and (c) covered by a due diligence procedure. [15] Consequently, with the adoption of this measure, the Union seeks to minimise its contribution to global forest degradation, while simultaneously addressing the associated greenhouse gas emissions and biodiversity loss linked to commodity production. [16] In simple words, products that fail to comply with the requirements set out in the Regulation are prohibited entering European market.

Although the Regulation was conceived to be origin-neutral in its conditionality, meaning that it also imposes obligations on EU Member States, its implementation undeniably entails extraterritorial effects that are disproportionately more significant than its internal ones, particularly for producers and exporters operating in third countries. In this context, it is unsurprising that, in a globalised world long regulated by multilateral trade rules, the legitimacy of such a measure under core principles of international trade law has been called into question mostly by developing countries, which will be directly affected by its entry into force. [17] A first legal question that this study proposes to address,

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Meyer, *Second-Generation Flanking Policies: Addressing Extraterritorial and Non-Economic Costs of Trade Liberalization*, in *World Trade Review*, 5, 2024, p. 601; J. Pauwelyn-C. Sieber-Gasser, *Addressing Negative Effects of Trade Liberalization: Unilateral and Mutually Agreed Flanking Policies*, in *World Trade Review*, 5, 2024, p. 554; B. Hollaus-S. Mayr, *Pushing for Sustainability Abroad: EU Environmental Unilateralism and its Legal Limits*, in *Global Europe: Legal and Policy Issues of the EU's External Action*, T.M.C. Asser Press, The Hague, 2024, pp. 225-255; T. Grigoras, *Should we regulate forests through free trade agreements?*, *International Environmental*.

[15] See Article 3, above n. 12.

[16] See Article 1, *ibid.*

[17] L. Mai, *Why the EU's Deforestation-Free Regulation Is Not Working in Southeast Asia*, 2024; A. Mano, *Brazil official defends progress on protecting forests, blasts EU ban*, 2023; M. de Andrade, *The EU Deforestation Regulation and its Potential Impacts on Brazil*, in *New*

emerging from the Regulation's legal design, concerns the nature of the measure and requires proper classification. Should this measure be regarded as a prohibition (or ban), or rather as a technical barrier to trade?

At first glance, the unilateral imposition of import restrictions, or simply the prohibition, on specific products could be perceived as a prima facie violation of core free trade principles enshrined in the General Agreement on Tariffs and Trade (GATT), [18] such as the Most-Favoured Nation (MFN) and NT principles, insofar as products from certain countries could be treated more favourably than others, or imported products could receive less favourable treatment in comparison with those produced within EU borders. However, a more comprehensive examination of the Regulation suggests that classifying the nature of the measure is not as straightforward as it might initially appear. This is because, given that the Regulation relies on mandatory legal requirements and a due diligence obligation with which imported products must comply, it is highly plausible that the measure will be classified as a technical regulation and thus fall within the scope of the TBT Agreement. [19]

Reference to two legal cases under WTO jurisprudence may offer greater clarity on how to properly classify the legal nature of the EUDR. First, as exemplified in *US – Shrimp*, [20] a case examined under the GATT legal framework, the United States established an import ban on shrimp products from non-certified countries based on production methods, namely the requirement to use Turtle Excluder Devices (TEDs) to protect sea turtles. The import ban introduced by the US measure was identified by the WTO adjudicatory bodies as a quantitative restriction and thus inconsistent with Article XI of the GATT. By contrast, in the second case, *US – Tuna II*, [21] which dealt with a labelling scheme, the "dolphin-

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Institutional Architectures and Substantive Rules in International Economic Law – The EU and the UN Sustainable Development Goals, Dipartimento di scienze giuridiche, Università di Bologna, Bologna, 2025; S. Fayezi-H. Varkkey-S.B. Briones, *Implications of the EU Deforestation Regulation on Global Palm Oil Supply Chains*, 2024 (online), https://rgdoi.net/10.13140/RG.2.2.12451.67361 [accessed 24 July 2025].

[18] As the nature of the multilateral trade system resides in the facilitation of trade liberalization and avoidance of restrictions other than duties, taxes, or other charges (Article XI of the GATT), or discriminatory measure that violate the core principles of Most Favourite Nation MFN and National Treatment. However, since the first years of the multilateral trade regime under the GATT/47 years, exceptions were already envisaged allowing the implementation of trade restrictive measures such as the measures authorized under the regime contained in Article XX.

[19] World Trade Organization, *Agreement on Technical Barriers to Trade*, WTO, Geneva, 1994.

[20] WTO Appellate Body, *Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO, Geneva, 1998.

[21] C. Derani-A.R. Dalmarco, *Silent Implications of US–Tuna II: Greening Market Behaviour through the WTO*, in C. Voigt (ed.), *International Judicial Practice on the Environment*, Cambridge University Press, Cambridge, 2019, pp. 262-287; WTO Appellate Body, *United States –*

safe" label, linked to production-method conditions under which tuna products imported into the US market were to comply, the measure was identified as a technical regulation and thus examined under the TBT Agreement.

In this manner, although both measures sought to address environmental concerns linked to production processes, the distinction between them lies in their legal design: while *US – Shrimp* involved an outright import ban targeting non-compliant countries, *US – Tuna II* imposed market access conditions based on conformity with specific requirements, leading both the Panel and the Appellate Body to classify the measure as a technical regulation within the scope of the TBT Agreement. [22]

Further guidance can be drawn from the interpretation provided by the Appellate Body in *EC – Asbestos*, which clarified the three categories of measures to which the TBT Agreement applies, [23] namely technical regulations, standards, and conformity assessment procedures. The first, as defined in Annex 1.1 of the TBT Agreement, refers to documents that lay down "product characteristics or their related processes and production methods (...) with which compliance is mandatory." The second, standards, are defined in Annex 1.2 as documents issued by recognised bodies that establish characteristics, rules, guidelines or requirements for products or related production methods, such as ISO standards, and differ from technical regulations insofar as compliance with them is not mandatory. Finally, Annex 1.3 clarifies that conformity assessment procedures are those used to determine whether the relevant requirements set out in technical regulations or standards have been fulfilled. [24]

So, putting it all together, while it is true that the EUDR imposes, under Article 3, an import ban on products that are non-compliant with the definition/standard of what the regulation classifies as a 'deforestation-free' product, it does not do

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Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – US – Tuna II (Mexico), WTO, Geneva, 2012.

[22] The Appellate Body found that "the US measure establishes a single and legally mandated set of requirements for making any statement with respect to the broad subject of 'dolphin-safety' of tuna products in the United States".

[23] The Appellate Body in the Asbestos cases recognized in paragraph 80: "We observe that, although the TBT Agreement is intended to 'further the objectives of GATT 1994', it does so through a specialized legal regime that applies solely to a limited class of measures. For these measures, the TBT Agreement imposes obligations on Members that seem to be different from, and additional to, the obligations imposed on Members under the GATT 1994." WTO Appellate Body, *Appellate Body Report, European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, 2001.

[24] World Trade Organization, *Agreement on Technical Barriers to Trade – Annex 1: Terms and Definitions (Annex 1 to the TBT)*, WTO, Geneva, 1994; W. Zdouc-P. Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge University Press, Cambridge, 2022.

so as an outright ban on specific countries. Rather, the conditioning of market access operates through compliance obligations to be fulfilled by Operators and Traders seeking to access the European market. Thus, by establishing mandatory characteristics of the products (that they are deforestation-free), mandatory processes and production methods (requiring that they be produced in accordance with the legislation of the country of origin), and a due diligence statement to be provided by Operators, this study argues that the EUDR, by incorporating elements of the various typologies of technical barriers, must be understood as such. [25]

Classifying the EUDR as a technical barrier to trade has a twofold importance for this study. First, it rebuts possible arguments from the European side that the measure does not qualify as a technical barrier, an argument that was present and reiterated during the panel disputes in the recent *Palm Oil* cases. Secondly, and most fundamentally, it facilitates the analysis proposed by this study under the NT obligation, given that the TBT Agreement and the GATT set out distinct legal requirements and interpretative approaches. [26]

However, it must be added that, while this study supports the argument that the EUDR will likely be interpreted as a technical barrier to trade, the reader must bear in mind that such a characterisation does not exclude the possibility that, depending on the specific facts of a case brought before a panel, a complainant might nevertheless choose to challenge the measure, or certain aspects of it, under the general trade disciplines of the GATT. Alternatively, a complainant may pursue a complementary claim under both agreements, particularly if the effects of the Regulation amount to a *de facto* import ban. Nonetheless, in light of the *lex specialis* status of the TBT Agreement, and pursuant to the General Interpretative Note to Annex 1A of the WTO Agreement, in cases of conflict between the provisions of GATT 1994 and those of other multilateral agreements on trade in goods, the latter shall prevail. [27]

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[25] See Article 3 of the EUDR, supra n. 12.

[26] Paras. 7.139-7.140 WTO Panel Body, *Panel Report, European Union and Certain Member States – Measures Concerning Palm Oil and Palm Oil Crop-Based Biofuels (Malaysia)*, 2024; Panel, *European Union – Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels (Indonesia) – EU – Palm Oil (Indonesia)*, 10 January 2025.

[27] According to the Annex 1A: “In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the ‘WTO Agreement’), the provision of the other agreement shall prevail to the extent of the conflict.” *Annex 1A: Multilateral Agreements on Trade in Goods*, World Trade Organization, 15 April 1994.

4. *Defining an (in)discriminatory deforestation-free standard*

Before addressing the NT analysis, this study will first examine three definitions contained in the EUDR that merit closer scrutiny. Although additional definitions are provided in the Regulation, particularly in Article 2, this study considers these three, namely the definitions of deforestation, of forests, and of the cut-off date, to be the most significant and debatable for the purposes of the analysis undertaken herein. [28] Moreover, these definitions establish characteristics and production methods that form the foundation of the standard [29] of what is considered deforestation-free under the Regulation. [30]

As a point of departure, it should be recalled that, under Article 2.2 of the TBT Agreement, the EU has the right to regulate and adopt technical regulations it deems necessary to pursue legitimate objectives, provided that such measures do not create unnecessary obstacles to trade. The TBT Agreement, however, requires that these technical regulations be based on relevant international standards, except where such standards would be ineffective or inappropriate for achieving the legitimate objectives of the regulation. [31] An interpretation that was recently confirmed in a similar case involving the EU. [32]

To begin the analysis, the first definition examined in this study is contained in paragraph (3) of Article 2, where deforestation is defined as the anthropogenic or natural conversion of forests to agricultural use. Although, on the one hand, the definition is broad, covering the conversion of forests resulting from both human and natural causes, such as fires, on the other, it restricts deforestation to cases linked specifically to agricultural use. This means that deforestation arising from activities such as extractive industries, settlements, or infrastructure development is excluded from the scope of the definition. This

[28] See Articles 2 and 3 of the EUDR, supra n. 12.

[29] It is important to note that the EUDR does not expressly establish, in its legal content, any reference to a deforestation-free standard. In fact, as argued in the preceding sections, it is likely that the EU will contend that the Regulation does not constitute a technical regulation. In any case, what this study identifies as a deforestation-free standard arises from a general understanding of the term "standard" as a mandatory criterion, model, or benchmark set by an authority as the basis for assessing the quality or compliance of a product. Thus, this study argues that the definitions contained in the EUDR create a specifically "European" standard of what constitutes a deforestation-free product.

[30] Recital 35 informs that: "The definition of 'deforestation-free' should be sufficiently broad to cover deforestation and forest degradation, should provide legal clarity, and should be measurable based on quantitative, objective and internationally recognised data." above n. 12.

[31] See paras. 7.188-7.189; see WTO, WTO Appellate Body, above n. 23.

[32] WTO Panel, *EU – Palm Oil (Malaysia)*, cit., paras. 7.139-7.140; WTO Panel, *EU – Palm Oil (Indonesia)*, cit., paras. 7.139-7.140.

demonstrates that the Regulation is not designed to address all forms of deforestation, but rather is limited to those caused by the specific commodities it seeks to regulate. [33]

Second, paragraph (4) defines forest as: "(…) land spanning more than 0.5 hectares with trees higher than 5 metres and a canopy cover of more than 10%, or trees able to reach those thresholds in situ, excluding land that is predominantly under agricultural or urban land use." [34] A first reading may create a misleading impression, as it could prompt the reader to interpret the definition as discriminatory in its very design, elaborated so as to target products originating from certain States, particularly developing countries with tropical forests. [35] However, a closer analysis demonstrates that the choice to rely on a definition based on quantitative ecological characteristics of forests is not only closely aligned with the FAO's definition in the *Global Forest Resources Assessment 2020*, but also sufficiently broad to cover all major forest types worldwide, such as boreal, tropical, and temperate. In simple terms, the definition appears *prima facie* neutral and non-discriminatory, as its global scope allows it to encompass the diversity of the world's forest biomes rather than targeting tropical forest producers alone. [36]

Finally, the third definition proposed for discussion is the one relating to the cut-off date adopted by the Regulation. Following the suggestion presented by the Commission in its impact assessment, the Regulation established December 2020 as the temporal threshold for assessing deforestation-free status. The Union's choice demonstrates alignment with the UN Sustainable Development Goals (Agenda 2030), in particular Goal 15.2, which commits to promoting the sustainable management of forests and halting deforestation by 2020, as well as with the New York Declaration on Forests, which aimed to halve deforestation by 2020 and to end it by 2030. [37] Interestingly, however, while addressing

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[33] See Article 2(3) of the EUDR, *supra* n. 12.

[34] *Ibid*., Article 2(4).

[35] Tropical forests represent 45% of global forest cover, followed by boreal forests at 27%, temperate forests at 16%, and subtropical forests at 11%. For a complete assessment, see: *Global Forest Resources Assessment 2020* (FAO, 2020).

[36] Z. Rakonczay-United Nations, *Report to the UNFCCC Secretariat – Technical Paper – Biome-Specific Forest Definitions*, United Nations, Geneva, 2002; above n. 35.

[37] The New York Declaration, unlike the 2030 Agenda, which was adopted through a UN Resolution, has been endorsed by only a limited number of national governments. Additionally, while these instruments may at first sight appear to share the same objective, it must be emphasised that there is a difference between broad commitments to promote sustainable forest management and to halt deforestation by 2020, and the imposition of a concrete obligation to eliminate deforestation linked to the production of specific commodities. *Endorsers of the New York Declaration on Forests*, Forest Declaration Platform, https://forestdeclaration.org/about/endorsers/ (last accessed 26 September 2025). United Nations General Assembly, *Transforming our world:*

concerns about, and rejecting the possibility of, setting a cut-off date in the future—which could create a "deforestation rush"—the Union nevertheless diverged from comparable international standards addressing deforestation concerns, adopted by recognised bodies such as the Rainforest Alliance and the Roundtable on Sustainable Palm Oil, which set their respective cut-off dates at 2014 and 2018. Initially, the Forest Stewardship Council (FSC) had established its cut-off date as 1994; however, in 2022 it amended its policy requirements to adopt the same cut-off date now employed by the EUDR, namely December 2020. [38]

Putting it all together, and stated simply, it is possible to extract from the text of the Regulation a standard of what is considered a deforestation-free product: namely, a product produced in a manner that did not cause deforestation, taking into account the broad definition of forest discussed above, where land was converted to agricultural use after December 2020. Moreover, the analysis carried out here, supported by the preparatory work of the Regulation, demonstrates that the EU sought to delineate the contours of what may be considered a deforestation-free standard by drawing inspiration from international instruments and documents. [39] Yet a question arises: does reliance on these international documents when formulating its technical regulation mean that it is based on international standards, or did the Regulation in fact establish its own standard of deforestation-free?

In fact, no clear international standard on deforestation-free products has been identified by this study, [40] nor has one been developed by "a recognised

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the 2030 Agenda for Sustainable Development, Resolution A/RES/70/1, 25 September 2015, https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf.

[38] Rainforest Alliance, *Annex Chapter 6: Environment (Sustainable Agriculture Standard)*, SA-S-SD-24-V1.1, June 2022, https://www.rainforest-alliance.org/wp-content/uploads/2022/06/SA-S-SD-24-V1.1-Annex-Chapter-6-Environment.pdf (last accessed 26 September 2025); Forest Stewardship Council (FSC), *Conversion & Remedy: Motions 37/2021 and 45/2021*, February 2023, https://fsc.org/sites/default/files/2023-02/Conversion%20%26%20Remedy%20Motions%2037%2045.pdf (last accessed 26 September 2025); Forest Stewardship Council (FSC), *FSC strengthens position on conversion and encourages remedy for harm*, News release, 2023, https://fsc.org/en/newscentre/general-news/fsc-strengthens-position-on-conversion-and-encourages-remedy-for-harm-with (last accessed 26 September 2025); Roundtable on Sustainable Palm Oil (RSPO), *Principles and Criteria for the Production of Sustainable Palm Oil*, adopted 15 November 2018, https://rspo.org/wp-content/uploads/rspo-principles-and-criteria-2018-approved-15-november-2018-english.pdf (last accessed 26 September 2025); European Commission, *Staff Working Document – Impact Assessment*, cit., p. 15.

[39] See European Commission, above n. 7.

[40] For instance, while the FSC certification may help identify products derived from sustainably managed forests and can support the due diligence procedure required under the EUDR, it does not clearly establish an international 'deforestation-free' standard. FSC, *FSC & EUDR. FSC helps companies comply with the EU Regulation on Deforestation-free Products* (2025);

body, providing, for common and repeated use, rules, guidelines or characteristics for products or relevant processes and production methods, with which compliance is not mandatory." [41] In the absence of such an agreed international standard upon which to base its technical regulation, it is reasonable to conclude that the EU's margin to define and regulate the applicable standard was correspondingly widened. Nevertheless, a few aspects now merit closer attention regarding the legitimacy of the measure and its potential trade-restrictiveness.

To begin with, pursuant to Article 2.9 of the TBT Agreement, a Member applying a technical regulation is under an obligation to publish, notify, and open it for comments from other Members that could suffer a significant trade impact resulting from its implementation. [42] A key deficiency of the standard set by the Regulation lies in the lack of opportunities afforded to third countries affected by the measure to participate in the procedure that defined its contours. Moreover, although cooperation with third countries is envisaged in Articles 29 and 30 of the Regulation, it relates solely to risk assessment and classification procedures, not to the definition of the standard itself. [43]

In this context, the EU may feel compelled, as observed in the *Palm Oil* cases, to once again argue that the EUDR does not constitute a technical regulation and is therefore exempt from the requirements of Article 2.9 of the TBT Agreement. In those disputes, the European Union argued that the contested measures were not "technical regulations" within the meaning of Annex 1.1, as reflected in its written submission, [44] an interpretation that sought to exclude the measures from the TBT Agreement's procedural and substantive disciplines, particularly the transparency and notification obligations under Article 2.9. Denying the characterisation of the EUDR as a technical regulation thus serves to limit WTO scrutiny, particularly considering potential procedural deficiencies such as the EU's failure to notify. If, however, a future panel were to reject that argument and confirm the measure's nature as a technical regulation, as this

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Appellate Body, *European Communities – Trade Description of Sardines – EC – Sardines*, 26 September 2002; see Preamble, eighth recital; see World Trade Organization, above n. 19.

[41] See the TBT definition of Standard at 1.2; see World Trade Organization, above n. 24, Annex 1 to the TBT.

[42] Para. 7.720, *ibid.*; Art. 2.9 reads as follows: "Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall:" see World Trade Organization, above n. 19.

[43] See Articles 29-30, above n. 12.

[44] European Union, *First Written Submission*, in *European Union and Certain Member States – Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels (DS600), Panel Proceedings*, Geneva, 30 November 2021.

study contends, it would likely find that the EU acted inconsistently with its notification obligations under Article 2.9. [45]

Subsequently, in the absence of a clear international standard on deforestation-free products, the mere reliance on definitions provided by international instruments and bodies appears precarious as a basis for identifying the existence of such a standard. It must be recalled that these instruments are soft-law in nature and therefore not legally binding on States. This is not to say that they lack value: they possess normative significance and may reflect a broad consensus on the need to address deforestation. Consequently, while these supporting documents to the EUDR may enhance the legitimacy of the terminology adopted in drafting the deforestation-free standard, they cannot be recognised as an internationally agreed standard formulated by recognised bodies, whether private (e.g. ISO, FSC) or public (e.g. UN organs), of what constitutes a deforestation-free product standard. Accordingly, they do not appear capable of resolving potential conflicts or addressing discriminatory aspects inherent in the standard adopted by the Regulation.

Additionally, it is useful to consider some *de facto* implications deriving from the definition of the standard. For example, when the physiognomies of a particular State's biomes are examined more closely—such as in the case of the Brazilian Cerrado—the adopted definition appears to fall short. The Cerrado not only represents the most degraded biome in Brazil, but is also the one most affected by agricultural expansion linked to soya production. [46] At first sight, therefore, soya production would seem to be directly targeted by the EUDR standard. However, part of the Cerrado consists of savannah physiognomies; in simpler terms, areas composed of trees that, by being shorter than the defined threshold of "forest" as presented earlier, fall outside the Regulation's scope. [47] Here things become somewhat blurred: as explained in the previous sections, while the EUDR adopts a broad definition intended to cover forests worldwide, its quantitative thresholds may in practice be too narrow, leaving out certain forest ecosystems, such as the Cerrado, from its scope.

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[45] Para. 7.140, see WTO, WTO Appellate Body, above n. 23, para. 7.811, see WTO, Panel, above n. 23, *EU – Palm Oil (Indonesia)*.

[46] For a map on the soya production in Brazil, see: IBGE, *Produção de Soja* (2025); Round Table on Responsible Soy, *Mapas RTRS* (2025).

[47] In the Brazilian Cerrado, the savannah physiognomy corresponds to 61% of the total territory of the biome. The biggest state producer of soya, Mato Grosso do Sul's Cerrado, has a distribution of 44% savannah against 21% forestal formation; another important producer state, Goiás, corresponds to 34% savannah and only 9% forestal formation. See: E.E. Sano *et al.*, *Mapeamento de Cobertura Vegetal do Bioma Cerrado*, Boletim de Pesquisa e Desenvolvimento, 205, Embrapa Cerrados, Planaltina (DF), 2008; J.F. Ribeiro-B.M.T. Walter, *Cerrado Típico*, Embrapa, Brasília, 2021; J.F. Ribeiro-B.M.T. Walter, *Savanas*, Embrapa, Brasília, 2021; S.P. de Almeida, *Cerrado: Ecologia e Flora*, Embrapa Informação Tecnológica, Brasília, 2007.

In the same manner, another important region for soya production in Brazil is the South, which served as the country's principal soya-producing area from the 1940s to the 1990s. This region is characterised by the Pampa biome, composed mainly of grasslands and non-forested areas. According to data from Global Forest Watch, the area is largely devoid of primary forests, indicating that it had already been significantly impacted by agricultural expansion prior to the cut-off date. [48] These two characteristics of the South's biome raise the question of whether soya produced in this area would fall within the scope of the Regulation's definition, given that it appears to escape both the cut-off date and the forest definition.

The Regulation is silent on such micro-region evaluations, both in its legal text and in the methodology document explaining how the benchmark system for classifying countries' risk of deforestation operates. Consequently, the answer appears to be negative, and such territories will inevitably be subjected to a one-size-fits-all national due diligence procedure for their Operators. While an individual analysis of micro-regions seems unrealistic and would significantly increase the complexity of the Regulation and its due diligence mechanisms, at first sight it appears to generate a form of *de facto* discrimination in the treatment of certain Operators, who will be required to bear stricter due diligence obligations solely as a result of the national classification applied to them.

Furthermore, it must be emphasised that, from both a WTO and an FTA law perspective, this potential *de facto* discrimination would not constitute a violation of the NT or MFN principles, as both concern discriminatory treatment between Member States rather than between regions or operators within the same country. The distinction described here, nevertheless, could still be relevant in relation to the implementation of the due diligence procedure, as well as to broader considerations regarding the fairness, proportionality, and legitimacy of the measure's objectives.

5. *Towards an (in)discriminatory categorization*

Perhaps the most controversial aspect of the EUDR concerns its benchmark classification system, which establishes a three-tier country ranking, categorising countries as low, standard, or high risk of deforestation. [49] The methodology

[48] On the Pampa's vegetation characteristics, see: Sistema Nacional de Informações Florestais, *Extensão das Florestas no Brasil: dados e Estatísticas 2024* (2024). Global Forest Watch provides an interactive map where the user can navigate through the different states receiving information about the current forest coverage; see Global Forest Watch, above n. 4.

[49] See Article 29, above n. 12.

outlined in the accompanying document on the application of the EUDR identifies two main objectives of this system. First, it seeks to determine the compliance checks to be carried out by competent authorities as part of their annual obligations. Secondly, it aims to provide clarity to operators and producers regarding the simplified due diligence procedure available to low-risk countries. [50] In this way, through a form of the Brussels Effect, the Regulation incentivises the adoption of stricter sustainability standards by participants in the supply chain, thereby seeking to minimise the deforestation impact associated with European consumption. [51]

In turn, the criteria employed by the benchmarking system are twofold: first, qualitative criteria, in accordance with Article 29(3), and second, quantitative criteria, as set out in paragraph (4). The quantitative criteria must take into account the rate of deforestation and forest degradation, the expansion of agricultural land, and the production trends of the relevant commodities covered by the Regulation and their derived products. Such data are to be assessed by the European Commission through an "objective and transparent assessment (…) taking into account the latest scientific evidence and internationally recognised sources." [52]

A first question regarding the initial criterion adopted by the benchmarking system concerns the reliability and timeliness of the data sources employed. The primary data on deforestation are drawn from the FAO's *Global Forest Resources Assessment* (FAO FRA), [53] the most recent version of which dates from 2020, while data on the expansion of agricultural land are sourced from the FAOSTAT database. [54] The main issue appears to stem from reliance on the FAO FRA data, which the Commission staff itself acknowledges. Although the 2020 report is relatively recent, in order to comply with the obligation to base the assessment on the latest scientific evidence, the classification system will need to be reviewed following the publication of the updated FAO FRA in 2025,

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[50] European Commission, *Commission Staff Working Document on the methodology used for the benchmarking system – Accompanying the document Commission Implementing Regulation (EU) laying down rules for the application of Regulation (EU) 2023/1115 of the European Parliament and of the Council as regards a list of countries that present a low or high risk of producing relevant commodities for which the relevant products do not comply with Article 3, point (a)* (2025).

[51] For the definition of Brussels Effect, see: A. Bradford, *The Brussels Effect: How the European Union Rules the World*, Oxford University Press, New York, 2020; P.G. Peña Alegría, *(Mis)Adapting Domestic Law to Meet New International Environmental and Trade Rules: How Peru Changed Its Environmental and Land Use Rights Laws in Response to the European Union Deforestation Regulation*, in *Journal of Environmental Law*, 3, 2024, p. 437.

[52] See European Commission, above n. 50.

[53] Above n. 35.

[54] See European Commission, above n. 50.

as required by Article 29(2). [55] This provision establishes that the classification system must be "reviewed, and updated if appropriate, as often as necessary in light of new evidence." [56]

Consequently, with the entry into effect of the Regulation deferred to December 2025, the list of countries published in May 2025 may be subject to challenge, as new factual evidence on deforestation will be available with the updated FAO FRA 2025. As stated by the Panel in *EC – Sardines*, Articles 2.3 and 2.4 of the TBT Agreement require parties to periodically evaluate their technical regulations, thereby avoiding the permanence of measures that no longer serve the purposes for which they were implemented. [57] Furthermore, although the Panel in *EU – Palm Oil (Malaysia)* interpreted Article 2.2 of the TBT Agreement as allowing a country to regulate in areas where scientific and technical data are not available, it also stressed the importance of relying on the most recent data. [58]

Secondly, the choice to rely on qualitative data is, *per se*, questionable, as political considerations may influence the outcome of the classification. Even though the staff document presents the qualitative analysis as complementary to the quantitative one, it may still affect the final result in uncertain ways. The criteria set out in points (a) to (d) of Article 29(4) take into account information such as "whether the country concerned has national or subnational laws in place, including in accordance with Article 5 of the Paris Agreement, and takes effective enforcement measures to tackle deforestation and forest degradation." [59] It is, at the very least, debatable how the Commission intends to assign a score—ranging from 0 to 5—on whether a given law aligns with the Paris Agreement, or how such a scoring system can adequately assess 'effective enforcement', particularly in a way that considers the temporal aspects of technical capacity and the financial resources available to the State under review to ensure proper implementation.

Thus, in theory, political considerations could play a relevant role in determining whether a State is classified as low, standard, or high risk. Firstly, since the qualitative analysis is complementary to the quantitative system, it functions as a decision-making tool for countries that exceed by more than 25% the absolute or relative thresholds set for low-risk classification. In such cases, the final determination ultimately depends on a political decision. Secondly, as the

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[55] *Ibid.*

[56] See Article 29(2), above n. 12.

[57] Para. 7.81, *European Communities – Trade Description of Sardines – Report of the Panel (EC-Sardines)*, 29 May 2002.

[58] See paras. 7.540, 7.550, 7.556; see WTO, WTO Appellate Body, above n. 23.

[59] See European Commission, above n. 50.

methodology explains, high-risk countries include those subject to sanctions imposed by the UN Security Council or the EU Council, which are automatically classified as high risk, even though they may not, in practice, be significant drivers of deforestation. [60]

Consequently, the benchmarking system appears to be the Regulation's *Achilles' heel*, potentially exposing its weakest structural point. While the system may seem, at first sight, to be formally neutral and therefore *de jure* non-discriminatory, its reliance on imprecise methodologies could result in *de facto* discrimination against imported products. This may confer a detrimental impact on their competitiveness while, at the same time, granting domestic production a comparatively easier path to compliance. The following sections will examine the NT principle and seek to disentangle its application in this context.

6. *The National Treatment Principle over Technical Barriers to Trade*

In the previous sections, this study sought to establish that the EUDR not only constitutes a technical barrier to trade but also raises controversial issues regarding the legal standard it sets for deforestation-free products and the benchmarking system it employs. With this in mind, the study now turns to examine the contours of the NT principle within the framework of the EU's bilateral trade agreements. The analysis presented in this section is firmly grounded in the interpretation provided by WTO adjudicatory bodies and based on WTO law. The rationale for this approach is straightforward: in the TBT chapters of the European Union's FTAs, it is common for the initial provisions to incorporate the WTO TBT Agreement *mutatis mutandis* into the bilateral framework. [61] In simple terms, it is unlikely that a panel of experts convened to resolve a bilateral dispute under an FTA would disregard the interpretations established by the WTO's multilateral dispute settlement mechanism. Furthermore, in the absence of disputes concerning TBT obligations within a bilateral FTA, WTO jurisprudence constitutes the most authoritative source for informing the required interpretation.

Nevertheless, while the TBT Agreement is fully integrated into the bilateral trade regimes of the EU and its partners, it is equally true that the TBT chapters

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[60] *Ibid*.

[61] Art. 73, EU-Colombia, Peru, and Ecuador Trade Agreement, EU, 2013; Art. 4.1, EU-South Korea Free Trade Agreement, EU, 2011; Art. 54, EU-Ukraine Association Agreement, EU, 2014; Art. 90, European Commission, *Trade and Cooperation Agreement – European Union and United Kingdom*, 8 (2021); Art. 9.3, European Commission, *Free Trade Agreement between the European Union and New Zealand* (2022); Art. 4.3, EU-Singapore Free Trade Agreement, EU, 2019.

of these agreements are often complemented by additional provisions that may influence how future panels interpret specific obligations. These dedicated chapters typically provide further elaboration on the understanding of technical regulations, conformity assessment procedures, standards, and institutional co-operation between the parties, potentially shaping the interpretative framework beyond that established under WTO law. [62]

In summary, as has long been recognised as a core principle of the multilateral trading system, the NT principle requires that imported and domestic products be treated equally. The Appellate Body in *EC – Asbestos* serves as a departure point for this analysis, as it affirmed that the TBT Agreement constitutes a *lex specialis* within the WTO legal system and therefore contains distinct and additional obligations beyond those found in the GATT 1994. [63] Thus, while the NT principle can be found throughout WTO agreements, such as the GATT, GATS and TRIPS, its contours vary slightly depending on the context of interpretation. Accordingly, the NT obligation under the TBT regime is set out in Article 2.1 of the Agreement, which provides: "Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country." [64]

The interpretation of Article 2.1 of the TBT Agreement was first examined in *US – Clove Cigarettes* (2012), in which the Appellate Body developed a three-tier test to assess consistency with the NT obligation. The adjudicatory body held that, for a violation of Article 2.1 to be established, the following elements must be satisfied: (1) the measure at issue must constitute a technical regulation; (2) the imported and domestic products must be considered like products; and (3) the imported product must be accorded less favourable treatment than that accorded to the domestic product. [65] As the interpretation of "technical regulation" has already been addressed in the previous sections, this study will now turn to the likeness test and the analysis of less favourable treatment. [66]

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[62] See Arts. 71-84; see EU, above n. 61.

[63] See para. 80; see WTO, WTO Appellate Body, above n. 23.

[64] See World Trade Organization, above n. 19.

[65] See para. 87: "For a violation of the national treatment obligation in Article 2.1 to be established, three elements must be satisfied: (i) the measure at issue must be a technical regulation; (ii) the imported and domestic products at issue must be like products; and (iii) the treatment accorded to imported products must be less favourable than that accorded to like domestic products." Appellate Body Report – *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, World Trade Organization, 4 April 2012, DS406.

[66] For a comprehensive review on both the National Treatment and Most-Favoured Nation principles, see J. Houston-McMillan, *The Legitimate Regulatory Distinction Test: Incomplete*

7. *The Likeness Test*

Establishing likeness may not always be straightforward. At first glance, it might seem simple to assert that a commodity listed in Annex I of the EUDR, such as wood, is "like" other wood products. However, practice demonstrates that this is not necessarily the case. In fact, the interpretation of like products is broader, as clarified in *US – Clove Cigarettes*, where the Appellate Body emphasised that "a determination about the nature and extent of a competitive relationship between and among the products at issue" must be made. [67] Consequently, a more comprehensive assessment may be required to establish the likeness of products, as illustrated in the *Palm Oil* disputes [68] or in cases involving derived products, [69] where it was recognised that palm oil-based fuel from Indonesia was "like" rapeseed and soybean oil produced within the EU. [70]

Four criteria identified in the *Report of the Working Party on Border Tax Adjustments* [71] have long been recognised and well-settled in WTO jurisprudence as forming the basis of the "like products" test. [72] These criteria are: (a) the physical properties of the products; (b) the extent to which the products can serve the same or similar end-uses; (c) consumers' perceptions of the products as alternatives; and (d) the tariff classification of the products. [73] However, this list is non-exhaustive and requires panels to undertake a holistic assessment of all the evidence presented to determine whether domestic and imported products are sufficiently in a competitive relationship. As recalled by the Panel in the recent *Palm Oil (Indonesia)* case, "the overarching question is thus whether the degree of competition between the products is sufficiently close to regard them as like." [74]

This demonstrates that, prior to bringing a dispute, the proper approach to assessing the likeness requirement is to question not only the inherent nature of the products but also the competitive relationship they maintain in a given

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and Inadequate for the Particular Purposes of the TBT Agreement, in *World Trade Review*, 4, 2016, p. 543.

[67] See para. 120; see World Trade Organization, above n. 65.

[68] See WTO, Panel, above n. 26, *EU – Palm Oil (Indonesia)*.

[69] See WTO, WTO Appellate Body, above n. 23.

[70] See Annex 1, above n. 12.

[71] WTO, *Report of the Working Party on Border Tax Adjustments* (1970).

[72] Para. 18, see World Trade Organization, above n. 65; see WTO, WTO Appellate Body, above n. 23.

[73] Paras. 7.442-7.443, see WTO, Panel, above n. 26, *EU – Palm Oil (Indonesia)*.

[74] Para. 7.445, *ibid.*; Carolyn Fischer and Timothy Meyer, 'Baptists and Bootleggers in the Biodiesel Trade: EU-Biodiesel (Indonesia)', *World Trade Review* 2 (2020), p. 297

market. [75] While it was not the intention of this study to undertake a specific analysis of a particular commodity or producer State, as such an inquiry would require a separate study in itself, the reader must bear in mind that the likeness test must be applied on a case-by-case basis.

8. *The Treatment no Less Favourable*

A greater challenge appears to lie in the assessment of the "treatment no less favourable" element, which, in the context of NT, concerns the comparative treatment accorded to imported products vis-à-vis like domestic products. As previously noted, pursuant to Article 29 of the EUDR ("Assessment of Countries"), [76] countries may be classified into three categories, imposing different levels of due diligence obligations on operators and traders. While technical regulations, by their nature, distinguish between products based on their characteristics and production processes, this does not *prima facie* amount to a violation of Article 2.1 of the TBT Agreement. A panel examining a potential breach must undertake a holistic assessment of the evidence presented by the parties in order to determine whether the measure in question accords 'treatment no less favourable' to imported products compared to their like domestic counterparts. [77]

When read in conjunction with the sixth recital of the preamble to the TBT Agreement, which closely mirrors Article XX of the GATT introducing the general exceptions regime, it becomes clear that States are permitted to adopt technical barriers to trade for the protection of human, animal, or plant life, provided that such measures do not constitute arbitrary or unjustifiable discrimination in trade. [78] Put simply, technical barriers to trade are permissible as long as

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[75] Para. 7.442, see WTO, Panel, above n. 26, *EU – Palm Oil (Indonesia)*; see World Trade Organization, above n. 65.

[76] See Article 29, above n. 12.

[77] Para. 169 states: "As such, technical regulations are measures that, by their very nature, establish distinctions between products according to their characteristics or their related processes and production methods. This suggests, in our view, that Article 2.1 should not be read to mean that any distinction, in particular those that are based exclusively on particular product characteristics or their related processes and production methods, would per se accord less favourable treatment within the meaning of Article 2.1." See World Trade Organization, above n. 65.

[78] While the TBT Agreement does not contain a general exceptions clause analogous to Article XX of the GATT, the Appellate Body has recognised that its sixth recital affirms that "no country should be prevented from taking measures necessary" to achieve legitimate public policy objectives, expressly including environmental protection. In conclusion, although the TBT Agreement seeks to advance trade liberalisation at the multilateral level, it simultaneously affirms the

they do not impose greater restrictions than necessary to achieve a legitimate objective. This recognition exposes the inherent ambivalence between a State's right to regulate and the trade liberalisation obligations it has undertaken. [79]

Thus, the legitimate objective of a technical regulation plays a vital role in justifying a trade-restrictive measure and must be applied in an even-handed manner. In *US – Clove Cigarettes*, the Appellate Body found that the United States had failed to demonstrate that the measure in question pursued a legitimate objective. This was because the addictive substance in cigarettes is nicotine rather than menthol, peppermint, or other flavouring ingredients contained in Indonesian cigarettes. Furthermore, the prohibition did not extend to domestically produced menthol cigarettes. [80] By contrast, in the *Palm Oil (Malaysia)* case, the panel recognised that the global risk of indirect land-use change (ILUC) was relevant to the purpose of the objective pursued by the Renewable Energy Directive II (RED II). It is therefore reasonable to assume that a future panel would similarly recognise the global risk of deforestation as a legitimate objective underpinning the EUDR. [81]

However, as the Appellate Body has recognised, both *de jure* and *de facto* discrimination fall within the scope of the NT principle. While the Regulation appears *de jure* neutral—since it does not explicitly target specific countries in its normative provisions and mandates periodic impact assessments to inform country classification—its practical implementation may give rise to *de facto* discrimination. This occurs where a measure, although facially neutral, imposes disproportionately burdensome obligations on certain trade partners. For example, all EU Member States have been classified as low risk, thereby benefiting from reduced compliance requirements, whereas cattle products originating from Brazil, classified as standard risk, are subject to more stringent due diligence obligations. [82]

In brief, in this author's view, it would not be particularly difficult to establish that combating climate change constitutes a legitimate objective consistent with other international agreements, such as the Paris Agreement, and one that necessitates global efforts, with the fight against deforestation being central to this endeavour. The real challenge appears, once again, to stem from

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regulatory autonomy of Members; thus, a balance must be struck between trade disciplines and the sovereign right to regulate in pursuit of non-trade objectives. See Sixth Recital, see World Trade Organization, above n. 17; paras. 94–95, see World Trade Organization, above n. 65.

[79] Para. 151, see World Trade Organization, above n. 65.

[80] Para. 225, *ibid.*

[81] Para. 7.535, see WTO, WTO Appellate Body, above n. 23.

[82] The Applellate Body recognized both the prohibition of *de jure* and *de facto* discrimination, See paras. 180–182, see World Trade Organization, above n. 65.

the different treatment afforded under the benchmarking system, which at first glance seems to lack even-handedness by discriminating among like products. Ultimately, it would be incumbent upon the European Union, if challenged before a dispute settlement body, to demonstrate that the Regulation and its benchmarking system are applied pursuant to a legitimate regulatory distinction grounded in objective and reliable deforestation data. [83]

9. *Technical Barriers to Trade Regime under the EU FTAs*

The most significant aspect to be taken into account by a panel convened to assess a potential violation of the EUDR and the legal obligations contained in the TBT Agreement, as incorporated into the EU FTA's, concerns the relationship between the TBT obligations and the commitments set out in the Trade and Sustainable Development (TSD) Chapter. [84] These chapters, which can no longer be regarded as a novelty, having first been introduced in the EU–Korea FTA in 2010, constitute regulatory cooperation frameworks. While they reaffirm the parties' sovereign right to regulate in relation to environmental and labour standards, they also impose limitations on that right by requiring the parties to maintain a high level of protection, to prevent regressions in the domestic protection of such rights, and to ensure their effective enforcement. [85]

Furthermore, these chapters establish a series of commitments that recognise the "value of international environmental governance and agreements as a response of the international community to global challenges," [86] together with a commitment by the parties to "effectively implement in their laws and practices" [87] a range of MEAs and the obligations derived from such instruments,

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[83] Appellate Body, *United States – Certain Country of Origin Labelling (COOL) Requirements – US – COOL*, 29 June 2012; WTO Appellate Body, above n. 19, *US – Tuna II (Mexico)*.

[84] For a comprehensive review on TSD chapters and deeper trade, see: A. Delgado Casteleiro, *The European Union's Preferential Trade Agreements: Between Convergence and Differentiation*, in *Yearbook of European Law*, 2023, p. 1; B.A. Melo Araujo, *The EU Deep Trade Agenda: Law and Policy*, Oxford University Press, Oxford, 2016; G. Marín Durán, *The EU's Evolving Approach to Environmental Sustainability in Free Trade Agreements*, in Faculty of Laws University College London, *Law Research Paper* No. 03/2023, 2023; G. Marín Durán, *The Role of the EU in Shaping the Trade and Environment Regulatory Nexus: Multilateral and Regional Approaches*, in B. Van Vooren-S. Blockmans-J. Wouters (eds), *The EU's Role in Global Governance*, Oxford University Press, Oxford, 2013, pp. 224-240.

[85] See Art. 268, see EU, above n. 61.

[86] See Art. 270.1, *ibid.*

[87] See Art. 270.2, *ibid.*

including, for example, the Paris Agreement. [88] Furthermore, several agreements contain additional provisions encouraging cooperation on trade in forest products and on climate change mitigation. [89] Although such normative content is sometimes criticised as being soft or non-binding, [90] it may nonetheless play an important role in assessing the legitimacy of the conditional technical regulation established by the EUDR, offering potential justification for a measure that, at first glance, may appear inconsistent with core trade obligations.

The design of EU bilateral agreements also shows signs of evolution, reflecting an attempt to validate its policies and measures aimed at reconciling trade liberalisation obligations with environmental protection objectives. A first example can be found in the recent agreement with New Zealand, [91] which enhanced the traditional Multilateral Environmental Agreements (MEA) provision contained in the TSD chapter by adding more substantive legal content. This included, inter alia, an obligation for the parties to work together on trade-related aspects of environmental policies, with explicit recognition of cooperation within the FAO framework. Furthermore, the agreement lists among the potential areas of cooperation the examination of "the impact of environmental law and standards on trade and investment, or the impact of trade and investment law on the environment." [92]

The further deepening of the obligations contained within the TSD chapter, particularly in the clause addressing the relationship with multilateral environmental

[88] S.E. Akdogan, *What is There to Enforce? Multilateral Agreements and Standards in the Trade and Sustainable Development Chapters of the EU Free Trade Agreements*, in *Global Europe: Legal and Policy Issues of the EU's External Action*, T.M.C. Asser Press, The Hague, 2024, pp. 137-166; G. Marín Durán, *The EU's Evolving Approach to Environmental Provisions in Free Trade Agreements*, in R.A. Wessel et al. (eds), *EU External Relations Law and Sustainability*, T.M.C. Asser Press, The Hague, 2024, pp. 257-276; G. Messenger, *Free Trade Agreements as Sites of Economic Diplomacy: Agreeing Common Standards for Sustainable Development*, *World Trade Review*, 2, 2025, p. 194.

[89] See Article 294, see EU, above n. 61; see Articles 403 and 764, see European Commission, above n. 61; see Articles 19.9 and 19.6(3), see European Commission, above n. 61; see Article 273, see EU, above n. 61.

[90] M. Bronckers-G. Gruni, *Retooling the Sustainability Standards in EU Free Trade Agreements*, in *Journal of International Economic Law*, 2, 2021, p. 1.

[91] The agreement with New Zealand, together with the Communication "The Power of Trade Partnerships: Together for Green and Just Economic Growth," appears to mark a departure from the early approach to TSD chapters, which was characterised by cooperation and non-confrontation in dispute settlement. Instead, it signals a move towards unifying the dispute settlement mechanism under a single channel, thereby creating the possibility for trade sanctions to be applied in respect of obligations contained in the regulatory cooperation chapter. European Commission, *The Power of Trade Partnerships: Together for Green and Just Economic Growth* (Brussels, Belgium, 2022).

[92] See Article 19.5, see European Commission, above n. 61.

agreements and with international governance institutions such as the FAO, appears to strengthen the pathway for parties to validate the development of an international standard, or at least a bilateral standard among participants in the trade regime. Such validation would be grounded in the definitions formulated by the FAO and incorporated into the standard established by the EUDR, thereby reducing the likelihood of the standard being perceived as lacking legitimacy.

Furthermore, improvements can also be identified outside the TSD chapter, such as in provisions on joint cooperation in trade-facilitating initiatives—for example, Article 4 of the TBT chapter contained in the agreement in principle with Mercosur—and in the provisions on Good Regulatory Practices and Regulatory Cooperation, such as Article 22.1 of the Agreement with New Zealand. [93] The latter states that, in relation to the TBT chapter or regulatory cooperation among trade partners:

> *Nothing in this article shall be construed as to oblige a Party to: a) deviate from domestic procedures for preparing and adopting regulatory measures, b) take actions that would undermine or impede the timely adoption of regulatory measures to achieve its public policy objectives, or c) adopt any particular regulatory outcome; fully respecting the Parties' right to regulate.* [94]

Within this clause, on the one hand, the right of a trade partner to regulate towards stricter environmental standards seems to gain further validation, reinforcing the legitimacy of a State's autonomy to pursue public policy objectives or adopt specific regulatory outcomes. On the other hand, it is not entirely clear how this provision adds much to the already integrated exceptions regime under Article XX of the GATT or to the sixth recital of the TBT Agreement, both of which are fully incorporated into bilateral trade regimes. As demonstrated in most trade disputes, panels generally recognise the legitimacy of the objectives contained in these provisions as justifications for trade-restrictive measures, while the parties often fail to meet the requirements of the chapeau—namely, proving that the measure was applied in a manner that does not constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade. [95]

It is also noteworthy that the limited case law under the bilateral regime appears to support the view that the TSD chapter should be taken into account

[93] See Article 4 of the TBT chapter, EU-Mercosur Agreement in Principle, EU, 2019; see Article 22.1, see European Commission, above n. 61.

[94] Article 4 of the TBT Chapter, see EU, above n. 93.

[95] See for example, cases: WTO Appellate Body, *Appellate Body Report, US – Gasoline*, 20 May 1996; see WTO, WTO Appellate Body, above n. 18; WTO Appellate Body, *Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres*, 2007.

when interpreting the general trade liberalisation provisions of an agreement. In *Ukraine – Wood Ban*, while the panel rejected Ukraine's argument that the dispute should be resolved under the dedicated dispute settlement mechanism of the TSD chapter, it nonetheless sought to clarify the relationship between the general trade obligations and the TSD provisions contained in the EU-Ukraine Association Agreement. According to the panel, the inclusion of the regulatory cooperation chapter was not intended to create self-standing rights that could serve as an additional exception regime beyond that provided for in the general exceptions clause of the agreement, which mirrors Article XX of the GATT. Rather, the panel stated that the provisions of the TSD chapter should form part of the relevant "context" for interpreting the trade liberalisation obligations. It further observed: "*If a domestic measure, challenged as being incompatible with the Association Agreement, is claimed to be an environmental measure in view of its object, purpose and design, it may as such come within the purview of any of the provisions contained in Chapter 13 (TSD chapter)*." [96]

Finally, while the environmental commitments embedded in the TSD chapter may support more environmentally friendly interpretations of trade obligations, several considerations must be kept in mind. First, bilateral litigation remains in its infancy, and trade actors continue to show a preference for engaging with the multilateral dispute settlement mechanisms of the WTO, even in their current state of crisis. [97] The option of forum selection enables parties to bypass self-contained and more ambitious bilateral trade regimes, relying instead on interpretations grounded solely in WTO law, where no comparable commitments on trade and sustainable development exist. Second, given the self-contained nature of these bilateral mechanisms, panels are not formally required to follow or take into account the decisions of their 'equivalent' adjudicatory bodies at the multilateral level. This contributes to legal uncertainty as to how a particular matter may ultimately be adjudicated.

10. *Conclusions*

The current generation of EU FTAs and the EUDR epitomises the complexity of the current international trade relations. On one side, as a result of the crisis of the WTO, they symbolise a shift from the EU support to the multilateral level to the creation of new and deepen bilateral trade regimes that search to

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[96] See paras. 241-245, *Ukraine wood export ban*, 12 November 2020. Title of the chapter added by the author.

[97] G. Vidigal, *Why is There So Little Litigation Under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement*, in *CTEI Working Papers*, CTEI, Geneva, 2017.

reconcile the duality among the conflictive relation between trade and environmental protection through the incorporation of TSD chapters. On the other, the lack of multilateral consensus has left a governance gap that, by its incapacity to advance global objectives and reform multilateral institutions, has been fulfilled by the enactment of unilateral measures, being it to address environmental concerns as in the case of the EU, or just concerning economical goals as in the case of the current US "Tax Wars". Thus, it was the objective of this study to approach the EUDR in face of the law created by the new EU bilateral trade regimes identifying the compatibility of this regulatory measure in face of the trade liberalization principle of NT.

As demonstrated in the first section, the EUDR more closely fits the definition of a technical regulation and thus its interpretation should be developed in light of the *lex specialis* contained in the TBT Agreement and incorporated *mutatis mutandis* into the EU's bilateral regimes. Defining it as a technical regulation is important given the slight differences in the normative content of the NT principle across the various agreements. Furthermore, the study demonstrated that, in the absence of an international standard, parties are permitted to regulate their own levels of protection; however, this right is accompanied by the obligation to cooperate with third parties, including through publication, notification, and the possibility of comments by affected parties. Thus, even if supported by FAO's definitional terminology, the EU's decision to set an international standard may become a point of contention with its trade partners. Additionally, the study highlighted that the Regulation's benchmarking system appears to be its Achilles' heel: while seemingly *de jure* neutral, the imprecise methodology adopted is likely to result in *de facto* discrimination, thereby undermining the competitiveness of imported products.

Within the second section, this study demonstrated the legal test and contours that the NT principle acquires when litigated under the TBT Agreement. It showed the necessity of establishing that the measure constitutes a technical regulation, that a comprehensive case-by-case analysis is required to determine the likeness of the competing products, and that the measure must not result in less favourable treatment for imported products. While the analysis indicated that trade-restrictive measures aimed at environmental protection may find justification under the sixth recital of the TBT Preamble—which reproduces content similar to the general exceptions regime contained in Article XX of the GATT, and given that combating deforestation can easily be recognised as a legitimate element of global efforts to address climate change—the more difficult task would be to demonstrate that the benchmarking system does not create either *de jure* or *de facto* discrimination.

Moreover, the study demonstrated that the inclusion of the TSD chapter, aimed at promoting and ensuring the maintenance of high levels of environmental protection, together with the additional commitments contained in the TBT chapters in EU FTAs, is likely to influence how a dispute settlement mechanism interprets the NT principle. However, while it may be easier, in theory, to establish the legitimacy of the EUDR as an exception to the NT principle, it is less clear how this could assist in satisfying the further requirement of demonstrating that the measure was not applied in a manner constituting unjustifiable discrimination or a disguised restriction on trade. Furthermore, the possibility for trade partners to choose the forum in which to bring a case allows them to bypass the bilateral regime in favour of the multilateral level, where legal commitments on sustainable development are absent.

LA LEGITTIMAZIONE PROCESSUALE DELLE ASSOCIAZIONI PER LA TUTELA AMBIENTALE NEL DIALOGO TRA LE CORTI SOVRANAZIONALI. IL COMPLESSO CASO DEI RIFIUTI TOSSICI IN CAMPANIA

Vincenzo De Falco[*]

SOMMARIO: 1. La capacità di proporre azioni giudiziarie nella dimensione sovranazionale e le divergenze nelle esperienze giuridiche contemporanee. – 2. L'implementazione della Convenzione di *Aarhus* nella giurisprudenza della Corte di giustizia. – 3. La discriminante dei cambiamenti climatici al cospetto della più ampia categoria degli interessi delle generazioni future. – 4. La dimensione intergenerazionale degli effetti prodotti dai rifiuti tossici. – 5. La forza espansiva del principio di precauzione e la problematica interpretazione della Corte dei diritti.

1. *La capacità di proporre azioni giudiziarie nella dimensione sovranazionale e le divergenze nelle esperienze giuridiche contemporanee*

Le questioni connesse alla legittimazione processuale delle associazioni per la tutela ambientale sono caratterizzate da un complesso intreccio tra la dimensione interna agli ordinamenti giuridici nazionali e i profili sovranazionali. La progressiva e diffusa tendenza a stimolare e rafforzare l'incisività e il ruolo della magistratura nelle problematiche ambientali, alquanto evidente sul tema dei cambiamenti climatici, è infatti condizionata da una vasta serie di tematiche, che partono dai requisiti di ammissibilità delle azioni giudiziarie, riguardano l'effettiva implementazione del principio di trasparenza, le caratteristiche delle strutture procedimentali, i meccanismi partecipativi, fino a interessare i poteri istruttori e l'efficacia delle pronunce degli organismi giudiziari [1].

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[1] R. Ferrara, *La protezione dell'ambiente e il procedimento amministrativo nella "società del rischio"*, in D. De Carolis-E. Ferrari-A. Pollice (a cura di), *Ambiente, attività amministrativa e*

Se si esclude il caso americano, o le recenti tendenze in Spagna, nel panorama comparatistico si riscontra una diffusa carenza di regole nazionali sulle connessioni tra trasparenza, partecipazione e funzione giurisdizionale nei procedimenti di formazione degli atti normativi. Come diretta conseguenza, tra le tematiche ancora non sufficientemente chiarite, emerge il rapporto tra il diritto all'informazione, la struttura dei meccanismi partecipativi e la legittimazione processuale, nonostante negli ultimi tempi la Corte di giustizia abbia mostrato di voler superare l'idea di una stretta relazione tra la partecipazione ai procedimenti in materia ambientale e la possibilità di adire la giustizia, per coloro che abbiano fornito i propri apporti istruttori e siano stati svantaggiati dalla decisione finale [2].

Sono tutte tematiche in continua evoluzione e trasformazione, rese particolarmente complesse sia per effetto delle specifiche caratteristiche che presentano le situazioni giuridiche al cospetto delle problematiche ambientali [3], che delle difficoltà di conferire un contenuto sufficientemente preciso ai vari concetti di ambiente, sviluppo sostenibile, o interessi delle generazioni future [4].

La questione è resa ancor più complessa per effetto della carenza di approcci metodologici condivisi nel panorama comparatistico [5], a partire proprio dai requisiti per il riconoscimento della legittimazione delle associazioni, di cui ci occuperemo nel presente lavoro. Qui emerge l'evidente incertezza determinata dalle differenti impostazioni seguite nelle varie esperienze giuridiche, in relazione al grado di rilevanza conferito alle posizioni giuridiche soggettive. Ci

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codificazione, Giuffrè, Milano, 2006, p. 344; A. Gambaro, *Interessi diffusi, interessi collettivi e gli incerti confini tra diritto pubblico e diritto privato*, in *Riv. trim. dir. proc. civ.*, 3, 2019, pp. 779-797; E. Fasoli, *Associazioni ambientaliste e procedimento amministrativo in Italia alla luce degli obblighi della Convenzione UNECE [United Nations Economic Commission for Europe] di Aarhus del 1998*, in *Riv. giur. amb.*, 27 (3-4), 2012, pp. 331-355.

[2] Ad esempio, la Corte di giustizia, sez. II, 20 dicembre 2017, causa C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* ha escluso che occorra la stretta correlazione tra la qualità di parte nel procedimento e la legittimazione processuale ad agire, che va ricercata mediante l'individuazione dello specifico obiettivo di tutela ambientale prestabilita dalla disciplina dell'Unione Europea. Cfr. anche Corte giust., sez. I, 28 maggio 2020, causa C-535/18.

[3] M. Calabrò, *La legittimazione ad agire a tutela delle risorse ambientali: la prospettiva dei beni comuni (The legal standing in environmental law: the Commons perspective)*, in *Dir. soc.*, 4, 2016, p. 807 ss.

[4] P. Maddalena, *L'ambiente e le sue componenti come beni comuni in proprietà collettiva della presente e delle future generazioni*, in *federalismi.it*, 25, 2011, p. 45 ss.; A. Postiglione, *Ambiente: suo significato giuridico unitario*, in *Riv. trim. dir. pubb.*, 1985, p. 33 ss.; P. Colasante, *La ricerca di una nozione giuridica di ambiente e la complessa individuazione del legislatore competente*, in federalismi.it, 20, 2020, pp. 123-141.

[5] R. Ionta, *Il paradigma di Aarhus. Interesse meta-individuale, potere diffuso e processo*, in *GiustAmm.it*, 5, 2015, p. 40 ss.

sono casi in cui viene riconosciuta la legittimazione processuale a chiunque, persone fisiche o associazioni di rappresentanza, intenda tutelare l'ambiente, mentre altri Paesi applicano filtri di ammissibilità delle azioni giudiziarie connessi alla tipologia delle posizioni giuridiche violate [6].

Ogni esperienza ha quindi affrontato le citate problematiche in linea con la propria tradizione giuridica [7]. Alcuni Stati stanno consentendo ad associazioni di rappresentanza di adire la magistratura interna per contestare la mancata adozione di discipline incisive nel contrasto ai cambiamenti climatici [8], spinti dal successo riscontrato in Olanda [9], Francia [10] e Germania [11]. In altri casi, come avvenuto di recente in Italia, si registrano invece impostazioni maggiormente conservatrici rispetto alla diffusa tendenza ad ammettere azioni giudiziarie che impattino sulla funzione di indirizzo politico e sul principio della separazione dei poteri [12].

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[6] P. Duret, *Riflessioni sulla legitimatio ad causam in materia ambientale tra partecipazione e sussidiarietà*, in *Dir. proc. amm.*, 26 (3), 2008, p. 688 ss.

[7] D. Amirante, *L'ambiente preso sul serio. Il percorso accidentato del costituzionalismo ambientale (Taking Environment seriously. The slippery path of environmental constitutionalism)*, in *Diritto pubblico comparato ed europeo*, 21 (S), 2019, p. 1 ss.; A. Martini, *La tutela processuale europea dell'ambiente. Problemi di legittimazione delle associazioni ambientaliste*, in *Giustamm.it*., 1, 2021, pp. 1-7.

[8] H. Keller-V. Gurash, *Expanding NGOs' Standing: Climate Justice through Access to the European Court of Human Rights*, in *Journal of Human Rights and the Environment*, 14 (2), 2023, p. 198.

[9] Corte internazionale di giustizia, 20 dicembre 2019, causa n. 19/00135, *Urgenda Foundation v. The State of the Netherlands* in cui viene ribadita l'applicabilità degli artt. 2 e 8 CEDU come base giuridica per l'azione di giustizia climatica, ed evidenziato come queste disposizioni vadano interpretate in base al principio di effettività. Così anche V. Jacometti, *La sentenza Urgenda del 2018: prospettive di sviluppo del contenzioso climatico*, in *Riv. giur. amb.*, 1, 2019, pp. 121-139; A. Villari, *Il caso olandese: un diritto ambientale che riflette problematiche specifiche*, in *federalismi.it*, 7, 2017, p. 45 ss.

[10] Il caso (denominato *Affaire du siècle*) concerne un procedimento giudiziario instaurato innanzi al Tribunale amministrativo di Parigi nel 2019, e concluso con sentenza del 3 febbraio 2021, che ha riconosciuto la responsabilità dello Stato francese nella gestione della crisi climatica in ordine al danno ecologico determinato dal mancato raggiungimento degli obiettivi di riduzione delle emissioni di gas ad effetto serra. Per il giudice francese le istituzioni competenti hanno violato il dovere costituzionale di tutelare l'ambiente, sancito agli artt. 3 e 4 della *Charte de l'environnement.*

[11] Nel caso tedesco (*Neubauer*), il giudice costituzionale con la sentenza 24 marzo 2021 1 BvR 2656/18, ha dichiarato la parziale incostituzionalità della legge federale sui cambiamenti climatici (*Bundes-Klimaschutzgesetz*), adottata nel 2019 per soddisfare i requisiti dell'Accordo di Parigi, che avrebbe creato rischi sproporzionati in ordine sia alle libertà degli individui, che, per quanto concerne le future generazioni.

[12] A differenza dei Giudici olandesi, francesi e tedeschi, e della Corte Edu, il Tribunale di

Le divergenze tra le esperienze giuridiche influenzano gli orientamenti delle Corti sovranazionali, le cui decisioni a loro volta determinano trasformazioni degli ordinamenti interni, in un contesto in continua evoluzione. Ma è proprio alla magistratura europea che spetta la principale funzione di stimolare i giudici nazionali ad assumere un ruolo maggiormente incisivo, che resta ancora oggi fortemente limitato dalla diffusa incertezza sul tema della legittimazione processuale delle associazioni di rappresentanza. La recente sentenza della Corte europea dei diritti dell'uomo sull'incapacità politica dello Stato italiano a gestire con efficacia il devastante problema determinato dall'indiscriminato smaltimento dei rifiuti tossici in Campania rappresenta senza alcun dubbio una notevole evoluzione verso una maggiore incisività del ruolo della magistratura sull'azione politica [13]. Ma lasciano francamente perplessi le argomentazioni che la Corte apporta nel sancire il difetto di legittimazione attiva delle associazioni di categoria, che di fatto restringono le possibilità di intraprendere azioni giudiziarie proprio alle organizzazioni che possiedono adeguate risorse finanziarie, la possibilità di raccogliere informazioni e di attivare procedimenti giudiziari con una capacità di gran lunga superiore rispetto ai singoli individui [14]. Soprattutto se poi proprio il giudice sovranazionale dei diritti si pone in divergenza rispetto alla diversa impostazione progressivamente assunta dalla Corte di giustizia.

2. *L'implementazione della Convenzione di* Aarhus *nella giurisprudenza della Corte di giustizia*

Osservando gli andamenti evolutivi delle pronunce giudiziarie della magistratura europea emerge una maggiore tendenza dei giudici di Lussemburgo verso l'ampliamento della legittimazione attiva delle associazioni di categoria rispetto all'impostazione seguita a Strasburgo, particolarmente evidente proprio in materia di gestione dei rifiuti. Questa differenza, sebbene in parte possa

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Roma, con sentenza del 26 febbraio 2024 ha declinato la propria giurisdizione sull'azione tendente ad accertare la responsabilità dello Stato per aver omesso di adottare specifiche disposizioni per combattere i cambiamenti climatici, con la motivazione che la magistratura non possa intervenire nella sfera di attribuzione del potere conferita alle istituzioni che perseguono fini politici. Da ultimo L. Papaleo, *The Climate Crisis and the Separation of Powers in E.U. What Role for the Court of Justice*?, in *DPCE*, 26 (3), 2024, p. 653 ss., in cui evidenza una tendenza globale alla "giurisdizionalizzazione della politica", nelle democrazie costituzionali fondate sullo Stato di diritto di matrice liberale.

[13] Corte Edu, *Cannavacciuolo ed altri v. Italia*, ric. n. 51567/14, 30 gennaio 2025.

[14] F. Giglioni, *La legittimazione processuale attiva per la tutela dell'ambiente alla luce del principio di sussidiarietà orizzontale*, in *Il Dir. proc. amm.*, 33 (1), 2015, pp. 413-456.

essere giustificata sia dal diverso ruolo esercitato dalle due giurisdizioni, sia dalla differenza nelle procedure seguite, non appare agevolmente condivisibile. La Corte dei diritti di norma interviene in casi di lesioni di specifiche posizioni giuridiche negli ordinamenti che aderiscono alla Convenzione. Il fenomeno si verifica in misura ridotta nell'ambito delle questioni sottoposte alla Corte di Giustizia [15], che agisce di norma su iniziativa della Commissione e piuttosto di rado su richiesta degli Stati membri, per sanzionare gli inadempimenti alla disciplina europea, o in via incidentale in giudizi pendenti innanzi ai giudici nazionali. Per effetto di questa differente impostazione, la problematica della legittimazione attiva viene affrontata attraverso diversi presupposti [16], che a loro volta mutano a seconda dell'oggetto del giudizio [17].

Nei procedimenti attratti alla giurisdizione della Corte di giustizia, il *locus standi* è fortemente condizionato dalle discipline interne agli Stati membri, tra i quali si registrano differenti impostazioni e modulazioni, nonostante la diffusa adesione alla Convenzione di *Aarhus* [18]. Tuttavia, ai giudici di Lussemburgo va riconosciuto il merito di aver imposto alla magistratura interna l'obbligo di interpretare le regole processuali nazionali in una maniera quanto più possibile conforme alla *ratio* sottesa alla Convenzione di *Aarhus* [19]. Ciò al fine

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[15] Nel diritto dell'Unione Europea la direttiva 2003/35/CE si pone l'obiettivo di consentire un ampio accesso alla giustizia in materia ambientale, ma lascia agli Stati membri la concreta determinazione. Ogni Stato può stabilire, in sintonia con le regole processuali nazionali, i presupposti che legittimano la proposizione dei ricorsi diretti ad assicurare la tutela dei diritti derivanti da disposizioni sovranazionali. Tuttavia, la Corte di giustizia ha dichiarato che l'art. 10 *bis* della direttiva 85/337 osta ad una normativa che non riconosca ad un'organizzazione non governativa, che opera per la protezione dell'ambiente, la possibilità di far valere in giudizio la violazione di una norma derivante dal diritto dell'Unione finalizzata alla tutela dell'ambiente, perché protegge esclusivamente gli interessi della collettività e non quelli dei singoli. Cfr. Corte giust. UE, sez. IV, 12 maggio 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV c. Bezirksregierung Arnsberg*, causa C-115/09, punto 46.

[16] M. Romanino, *L'accesso alla giustizia delle organizzazioni ambientali a livello europeo e nazionale*, in *GiustAmm.it*, 3, 2015, p. 10 ss.

[17] M. Baran-B. Iwanska, *Access of an Environmental Organization to Court in Light of the EU Standard Set by the Principle of Effective Legal (Judicial) Protection*, in *E.E.E.L.R.*, 2019, p. 47 ss.

[18] A. Morrone, *L'accesso alla giustizia in materia ambientale: la Convenzione di Aarhus nell'ordinamento italiano*, in A. Tanzi-E. Fasoli-L. Iapichino (a cura di), *La Convenzione di Aarhus e l'accesso alla giustizia in materia ambientale*, Cedam, Padova, 2011, p. 77; A. Danthinne-M. Eliantono-M. Peeters, *Justifying a presumed standing for environmental NGOs: A legal assessment of Article 9(3) of the Aarhus Convention*, in *RECIEL*, 31 (3), 2022, pp. 1-10; G. Valenti, *L'interpretazione dell'art. 9, par. 3, della Convenzione di Aarhus da parte della Corte di giustizia. Nuove prospettive in tema di legittimazione processuale delle associazioni ambientaliste?*, in *Dpce online*, 57 (1), 2023, p. 1483 ss.

[19] I giudici di Lussemburgo comparano le disposizioni interne con i parametri normativi

di assicurare la tutela giurisdizionale nei settori coperti dal diritto ambientale dell'Unione, secondo il principio di effettività. La magistratura è pertanto indotta a espandere l'ambito di applicazione delle discipline nazionali e favorire il *locus standi* delle associazioni, a prescindere dalla circostanza che l'art. 9, par. 3, della Convenzione di *Aarhus* non sia direttamente applicabile nei singoli ordinamenti giuridici. Ovviamente ciò non esclude che il giudice nazionale possa continuare a esercitare la propria discrezionalità, o che resti vincolato al rispetto delle normative statali contrarie a questa impostazione. Circostanza che rende sempre possibile che venga negata la legittimazione processuale alle associazioni in conseguenza di disposizioni processuali particolarmente ostative.

Questa condizione attenua, ma non esclude la notevole influenza esercitata dalla Corte di giustizia, che mostra tutta la sua forza nei casi in cui le regole processuali nazionali impediscano totalmente di riconoscere la legittimazione attiva alle associazioni [20].

L'analisi giurisprudenziale evidenzia una tendenza evolutiva verso l'ampliamento della legittimazione processuale in materia ambientale che prescinde dall'individuazione di specifiche posizioni giuridiche [21]; è un dato di fatto che incrementa la possibilità per le associazioni di rappresentanza di vedersi riconosciuta la capacità di proporre azioni giudiziarie. In altri termini, per i giudici di Lussemburgo il *locus standi* delle associazioni che perseguono le finalità di tutela dell'ambiente non dipende dall'esistenza di una posizione giuridica soggettiva conferita da atti normativi interni. Il che vale a sostenere che esiste una sorta di presunzione di legittimazione delle organizzazioni di rappresentanza, che può essere superata soltanto per effetto di disposizioni interne particolarmente ostative, ma che non possono giungere al punto di contrastare la *ratio* della Convenzione di *Aarhus* e l'art. 47 della Carta.

3. *La discriminante dei cambiamenti climatici al cospetto della più ampia categoria degli interessi delle generazioni future*

La Corte di giustizia mostra così l'evidente propensione a valorizzare il ruolo delle associazioni nel compito di controllare l'attuazione del diritto ambientale

forniti dal combinato disposto degli artt. 9, par. 3, Convenzione di *Aarhus* e 47 della Carta dei diritti fondamentali dell'Unione Europea. Corte giust. UE, Grand. sez., 8 novembre 2022, *Deutsche Umwelthilfe*, causa C-873/19. Sul punto, L. Ankersmit, *Article 47 of the Charter precludes national procedural rules that allow decisions to be taken in environmental matters pending litigation on participation in that decision-making*, in *EJRR*, 8 (S2), 2017, p. 448 ss

[20] Corte giust. UE, *Protect Natur*, causa C-664/15, 20 dicembre 2017.

[21] P. Oliver, *Access to Information and to Justice in EU Environmental Law: the Aarhus Convention*, in *Fordham J. Int'l L.*, 36, 2013, p. 1423 ss.

dell'Unione Europea, all'interno degli ordinamenti giuridici nazionali. Questa tendenza ha consentito alla magistratura europea di sanzionare gravi inadempimenti da parte dello Stato italiano o fornire interpretazioni per l'adeguamento del diritto interno [22]. E il più delle volte la sua giurisprudenza ha stimolato i singoli ordinamenti giuridici ad ampliare le ipotesi di legittimazione attiva delle associazioni ambientali [23]. Tuttavia, anche negli orientamenti della Corte di giustizia residuano ulteriori spazi per un'interpretazione maggiormente espansiva della Convenzione di *Aarhus* [24]. Talvolta, i giudici di Lussemburgo appaiono ancora fortemente influenzati dall'analisi della tipologia degli atti impugnati, e applicano standards maggiormente restrittivi quando verificano il requisito della legittimazione in relazione all'impugnazione di atti e provvedimenti emanati da istituzioni e organismi dell'Unione [25].

Un interessante viatico proviene dalla necessità di tutelare gli interessi delle generazioni future rispetto ai cambiamenti climatici [26]. Questa tendenza innovativa ha determinato una notevole espansione del contenzioso proposto da associazioni di protezione ambientale nei confronti dell'inerzia mostrata delle istituzioni interne, responsabili di non aver predisposto gli strumenti normativi adeguati a contrastare i mutamenti del clima mondiale. Si è notato che in questo settore si registrano notevoli aperture, in Olanda, Germania e Francia, mentre la posizione italiana è più tenue. In Italia è infatti prevalsa la categoria degli interessi diffusi, in aggiunta alle diverse posizioni giuridiche connesse ai diritti individuali o all'interesse legittimo. Alla base di questa impostazione vi è l'incerto concetto di ambiente, e le difficoltà di delineare una precisa linea di

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[22] Tra le tante, nella sentenza Commissione c. Italia del 16 luglio 2015, la Corte di giustizia ha ritenuto che l'Italia avesse omesso di adottare le misure necessarie per disporre dei rifiuti senza mettere in pericolo la salute umana e senza recare pregiudizio per l'ambiente in violazione dell'art. 191 TFUE. In particolare, la Corte di giustizia ha evidenziato significative disfunzioni in relazione alla capacità della regione Campania di smaltire i rifiuti (consistenti complessivamente nell'oltre l'8% della produzione nazionale). Nella sentenza del 26 aprile 2007 Commissione/Italia (C-135/05, EU:C:2007:250), i giudici di Lussemburgo Corte di giustizia hanno rilevato la generale non conformità a norma di oltre 700 discariche abusive in tutto il territorio nazionale, contenenti rifiuti pericolosi, e non sottoposte a misure di controllo. Cfr. sul punto, anche sentenza del 16 luglio 2015, Commissione/Italia (C-653/13, EU:C:2015:478). Con la sentenza del 4 marzo 2010, Commissione/Italia (C-297/08, EU:C:2010:115), la Corte di giustizia ha evidenziato un deficit strutturale in termini di impianti necessari allo smaltimento dei rifiuti urbani prodotti in Campania.

[23] F. Fracchia, *Il diritto ambientale comparato*, in *federalismi.it*, 7, 2017, p. 21 ss.

[24] A. Martini, *op. cit.*

[25] Si tratta di un maggior rigore nell'ambito dei ricorsi per annullamento degli atti UE, per lo più dovuto alle caratteristiche intrinseche di questo strumento processuale.

[26] D. Markell-J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?*, in *Fla. L. Rev.*, 64, 2012, pp. 15-86.

demarcazione con il diritto alla salute, da cui è poi derivata l'idea anche del diritto ad un ambiente salubre [27]. A tutti gli studiosi del diritto ambientale è ben nota questa difficoltà, a cui si aggiunge la problematica dell'individuazione del nesso causale con gli effetti sulla salute, determinati sia a breve che a lungo termine dagli agenti inquinanti [28]. Non a caso le innovazioni costituzionali verso l'affermazione degli interessi delle generazioni future alla tutela dell'ambiente sono intervenute proprio con la finalità di fornire un viatico interpretativo maggiormente preciso, rispetto all'evanescente idea di sviluppo sostenibile [29]. L'aver scelto di utilizzare il concetto di interesse delle generazioni future e non di diritto, che a sua volta avrebbe determinato ulteriori difficoltà, a partire dall'idea stessa di conferire una forte posizione giuridica a soggetti inesistenti, sottolinea la rilevanza che riveste la tutela dell'ambiente, della biodiversità e degli ecosistemi, nell'esercizio delle funzioni pubbliche. Le generazioni attuali sono quindi vincolate dallo specifico obbligo giuridico di evitare danni all'ambiente, sotto qualsiasi forma.

I fenomeni connessi ai cambiamenti climatici possiedono una dimensione internazionale, interessano le generazioni presenti e future. Di riflesso, nei vari precedenti giudiziari i giudici di Strasburgo hanno riconosciuto la legittimazione senza verificare nel dettaglio se all'interno del singolo Stato le associazioni avessero la finalità di proteggere l'ambiente in una dimensione internazionale [30].

Desta invece notevoli perplessità l'interpretazione fornita dalla Corte europea dei diritti [31], quando distingue le questioni che interessano i cambiamenti climatici rispetto al disastro ambientale provocato dai rifiuti tossici in Campania. Le argomentazioni giuridiche si fondano sull'idea che la violazione dei

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[27] N. De Dominicis, *L'accesso alla giustizia in materia ambientale. Profili di diritto europeo*, Cedam, Padova, 2016, p. 78.

[28] G. Ceccherini, *Danno all'ambiente e garanzia dell'accesso alla giustizia: una questione aperta*, in *Riv. dir. civ.*, 67 (2), 2021, p. 366 ss.; E. Ferrero, *Lo sviluppo sostenibile tra etica e diritto*, in *Amb. e Sviluppo,* 5, 2021, p. 358.

[29] G. Montedoro, *Spunti per la "decostruzione" della nozione di sviluppo sostenibile*, in *Ammin. in Cammino*, 2009, p. 1 ss.

[30] Corte Edu, *Verein KlimaSeniorinnen Schweiz e altri c. Svizzera*, ric. n. 53600/20, 9 aprile 2024, §§ 498-499, in cui la legittimazione attiva dell'associazione viene riconosciuta ex art. 8 della Convenzione e in considerazione che l'azione era stata proposta anche per la tutela degli interessi delle generazioni future. Per la protezione del diritto alla vita ex art. 2 la Corte ribadisce che la capacità processuale spetta soltanto alle persone fisiche. K. Dzehtsiarou, *KlimaSeniorinnen Revolution': The New Approach to Standing*, in *ECHR L. Rev.*, 5 (4), 2024, pp. 423-431.

[31] In senso conforme L. Magi, *Considerazioni sulla legittimazione ad agire delle associazioni davanti alla Corte Edu in due recenti pronunce in materia di cambiamento climatico e danni ambientali gravi e diffusi*, in http://www.osservatoriosullefonti.it, 2025.

diritti sanciti dagli artt. 2 e 8 della Convenzione sia una questione che interessi soltanto singole posizioni giuridiche, per le quali le associazioni non possiederebbero nessuna legittimazione attiva [32]. Ad avviso della Corte, la tutela dell'integrità fisica, dunque, non potrebbe essere invocata da una persona giuridica [33], che a sua volta non potrebbe rivendicare lo status di vittima [34].

Dalla giurisprudenza della Corte dei diritti emerge pertanto il principio in base al quale alle persone giuridiche è riconosciuta la legittimazione processuale nei casi connessi ai cambiamenti climatici, al pericolo per l'intera umanità e al rispetto degli obblighi di tutela delle generazioni future, mentre quando vengono invocati il diritto alla salute, alla vita, o la qualità delle condizioni in cui si vive, di norma la legittimazione è consentita a singole persone fisiche. Si registrano rare eccezioni rispetto a questa impostazione, e la possibilità per le associazioni di essere legittimate ad agire in giudizio in qualità di rappresentanti degli individui i cui diritti sono o saranno presumibilmente lesi, è per lo più collegata a valutazioni sempre connesse ai cambiamenti climatici [35]. Un'ulteriore eccezione riguarda i casi in cui l'associazione lamenti l'iniquità del procedimento giudiziario interno in cui è stata parte [36] o perché le vittime dirette siano decedute senza lasciare eredi, o perché l'estrema vulnerabilità le abbia impedito di agire [37]. Una sorta di legittimazione processuale in via sussidiaria, in sostanza. Eppure, in questa ultima ipotesi, l'associazione persegue comunque la finalità di tutelare le posizioni giuridiche di singoli individui, in qualità di rappresentante, esattamente come successo nel caso sottoposto all'esame della Corte relativo ai rifiuti tossici in Campania.

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[32] Corte Edu, *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği c. Turchia* (dec.), No. 37857/14, 20 gennaio 2022, §§ 36-41.

[33] Corte Edu, *Identoba e altri c. Georgia*, n. 73235/12, 12 maggio 2015, § 45.

[34] Il giudizio della Corte si basa sulla sua tradizionale giurisprudenza secondo cui un'associazione può essere legittimata ad agire solo se sia in grado di dimostrare di essere stata direttamente colpita dalla misura contestata. Cfr. *Cannavacciulo* cit., §§ 215-22 della presente sentenza e Corte Edu, *Fédération nationale des associations et syndicats de sportifs (FNASS) e altri c. Francia*, nn. 48151/11 e 77769/13, 18 gennaio 2018, §§ 93-95; Corte Edu, *Čonka e Ligue des droits de l'homme c. Belgio* (dec.), n. 51564/99, 13 marzo 2001.

[35] Corte Edu, *Verein KlimaSeniorinnen Schweiz e altri c. Svizzera*, cit., §§ 498-99.

[36] Corte Edu, *Asselbourg e altri c. Lussemburgo* (dec.), n. 29121/95, 29 giugno 1999; Corte Edu, *Collectif national d'information et d'opposition à l'usine Melox – Collectif stop Melox e Mox c. Francia* (dec.), n. 75218/01, 28 marzo 2006.

[37] Corte Edu, *Centre for Legal Resources per conto di Valentin Câmpeanu c. Romania* [GC], ric. No. 47848/08, 17 luglio 2014, §§ 104-14; Corte Edu, *Association Innocence en Danger e Association Enfance et Partage c. Francia*, nn. 15343/15 e 16806/15, 4 giugno 2020, §§ 119-32; Corte Edu, *L.R.* c. *Macedonia del Nord*, ric. n. 38067/15, 23 gennaio 2020.

4. *La dimensione intergenerazionale degli effetti prodotti dai rifiuti tossici*

La verifica delle conseguenze epidemiologiche a cui sono esposti i residenti nelle aree interessate dal fenomeno mostra dati a dir poco allarmanti [38]. In una vasta area che va dalla parte settentrionale della Provincia di Caserta a quella meridionale della Provincia di Napoli, si registrano eccessi statisticamente significativi di mortalità per linfomi non Hodgkin e tumori alla mammella, nelle donne, nonché al fegato e alla vescica per entrambi i generi. Si è inoltre verificato un notevole tasso di incremento di tumori al polmone, per effetto della circolazione nel territorio di sostanze volatili emesse da diverse sorgenti e delle elevate concentrazioni aerodisperse di idrocarburi policiclici aromatici. Nell'ambito della fascia di età che va da 0 a 19 anni si registra un notevole ampliamento dell'ospedalizzazione per asma, di bambini nati prima del termine, di malformazioni congenite, di leucemie, di eccessi di specifiche patologie che possono condurre alla mortalità [39].

Il fenomeno dell'inquinamento da rifiuti in Campania concerne territori agricoli altamente popolati. Esistono sostanze tossiche nel suolo, nell'acqua e nell'aria che non possono non determinare effetti anche per le generazioni future, sia per l'accumulazione nella catena alimentare, che in conseguenza della circostanza che le emissioni derivanti dalla combustione e dallo scarico dei rifiuti si depositano nell'atmosfera, e negli ecosistemi terrestri e acquatici [40]. Queste condizioni provocano anche cambiamenti climatici, dovuti all'ampia gamma di emissioni di gas metano, o agli elementi derivanti dalla diffusa pratica di incendiare i rifiuti all'aperto, in maniera simile, anche se con ridotte dimensioni, ai danni determinati dai gas serra. Effetti, quindi, che superano anche i confini nazionali e interessano i profili intergenerazionali.

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[38] Cfr. rapporto finale 2020 dell'indagine svolta dall'Istituto Superiore della Sanità "Studio sull'impatto sanitario degli smaltimenti controllati ed abusivi di rifiuti nei 38 comuni del circondario della Procura della Repubblica di Napoli Nord", (accordo prot. 1104 del 23 giugno 2016).

[39] È stato stimato che ogni anno muoiono tra 400.000 e 1 milione di persone a causa di malattie legate alla cattiva gestione dei rifiuti, tra cui diarrea, malaria, malattie cardiache e cancro. Cfr. L. Musmeci-P. Comba-L. Fazzo-I. Iavarone-S. Salmaso-S. Conti-V. Manno-G. Minelli, *Mortalità, ospedalizzazione e incidenza tumorale nei Comuni della Terra dei Fuochi in Campania (relazione ai sensi della Legge 6/2014)*, Istituto Superiore di Sanità, Roma, 2015. (Rapporti ISTISAN 15/27).

[40] I rifiuti smaltiti sulla terraferma possono causare l'inquinamento a lungo termine delle fonti di acqua dolce da parte di agenti patogeni, metalli pesanti, sostanze chimiche che alterano il sistema endocrino e altri composti pericolosi. La combustione a cielo aperto dei rifiuti rilascia inquinanti organici persistenti non intenzionali, le c.d. "sostanze chimiche per sempre", che possono essere trasportate per lunghe distanze nell'aria, persistere nell'ambiente, biomagnificarsi e bioaccumularsi negli ecosistemi. Cfr. L. Musmeci-P. Comba-L. Fazzo-I. Iavarone-S. Salmaso-S. Conti-V. Manno-G. Minelli, *Mortalità, ospedalizzazione e incidenza tumorale nei Comuni della Terra dei Fuochi in Campania*, cit., *passim*.

L'idea della Corte di poter delineare una precisa linea di demarcazione tra i concetti di clima e ambiente, al cospetto di una pretesa che in sostanza riguarda, in entrambi i casi, il diritto a vivere in un ambiente salubre, non convince. Non è possibile individuare uno specifico ambito territoriale da utilizzare come parametro di riferimento per questa ipotetica distinzione. Si è al cospetto di un fenomeno per il quale è agevolmente ipotizzabile un'espansione notevolmente maggiore nel futuro, rispetto alla situazione oggi accertata [41]. Né è pensabile che possa essere determinato il numero di persone che potrebbero subire danni alla propria salute per effetto di questo indiscriminato sversamento di rifiuti tossici. Ci sembra pertanto evidente che l'azione intrapresa dalle associazioni di categoria in sostanza sia stata anche volta alla tutela degli interessi delle generazioni future [42].

5. *La forza espansiva del principio di precauzione e la problematica interpretazione della Corte dei diritti*

In realtà, anche l'applicazione del principio precauzionale avrebbe potuto consentire di ampliare le ipotesi di legittimazione processuale delle associazioni.

Il ben noto principio registra una continua espansione a livello sovranazionale; costituisce non solo un presupposto di legittimazione processuale ma anche un vero e proprio parametro di validità per tutte le politiche e azioni europee in materia di ambiente, salute e sicurezza [43]. Per effetto dell'efficacia trasversale del principio di integrazione delle esigenze di tutela dell'ambiente in tutte le politiche e azioni dell'Unione, il modello precauzionale rappresenta dunque un generale criterio di legittimità della funzione normativa e

[41] Nella Dichiarazione di Reykjavík del 2023, è emersa la diffusa esigenza che gli Stati predispongano urgenti azioni per contrastare non solo il cambiamento climatico, ma anche l'inquinamento e la perdita di biodiversità.

[42] In tal senso le opinioni del giudice Krenc e Serghides nella sentenza *Cannavacciuolo*, che confermano l'estrema difficoltà di ravvisare nel caso di specie una netta distinzione degli effetti dei rifiuti tossici sul clima o sull'ambiente, come fondamento per giustificare due approcci diversi sul *locus standi* delle associazioni.

[43] Il dovere per gli Stati di applicare intensamente misure di precauzione a tutela dell'ambiente, anche in assenza di certezze scientifiche, risale all'art 15 della Dichiarazione di Rio de Janeiro sull'ambiente e lo sviluppo del 14 giugno 1992. Il principio è ripreso in termini analoghi anche nel preambolo della Convenzione sulla diversità biologica (1992) e nell'art. 3 della Convenzione sui cambiamenti climatici (1992), nonché nella Convenzione di Parigi per la protezione dell'ambiente marino per l'Atlantico Nord-Orientale (settembre 1992). Il principio si trova citato nel trattato di Maastricht, e all'interno del par. 2 dell'art. 191 del Trattato sul Funzionamento dell'Unione Europea.

amministrativa europea [44]. L'obbligo per gli Stati di tutelare la qualità della vita sorge così a prescindere dalla verifica della certezza scientifica sugli effetti prodotti dall'inquinamento sulla salute umana.

Oltre all'orientamento ormai consolidato della Corte di Giustizia [45], la stessa Corte Europea dei diritti dell'Uomo, nonostante abbia assunto posizioni in passato maggiormente prudenti, ha evidenziato l'inscindibile collegamento tra il principio precauzionale e il dovere delle pubbliche amministrazioni di informare correttamente i soggetti esposti ai possibili rischi ancora incerti, finanche ipotizzando, in caso di inadempimento, una responsabilità patrimoniale a carico dello Stato [46]. Nel giudizio relativo ai rifiuti tossici in Campania, la CEDU ha superato la prova della sussistenza del nesso causale tra i danni lamentati e le violazioni commesse proprio attraverso l'interpretazione espansiva del principio precauzionale [47]. La circostanza che, per determinati ricorrenti, non vi fosse certezza scientifica sugli effetti che l'inquinamento avrebbe potuto produrre sulla loro salute non è stata ritenuta una ragione sufficiente per negare l'esistenza di un dovere di protezione, per effetto della necessità di indagare, identificare e valutare la natura e il livello del rischio [48].

L'interpretazione espansiva dell'art. 8 ha dunque consentito di riconoscere la legittimazione ad agire dei singoli individui, anche di fronte all'assenza di una specifica dimostrazione della sussistenza del nesso causale tra il danno provocato e l'esposizione agli agenti inquinanti, che nel caso delle patologie cancerogene connesse ai rifiuti tossici è sempre particolarmente complessa. In altri termini, i giudici di Strasburgo si sono limitati ad accertare l'esistenza di un rischio serio di compromissione del diritto alla vita, a prescindere dagli effetti

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[44] Si trovano precedenti già a partire dalla sentenza *Artegodan*, Tribunale CE, Seconda Sezione ampliata, 26 novembre 2002, in cause riunite T-74/00 e altre, *Artegodan GmbH e aa.* c. *Commissione delle Comunità europee*, punto 184. Stessa posizione è costantemente ribadita anche dal giudice amministrativo italiano. Cfr. Cons. Stato, sez. IV, 31 maggio 2023, n. 537; Cons. Stato, sez. III, 3 ottobre 2019, n. 6655; Cons. Stato, sez. I, 18 dicembre 2019, n. 3182.

[45] La Corte di giustizia, sez. II, sentenza 21 giugno 2017, n. C-621/15, ha evidenziato che, in caso di incertezze scientifiche, il nesso di causalità può essere provato anche attraverso elementi indiziari empirici gravi, precisi, concordanti ed univoci, seppur non ancora scientificamente suffragati, che siano tali da potere fondare una presunzione, superabile soltanto con una prova contraria.

[46] Corte Edu, 5 dicembre 2013, ricorso n. 52809/09 in *Giornale di dir. amm.*, 6, 2014, 586.

[47] Coloro che avevano proposto il ricorso illustravano tipologie di danni differenti tra loro. Alcuni ricorrenti agivano per il riconoscimento dei danni subiti a seguito del decesso di parenti derivanti, a loro avviso, da patologie cancerogene prodotte per effetto dei rifiuti interrati, ma che in realtà non risiedevano nell'area che, secondo le disposizioni nazionali, era stata individuata come interessata dall'inquinamento ambientale.

[48] Cfr. Corte Edu, *Kurt c. Austria* [GC], n. 62903/15, 15 giugno 2021, § 159.

già determinati [49]. Questa impostazione espansiva ha consentito alla Corte di superare alcuni suoi precedenti orientamenti in cui, era stata piuttosto rigorosa nell'escludere il nesso causale quando fossero presenti dubbi sulla circostanza che le patologie riscontrate costituissero l'effetto dell'esposizione agli agenti inquinanti. La sua giurisprudenza oggi si attesta ad applicare il principio di precauzione anche nel contesto dell'indagine sulla legittimazione ad agire, ma non per quanto concerne le associazioni di rappresentanza.

Eppure, il concetto di precauzione possiede in sé l'intrinseca funzione di anticipazione della soglia di intervento dell'azione preventiva, che non può restare condizionata da un'inconfutabile prova scientifica degli effetti dannosi, ma deve essere condotta sulla base di attendibili valutazioni di semplice possibilità/probabilità del rischio, tenendo conto delle conoscenze scientifiche e tecniche attualmente disponibili. Il fondamento concettuale della logica precauzionale comporta che le scelte vadano effettuate prospettando sempre il peggior scenario possibile, quando occorra assumere decisioni in situazioni di incertezza.

Queste condizioni possono essere conosciute soltanto dalle associazioni maggiormente organizzate, in virtù dell'ampia capacità di risorse finanziarie, informazioni e personale da impiegare. Il che porta a evidenziare una chiara contraddizione tra l'applicazione espansiva del principio precauzionale, per quanto concerne la rilevanza della prova del nesso causale, e la scarsa considerazione della valenza dello stesso principio, in relazione alla ritenuta carenza di legittimazione attiva delle associazioni di tutela ambientale. La Corte Europea dei diritti dell'uomo, in controtendenza rispetto all'impostazione seguita dalla Corte di giustizia, ha così perduto un'occasione per consentire l'incremento del sindacato giurisdizionale sull'inerzia delle istituzioni nazionali, quando il problema riguardi il sistema di gestione dei rifiuti e le devastanti conseguenze sull'ambiente e sulla salute umana. Sarebbe auspicabile che nel tempo a venire la Corte ponesse in maggiore rilievo la circostanza che la tutela dell'ambiente in contesti territoriali particolarmente estesi è finalizzata anche a proteggere l'interesse delle generazioni future, e giungesse a elaborare un'interpretazione espansiva del concetto di cambiamento climatico. Si consentirebbe così una più ampia legittimazione processuale alle associazioni di categoria, ben al di là della complessa ricerca degli elementi che rendano possibile la sua qualificazione in termini di vittima di inquinamenti devastanti.

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[49] La Corte aveva escluso la necessità della dimostrazione di un preciso nesso causale anche in *Verein KlimaSeniorinnen Schweiz and Others c. Svizzera*, 2024, cit., par. 437, in base alla considerazione che l'art. 8 della Convenzione, oltre ai danni concreti alla salute e al benessere di una persona, protegge anche dal rischio che questi valori possano essere lesi, e implica che gli Stati sono obbligati a predisporre le misure idonee ad evitarli.

Abstract

The work focuses on the analysis of locus standi of the associations of environmental protection in Europe, in light of the different settings of the Court of Justice and the European Court of Human Rights. The author illustrates the main differences in contemporary jurisdictions, which in turn affect the supranational judiciary, with reference to the toxic waste in Campania. The work criticizes the distinction between climate and the environment carried out by the Court of Human Rights and the restriction on the locus standi of the environmental associations.

Keywords

Environmental Associations' locus standi, Aarhus Convention, Climate litigations and Environment, Court of Justice of UE, European Court of Human Rights.

L'INFORMAZIONE NEI CONTRATTI DI FINANZA SOSTENIBILE. OBBLIGHI E RESPONSABILITÀ A CONFRONTO TRA *COMMON LAW* E *CIVIL LAW*

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SOMMARIO: 1. I fattori *Environmental*, *Social*, *Governance*. – 2. L'informazione e la sua inesattezza nella *common law*. – 3. La verifica della *proximity* nella terra di mezzo tra *contract* e *tort*. – 4. L'informazione inesatta nel sistema giuridico italiano. – 5. L'*insider trading* nel sistema giuridico statunitense. – 6. *Segue*: nel sistema eurounionale e italiano. – 7. Considerazioni a margine.

1. *I fattori* Environmental*,* Social*,* Governance

Il percorso verso una finanza sostenibile, a oggi, sembra mostrare le prime concrete risposte, seppur provenienti da un mercato di nicchia che colloca prodotti e attiva meccanismi che mirano a favorire il processo di transizione. È in atto l'evoluzione di un mercato retto da principi di responsabilità e solidarietà che richiede al diritto di raccogliere la sfida di una nuova idea di economia, quella che riconosce, nella spontanea solidarietà della comunità verso il singolo e viceversa, un valore e una risorsa [1]. L'Agenda 2030 per lo Sviluppo Sostenibile, costituita da 17 Obiettivi (SDGs – *Sustainable Development Goals*), riafferma le libertà individuali funzionalizzandole alla promozione dei diritti sociali, mediante il coinvolgimento dell'intera rete di relazioni tra soggetti e beni [2], anche alla luce di quelle tra l'Unione Europea e il resto del mondo (artt.

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[1] Testualmente, D. Caldirola, *Stato, mercato e Terzo settore nel decreto legislativo n. 117/2017: per una nuova* governance *della solidarietà*, in *www.federalismi.it*, 2018, p. 35.

[2] Sul punto, R. Esposito, Communitas. *Origine e destino della comunità*, Einaudi, Torino, 2006, *passim*.

3, par. 5, e 21 ss. Trattato sull'Unione Europea (TUE) e artt. 205 ss. Trattato sul Funzionamento dell'Unione Europea (TFUE) [3]. L'Unione Europea ha, in tal senso, rimodulato gli obiettivi di benessere [4]. La realizzazione di uno sviluppo che tende alla sostenibilità richiede la (ri)formulazione delle condizioni per lo sviluppo di un'economia finanziaria basata su prodotti che, aumentando le transazioni e prevedendo i rischi, convergono verso un progressivo aumento dell'interesse del mercato nei confronti dei prodotti finanziari e verso l'incremento costante del benessere generale della società [5]. Si potenzia, così, la finanza mediante nuove modalità di investimento in grado di raggiungere obiettivi di carattere sociale e ambientale, con un rendimento economico per gli investitori [6] e uno sviluppo basato su una crescita economica equilibrata (art. 3, par. 3, TUE) [7]. La promozione di una finanza sostenibile è legata al dovere di informazione dell'intermediario che si risolve nell'esistenza di un'obbligazione di risultato, consistente nel dovere di fornire un flusso di informazioni chiare e comprensibili, idonee a rendere l'investitore consapevole della scelta di investimento [8].

Le criticità connesse alla realizzazione di tali obiettivi non sono riferibili soltanto al profilo della *disclosure* ma vanno ricercate nelle modalità mediante le quali avviene la contrattualizzazione dei fattori ESG (*Environmental*, *Social*,

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[3] Corte giust., 3 dicembre 1996, causa C-268/94, *Portogallo* c. *Cons.* Sull'argomento, v. F. Munari, *Azione esterna*, in *Enc. Treccani*, *Diritto on line*.

[4] M. Barcellona, *L'interventismo europeo e la sovranità del mercato: le discipline del contratto e i diritti fondamentali*, in *Europa dir. priv.*, 2011, 2, p. 342 ss.

[5] In tale direzione F. Di Ciommo, *Civiltà tecnologica, mercato ed insicurezza: la responsabilità del diritto*, in *Riv. crit. dir. priv.*, 2010, 4, p. 571.

[6] Così, L.M. Salamon, *New frontiers of philanthropy: A guide to the new tools and new actors that are reshaping global philanthropy and social investing*, Oxford University Press, Oxford, 2014.

[7] Il valore programmatico dell'art. 3 trova riscontro precettivo nell'art. 11 TFUE; quest'ultimo impone di integrare, nella definizione e nell'attuazione delle politiche e azioni dell'Unione, le esigenze connesse con la tutela dell'ambiente e con uno sviluppo integrato, il quale è favorito dall'emersione di talune tipologie contrattuali nella cui funzione si esprimono valori sociali e ambientali condivisi a livello globale. Il processo delineato dall'Unione Europea trova conferma anche nelle Carte costituzionali, le quali attestano una piena presa di coscienza della necessità di fissare confini inamovibili per l'autonomia individuale in ragione di interessi di carattere pubblicistico super individuali ed intergenerazionali (§ 20° *Grundgesetz*), incaricando lo Stato di tutelare le generazioni future. In Italia, la modifica degli artt. 9 e 41 Cost., avvenuta con la legge cost. 11 febbraio 2022, n. 1, ha evidenziato come il principio personalista abbia acquisito una dimensione integrata e relazionale. Sul rapporto tra principio dello sviluppo sostenibile e attività d'impresa, v. E. Caterini, *Sostenibilità e ordinamento civile*, *Per una riproposizione della questione sociale*, Edizioni Scientifiche italiane, Napoli, 2018, p. 96.

[8] G. Facci, *Operazioni finanziarie non adeguate e doveri di informazione dell'intermediario*, in *Resp. civ. prev.*, 2007, p. 1352 ss.

Governance) [9]. L'inserimento all'interno del vincolo contrattuale di tali fattori può ripercuotersi sia sulla fase genetica sia su quella funzionale del rapporto. La conformazione dell'autonomia negoziale [10] a tali obiettivi richiama i contratti di finanza sostenibile e la loro funzione [11]. La loro collocazione all'interno del settore finanziario consente di rilevare come i medesimi, sul fronte pubblicistico, assurgono a nuovo parametro di legittimità delle azioni politico-istituzionali; sul fronte privatistico concorrono nella valutazione di meritevolezza degli atti negoziali. Ciò incide sugli aspetti dei controlli e dei rimedi. In tale ambito, il quadro giuridico è conteso tra spinte a volte contrastanti che meritano di essere indagate al fine di verificare l'effettività dei medesimi all'interno di ciascun ordinamento. Non rileva soltanto la diffusione di strumenti finanziari sostenibili (si pensi ai green bond) o la creazione di modelli di finanza sostenibile e solidale (si pensi alle società benefit) ma diventa rilevante la correttezza dei comportamenti e l'esattezza delle informazioni che circolano nel mercato. È in tale direzione che si affrontano due questioni: la divulgazione di informazioni inesatte e il fenomeno dell'*insider trading*. Nel primo caso si tenta di evidenziare l'importanza che ricopre il ruolo, istituzionale o qualificato, del soggetto che fornisce l'informazione al fine di verificare l'innesco dell'obbligazione risarcitoria (contrattuale e/o extracontrattuale), nel secondo caso si evidenzia l'importanza dell'esistenza di regolamentazioni specifiche riguardo la responsabilità dell'*insider*.

2. *L'informazione e la sua inesattezza nella* common law

Tra la protezione dell'investitore e l'efficienza del mercato si staglia il profilo dell'informazione [12]. L'obiettivo di livellare il divario informativo si persegue uniformando le modalità di *disclosures* non soltanto tenendo conto dell'incidenza negativa sul valore dell'investimento all'avverarsi di un rischio ESG ma anche in relazione agli effetti che la scelta dell'investimento potrebbe avere sull'ambiente e sulla società.

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[9] Sul punto, A. Perfetti, *Gli strumenti normativi e finanziari della politica di coesione dell'Unione europea tesi alla valorizzazione della dimensione ambientale*, in *DPCE online*, 2019, p. 1017 ss.; M. Cafagno, *Analisi economica del diritto e ambiente, tra metanarrazioni e pragmatismo*, in *Il diritto dell'economia*, 2019, p. 159 ss.

[10] M. Pennasilico, *Sviluppo sostenibile, legalità costituzionale e analisi «ecologica» del contratto*, in *Persona e mercato*, 2015, p. 37.

[11] Per un'analisi degli effetti prodotti, si veda AA.VV., *Evaluating the regulatory approach to open banking in Europe: an empirical study*, in *Financial Law Review*, 2024, p. 58.

[12] M. Maugeri, *Informazione non finanziaria e interesse sociale*, in *Rivista delle società* 2019, p. 992.

La violazione degli obblighi informativi conduce il discorso sul versante delle categorie contrattuali e/o extracontrattuali.

Lo studio delle fattispecie concrete, per il tramite del diritto comparato quale metodologia che ha riguardo «essenzialmente alla dimensione dell'effettività del diritto nella società» [13], ci consente di comprendere ciò che il «diritto *fa*» [14] e non semplicemente ciò che il diritto è. La comparazione non è circoscritta agli aspetti più evidenti dei termini da comparare né incentrata su uno degli aspetti che compongono ciascun elemento giuridico [15]; essa individua le relazioni esistenti fra di loro e valuta l'influenza esercitata dagli elementi determinanti [16].

La scelta di adottare come oggetto di questo studio il modello italiano da una parte (non mancando di considerare il diritto europeo) e quello inglese e statunitense dall'altro, risponde alla fiduciosa predizione che tali sistemi, nell'approntare modelli di protezione, per certi aspetti diversi, mostrano come le peculiarità fattuali della singola fattispecie concorrono a stabilire il configurarsi di ipotesi diverse di responsabilità.

Nel diritto inglese la *misrepresentation* rappresenta una nozione alquanto elaborata. Essa viene in rilievo a volte come semplice affermazione (*statement of fact*) riguardante l'oggetto del contratto, a volte come assicurazione (*assurance*) dell'esistenza di alcune qualità, altre volte, ancora, come assunzione di una garanzia (*warrant*) da parte del *representor* al fine di indurre il *representee*, raggirato dalla falsa dichiarazione, alla conclusione dell'affare. Essa combina particelle giuridiche che nella tradizione di *civil law* sono concepite, unite o dissociate in maniera diversa. La *misrepresentation* è un complesso sistema rimediale [17] che riconosce alla vittima la possibilità di far valere l'inesattezza di una dichiarazione mediante strumenti talvolta contrattuali talaltra extracontrattuali.

Il diritto in materia di *misrepresentation* è una commistione di *common law*,

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[13] Testualmente, M. Graziadei, *Un compasso allargato. La comparazione giuridica nel mondo attuale e le questioni di metodo*, in *Diritto pubblico comparato ed europeo*, 2024, p. 28.

[14] M. Graziadei, *op. ult. cit.*

[15] È tale equivalenza che permette di identificare gli elementi comuni degli oggetti posti a confronto e di rilevarne la comparabilità. Quest'ultima si prospetta su due piani diversi: il primo riguarda i termini da comparare ovvero gli elementi o gli oggetti che vengono confrontati e che appartengono a ordinamenti diversi; il secondo è quello degli ordinamenti ai quali appartengono tali elementi. V., L.J. Costantinesco, *La méthode compartive*, in *Traité de Droit Comparé*, Librairie Générale de Droit et de Jurisprudence, Parigi, 1974. Sulla questione della comparabilità, v. L. Saporito, *Vizi del consenso e contratto*, ESI, Napoli, 2001, p. 17 ss.

[16] Propone una attenta distinzione tra elementi fungibili determinanti, L.J. Costantinesco, *Introduzione al diritto comparato*, in A. Procida Mirabelli Di Lauro (a cura di), *Sistemi giuridici comparati*, Giappichelli, Torino, 1996, p. 224.

[17] L. Saporito, *Vizi del consenso e contratto*, cit., p. 107 ss.

equity e statute. Quest'ultimo è costituito dal *Misrepresentation Act* del 1967 che ha mantenuto inalterati gli elementi costitutivi e comuni a tutte le ipotesi di *misrepresentation* così come ereditato dalle corti, prevedendo una disciplina lacunosa e in alcuni casi ambigua.

A livello di *statute* manca una puntuale definizione di *misrepresentation.* È stata l'opera della dottrina e della giurisprudenza a discorrerne ogni qualvolta il destinatario, *representee* concluda un affare (*inducement*) a causa del non colpevole affidamento (*reasonabile reliance*) creato nella sua mente dalla falsa dichiarazione della controparte, il *representor*.

Anche se le origini della responsabilità per *fraud* risalgono al XIII secolo, la possibilità di ottenere un rimedio a causa di una *negligent misrepresentation* risale a tempi più recenti.

Le azioni in *deceit* riguardavano situazioni ben precise. Inizialmente, le parti erano attratte dal *privat of contract*; in seguito all'eliminazione di tale elemento il rimedio è stato assorbito nella sfera dei *torts*, fino a divenire una dichiarazione volutamente menzognera riguardante una situazione di fatto nella quale il destinatario fa affidamento, con conseguente danno per quest'ultimo.

La questione del rapporto tra *deceit* e *negligent misrepresentation* è stata affrontata per la prima volta nel 1964. Il *leading case Headley Byrne v. Heller* [18] ha sancito l'obbligo del risarcimento dei danni se, anche in assenza di frode, il *representor*, per effetto di una inesatta dichiarazione, causa un pregiudizio al destinatario.

In tale occasione, la Corte ha affermato che la responsabilità di tipo delittuale trova origine nella violazione di una relazione *equivalent to contract.* La mancanza di un vincolo contrattuale non ostacola la configurazione del *tort of negligent misstatement* quando tra le parti sussiste una *special relationship*.

Nel caso di specie la *House of Lords* ha considerato non responsabile la banca alla quale l'agente pubblicitario *Hedley* aveva chiesto, per il tramite di una società finanziaria, informazioni sulla situazione economica della cliente. L'istituto di credito, *Heller*, ha fornito, in *confidence and without liability*, dichiarazioni inesatte, le quali non hanno consentito di prevedere un obbligo risarcitorio, a causa della mancanza di un *duty of care*, in capo a *Heller* [19].

Le argomentazioni contenute nel caso *Hedley* hanno ripreso quanto contenuto nel caso *Nocton v. Ashburton* [20]. In tale occasione i giudici riconoscono alla vittima la possibilità di beneficiare dei *dameges* tutte le volte nelle quali, pur mancando una relazione contrattuale, sia possibile individuare tra le parti una *special relationship*.

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[18] AC 465 [1964].

[19] L. Saporito, *Vizi del consenso e contratto*, cit., p. 108.

[20] A.C. 932 [1914].

Affinché possa essere ravvisata una *special relationship* è necessario che sussistano tre condizioni: il nesso di *proximity* tra i contraenti, la fondatezza dell'imposizione del dovere e la prevedibilità del ragionevole affidamento del destinatario [21].

Nel successivo caso *Smith v Eric* [22] si esclude che il *representor* debba assumere la responsabilità di ciò che dichiara e che il dovere di fornire informazioni esatte sia rivolto esclusivamente a soggetti dotati di *professional skin*. In tal guisa, i giudici conferiscono al dovere di diligenza un'eccezione più ristretta rispetto al concetto di *neighbourness* fornito dal caso *Donoghue v. Stevenson*, tracciando, con timore, la possibilità di servirsi del risarcimento per danni squisitamente economici.

Seguendo l'evoluzione giurisprudenziale in un certo momento le corti, per 'paura' di produrre una eccessiva espansione della responsabilità, hanno tentato di bilanciare la decisione contenuta nel caso *Hedley* con una rigida accezione di *reliance*.

L'importanza del caso *Hedley* emerge anche sotto il profilo della natura del danno risarcibile. La *House of Lords* puntualizza che il pregiudizio può derivare sia da atti sia da parole, e senza dir nulla sul punto, lascia intravedere la possibilità di far valere *a pure economic losses*. È la relazione di *proximity* rinvenibile tra attore e convenuto che consente di fondare il risarcimento sul ragionevole affidamento della parte.

Con riferimento al sistema rimediale, la *Section* 2(1) del *Misrepresentation Act* prevede un'ipotesi di responsabilità i cui contorni sembrano precari.

Se un contratto è concluso in seguito a una falsa dichiarazione e se la vittima subisce un pregiudizio, il *representor* è tenuto a risarcire il danno se ha reso una falsa dichiarazione, seppur non intenzionale. Tale obbligo viene meno se prova che al momento della conclusione dell'accordo credeva, ragionevolmente, nella verità delle proprie affermazioni [23].

L'incompleta e, forse equivocabile formulazione della norma, può generare dubbi interpretativi in merito alle questioni relative alla natura contrattuale o delittuale della responsabilità. Qui il legislatore ha omesso di considerare ciò che era stato formulato, qualche anno prima, nella *Law Reform Commitee* in seguito al caso *Hedley*, vale a dire il riconoscimento del risarcimento dei danni causati da una falsa, colpevole affermazione, superando in tal modo la visione

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[21] Non si identifica nessuna responsabilità quando il danno è frutto di un cattivo consiglio fornito nel contesto di un rapporto amichevole seppur il soggetto da cui esso promana sia un professionista.

[22] A.C. 381, [1990].

[23] L. Saporito, *Vizi del consenso e contratto*, cit., p. 151.

che ravvisava una *pecuniary liability* soltanto in caso di *deceit* (frode) o in caso di inadempimento di una clausola contrattuale [24].

3. *La verifica della* proximity *nella terra di mezzo tra* contract *e* tort

La delineazione degli spazi di operatività della responsabilità contrattuale e della responsabilità extracontrattuale nell'esperienza della *common law* è stata rinvenuta mediante l'elaborazione del concetto di *special relationship* [25].

Si tratta di verificare di volta in volta la possibilità di ravvisare una relazione basata su una *proximity* tra le parti e definire la qualificazione professionale del soggetto che somministra l'informazione, capace di attribuire rilevanza all'affidamento che sulla veridicità dell'informazione ha riposto il destinatario della stessa [26].

Una situazione di affidamento che vale a giustificare la fiducia nella regolarità del comportamento altrui.

Interessante è il caso *BNL v. Playboy Club London* deciso dalla Corte Suprema del Regno Unito nel 2018. Il fatto è il seguente: nel 2010 un giocatore d'azzardo libanese, il sig. *Barakat* si rivolge al casinò *Playboy club* di Londra chiedendo l'apertura di una *check cashing facility* fino a 800.000 sterline per poter giocare. Come risulta da prassi, il casinò richiede al sig. *Barakat* di fornire una garanzia bancaria fino al doppio della somma richiesta. Il casinò per motivi di tutela della *privacy* si serve di una società esterna, la *Burlington*, per ottenere tali informazioni. Il sig. *Barakat* indica come referente la BNL, filiale di Reggio Emilia. La società esterna, nel silenzio sul nome del casinò, si rivolge alla BNL la quale riferisce che il cliente è solvibile fino a 1.600.000 di sterline. Il casinò, confidando nell'informazione ricevuta dalla *Burlington*, procede con l'apertura di una linea di credito di 1.250.000 di sterline. Il sig. *Barakat* utilizza tale credito servendosi di due assegni per acquistare *fiches*. Gioca e vince 400.000 sterline che riscuote prima di tornare in Libano.

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[24] L. Saporito, *op. ult. cit.*, p. 153.

[25] Cfr. *Chiarella v United States*, 445 U.S. 222, 230 [1980].

[26] C. Scognamiglio, *La responsabilità da informazioni inesatte*, in *I problemi dell'informazione nel diritto civile, oggi*, in *I problemi dell'informazione nel diritto civile, oggi. Studi in onore di Vincenzo Cuffaro*, Roma Tre Press, Roma, 2022, p. 120. In tema di veridicità dell'informazione con riferimento alla promozione di uno sviluppo sostenibile, vedi per la normativa europea, Regolamento (UE) 2020/852 del Parlamento europeo e del Consiglio del 18 giugno 2020 relativo all'istituzione di un quadro che favorisce gli investimenti sostenibili e recante modifica del regolamento (UE) 2019/2088. «Al fine di assicurare informazioni chiare e non fuorvianti per gli investitori, i partecipanti ai mercati finanziari dovrebbero spiegare chiaramente la base delle loro conclusioni e i motivi per cui sono tenuti a effettuare tali valutazioni e stime complementari ai fini dell'informativa destinata agli investitori finali» (Considerando 21).

Nel momento dell'incasso degli assegni da parte del casinò, questi vengono respinti, così il *Playboy Club* fa causa alla BNL in quanto le informazioni da essa fornite sono risultate inesatte. Infatti, nel momento nel quale sono state chieste, il sig. *Barakat* non disponeva di nessun conto presso la BNL. Alla luce di ciò, il casinò chiede il risarcimento del danno derivatogli dall'aver ricevuto informazioni inesatte in merito alla solvibilità del sig. *Barakat* e il caso giunge dinanzi la Suprema Corte.

È dalla valutazione del caso concreto che si stabilisce se nella fattispecie specifica la *proximity* faccia nascere un rapporto obbligatorio e una eventuale responsabilità. La responsabilità da informazioni inesatte che incombe su di un soggetto che non è obbligato a fornire le informazioni a un altro soggetto, nei confronti del quale non esiste nessun vincolo contrattuale, genera un problema di fondo: la collocazione della responsabilità tra la categoria del *contract* e la categoria del *tort*.

Dall'analisi degli elementi di fatto emerge che affinché sorga la responsabilità non è necessaria la presenza di un rapporto diretto tra le parti né che l'informazione sia indirizzata al soggetto che subisce il danno ma che dai fatti risulti una relazione che faccia sorgere il *duty of care*.

Come già evidenziato nel caso *Hedley*, nonostante mancasse un accordo tra le parti, sulla banca gravava un dovere nei confronti del destinatario delle informazioni, dalla cui inosservanza nasce una responsabilità. Nel caso di specie, però, la banca non è tenuta a risarcire il destinatario in quanto nella lettera di referenze aveva inserito un *disclaimer* «without responsability».

Tale *disclaimer* non impedisce il sorgere della *special relatioship*. La responsabilità sorge per il sol fatto che chi ha fornito l'informazione inesatta sapeva, o avrebbe dovuto sapere, lo scopo di tale informazione e l'affidamento che il destinatario ne avrebbe fatto.

La circostanza dell'esistenza del *disclaimer* e dell'affidamento da parte del destinatario dell'informazione ci consentono di operare un confronto con l'ordinamento nazionale che si atteggia, come si vedrà, nella linea di demarcazione tra responsabilità che sorge dall'affidamento e responsabilità che sorge da contratto. Sono entrambe ipotesi che originano responsabilità contrattuale ma non si può pensare a un contratto nel quale una parte, in maniera unilaterale, declini ogni responsabilità in caso di inadempimento.

Situazione diversa in presenza di *proximity*: il soggetto che fornisce l'informazione può non assumersi nessuna responsabilità in quanto, in assenza di vincolo contrattuale, non è tenuto a fornirla.

Nel caso *BNL v. Playboy Club London*, gli elementi di fatto della fattispecie inducono ad affermare che il soggetto che ha fornito le informazioni non poteva sapere lo scopo alle quali le medesime fossero destinate. La *Burlington* non aveva precisato nulla alla BNL, dunque, non sorge una relazione tra le parti né tanto meno un *duty of care* della *Burlington* nei confronti della BNL. In tale situazione, il dovere di diligenza sussiste soltanto nei confronti del soggetto appellante, in caso contrario si potrebbe giungere a sostenere l'esistenza di una responsabilità *omnibus*, soluzione adottabile soltanto nel caso di informazioni pubbliche. Nel caso in esame la relazione esiste tra la *Burlington* e la BNL. Anche se la BNL ha fornito informazioni inesatte a prescindere da chi le ha chieste, non basta a far sorgere responsabilità verso il casinò che, invece, è terzo rispetto alla vicenda principale.

Gli elementi di fatto descritti delineano, in maniera nitida, la fattispecie della responsabilità contrattuale. Ciò che rileva è la *relationship* tra le parti. Si tratta di soggetti non estranei legati da una *relationship equivalent to contract* che colloca la fattispecie in quell'aria di mezzo tra *contract* e *tort*. È stata la giurisprudenza in materia di *misstatement* a fornire la soluzione.

Visto che la *relationship* rappresenta il nucleo centrale della *liability of misstatement* si può affermare che la questione non riguarda la distinzione tra *contract* e *tort.* Diventa rilevante la verifica della *relationship* in termini di *proximity* per stabilire la nascita o meno del dovere di diligenza. In merito alla collocazione di questa responsabilità 'in quella terra di mezzo' non sono mancate voci che hanno considerato la *relationship equivalent to contract* diversa dal contratto perché manca la *consideration* [27].

Quanto detto concorre a descrivere l'istituto della responsabilità contrattuale che deriva dalla violazione di un obbligo volontariamente assunto e dalla violazione di un obbligo giuridico preesistente [28]. Tale risultato dogmatico è l'esito del precedente riconoscimento dell'esistenza, all'interno del rapporto obbligatorio, di obblighi di protezione, accessori e non autonomi rispetto a quello principale di prestazione, che trovano la loro fonte nella *good faith* e non nell'accordo delle parti, la cui violazione genera responsabilità contrattuale [29].

Se è vero che «la responsabilità extracontrattuale è […] collegata alla

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[27] Sul punto, G. Treitel, *The law of contract*, Westlaw Book, Londra, 2000, p. 67 ss. Offre una puntuale analisi in merito F. Castronovo, *La responsabilità da false informazioni comparata*: special relationship *nel diritto anglosassone*, species *della responsabilitá da contatto sociale nel nostro sistema*, in *Banca, borsa e titoli di credito*, 2019, p. 319 ss.

[28] A. Albanese, *La lunga marcia della responsabilità precontrattuale: dalla* culpa in contrahendo *alla violazione di obblighi di protezione*, in *Europa e diritto privato*, 2017, p. 1132. L'a. afferma che «tra responsabilità contrattuale ed extracontrattuale non si basa sulla sussistenza o meno di un contratto, ma sulla violazione di un obbligo che, indipendentemente da una prestazione, si inscriva in una relazione giuridicamente vincolante tra due soggetti.

[29] Per un'analisi più dettagliata, si veda L. Mengoni, *Ancora in tema di pagamento al* falsus procurator, in *Rivista di diritto civile*, 1953, II, p. 118. L'argomento è stato affrontato con rigore da F. Benatti, *Osservazioni in tema di «doveri di protezione»*, in *Riv. trim dir. proc. civ*., 1960, p. 1342.

violazione di doveri assoluti che sorgono al di fuori di una relazione specifica tra soggetti» [30], va da sé che le pronunce richiamate non possono rientrarvi in quanto si concretizzano in una relazione qualificata tra due soggetti.

4. *L'informazione inesatta nel sistema giuridico italiano*

Nell'ordinamento giuridico italiano le [31] responsabilità da informazioni inesatte richiamano l'istituto della responsabilità precontrattuale [32] delineando tra le parti del rapporto una relazione di correttezza dell'una sulla condotta dell'altro. È il legislatore a stabilirlo nell'art. 1337 c.c. richiamando il principio della buona fede [33] nella fase delle trattative e della formazione del contratto, con la conseguenza che gli obblighi di correttezza di entrambe le parti, di cui discorre l'art. 1175 c.c., sorgono già in questa fase al fine di perseguire un interesse di protezione delle parti.

L'art. 1337 comprende non soltanto qualsiasi «attività collegata con un futuro contratto o con un affidamento precontrattuale» ma anche qualsiasi «condotta dell'agente volta ad incidere su un consenso contrattuale della vittima, o su una condotta della vittima rilevante ai fini della conclusione di un contratto, o su una rappresentazione con cui la vittima si prefigura la conclusione di un contratto» [34].

La responsabilità da informazioni inesatte, caratterizzata dall'assenza di una regolamentazione generale delle varie ipotesi ad essa riconducibili, non ha consentito una risoluzione definitiva delle questioni che l'esperienza concreta presenta [35].

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[30] Così, L. Mengoni, *Sulla natura della responsabilità precontrattuale*, in *Riv. dir. comm.*, 1956, p. 360.

[31] La declinazione al plurale appare opportuna per la varietà delle questioni che il tema mostra. Sul punto, per un'analisi puntuale, v. C. Scognamiglio, *La responsabilità da informazioni inesatte*, cit., p. 115.

[32] V. Cuffaro, *Responsabilità precontrattuale*, in *Enc. dir.*, XXIX, Giuffrè, Milano, 1988, p. 1267.

[33] V. Cuffaro, *op. ult. cit.* L'a. afferma che «la disposizione dell'art. 1337 c.c. appare un sicuro modello per valutare quelle relazioni e quei rapporti che l'attuale sistema economico vede moltiplicarsi prima ed in vista della effettiva stipulazione dei contratti, mentre la peculiare elasticità della norma fornisce uno strumento duttile per la considerazione dei nuovi accadimenti che la realtà dei fatti propone».

[34] R. Sacco, *Il contratto*, in *Tratt. dir. civ.*, diretto da R. Sacco e G. De Nova, III ed., Tomo II, Giappichelli, Torino, 2004, p. 438.

[35] In tal senso, F.D. Busnelli, *Itinerari europei nella 'terra di nessuno tra contratto e fatto illecito': la responsabilità da informazioni inesatte*, in *Contratto e impresa*, 1991, p. 539. L'a. ha definito un insuccesso esemplare, nel quadro di un tentativo di tipizzazione della responsabilità da informazioni inesatte, quello del modello normativo contenuto nel § 676 del BGB, riprodotto, successivamente, dal codice civile portoghese.

È la diversificazione delle ipotesi a rendere non percorribile una impostazione della responsabilità da informazioni inesatte senza plasmarla sulle peculiarità del caso concreto, richiamando il contributo dell'interprete. Egli dovrà verificare se è identificabile un rapporto avente a oggetto, da un lato l'obbligo di comunicazione delle informazioni, dall'altro il diritto di acquisizione delle stesse, ovvero spingersi fino al punto di identificare la nascita di una obbligazione risarcitoria del danno causato dall'informazione inesatta, portandosi, così, sul terreno della responsabilità extracontrattuale.

Anche nell'ordinamento italiano, dottrina e giurisprudenza si sono mosse in quella terra di mezzo che si staglia fra contratto e fatto illecito, superando la visione che in passato aveva ricondotto la fattispecie all'istituto della responsabilità civile, attestandosi nella posizione che riconduce la fattispecie nell'alveo della responsabilità contrattuale [36]. Il contatto sociale [37] è fonte di obbligazione, pur in assenza di contratto [38]. Quest'ultima considerazione consente di individuare un'analogia con l'ordinamento inglese. È necessario indentificare il ruolo (istituzionale o qualificato) che ricopre il soggetto che fornisce l'informazione. Sarà questo ad attribuire al contatto sociale la rilevanza che, in ogni fattispecie concreta, decreterà il segno della relativa responsabilità; saranno gli elementi di fatto a stabilire l'esistenza di un contatto sociale in quella specifica fattispecie.

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[36] In senso contrario, v. Corte Cass., 14 luglio 2009, n. 16382, in *Vita not.*, 2009, p. 1446. La Corte, in un caso riguardante la vendita di un immobile, riconosce in capo al mandatario incaricato di promuovere tale vendita, un obbligo di diligenza professionale anche nei confronti dei terzi; pertanto, nel caso nel quale egli fornisce informazioni inesatte ingenera nel terzo un affidamento, che è fonte di responsabilità, qualificandola, se pur in presenza di una relazione, come responsabilità extracontrattuale.

[37] V. Molaschi, *Responsabilità extracontrattuale, responsabilità precontrattuale e responsabilità da contatto: la disgregazione dei modelli di responsabilità della pubblica amministrazione*, in *Foro it.*, 2002, III, c. 4 ss. Cfr., veda L. Lambo, *Obblighi di protezione*, Cedam, Padova, 2007, p. 385.

[38] V. Corte Cass., 22 gennaio 1999, n. 589, in *Corriere giuridico*, 1999, p. 446 ss., con nota di A. Di Majo, *L'obbligazione senza prestazione approda in Cassazione*. La pronuncia riguarda la responsabilità del medico dipendente di una struttura sanitaria pubblica o privata per i danni cagionati al paziente dall'inesatto adempimento della prestazione. Nel caso di specie, la Corte, dopo aver escluso l'applicazione del contratto con effetti di protezione per terzi, sembra identificare la figura dell'obbligazione senza prestazione con il concetto di contatto sociale; in tal guisa, accertata l'esistenza di tale elemento, sia possibile giustificare l'applicazione delle regole relative alla responsabilità del debitore mediante la clausola generale di chiusura dell'art. 1173. Secondo la Suprema Corte si configurerebbe una responsabilità contrattuale nascente da un'obbligazione senza prestazione; poiché sul medico gravano obblighi di cura, il vincolo con il paziente esiste, nonostante non si configuri un obbligo di prestazione, dunque, la sua violazione configura la *culpa in non facendo*, la quale dà origine a responsabilità contrattuale. Sul punto, L. Lambo, *Obblighi di protezione*, cit., p. 355.

Se in passato [39] dottrina [40] e giurisprudenza [41] hanno ascritto tale fattispecie in una 'terra di mezzo' tra contratto e fatto illecito, cercando di incasellare la fattispecie della responsabilità da informazioni inesatte nell'alveo dell'art. 2043 c.c., sviluppi più recenti hanno ritenuto idoneo collocare la fattispecie nella categoria della responsabilità contrattuale.

Sulla questione dell'obbligazione senza obbligo di prestazione la giurisprudenza nazionale [42] ha introdotto[43], la figura della responsabilità da contatto sociale qualificato. È una fattispecie equiparabile alla responsabilità contrattuale, dal momento che nel contatto, il quale si verifica prima della delineazione della fattispecie di danno, si ravvisa il presupposto, di per sé sufficiente, a giustificare l'applicazione della disciplina prevista in materia di rapporto obbligatorio [44].

Assodato che il contatto sociale qualificato è fonte di obbligazione, va da sé che anche il rapporto che si instaura tra il soggetto professionale che fornisce informazioni, sia pur in assenza di un precedente accordo e il soggetto che le riceve, può essere ricondotto entro tale categoria.

Dopo aver ripercorso gli sviluppi giurisprudenziali in materia, più di recente, in tema di contatto sociale qualificato, si richiama una pronuncia delle Sezioni Unite [45].

La Suprema Corte, partendo dal definire lo *status* della pubblica amministrazione come soggetto obbligato a osservare la legge in quanto fonte di legittimità dei propri atti, giunge a intendere il contatto o rapporto tra il privato e la pubblica amministrazione come un fatto idoneo a produrre un'obbligazione. Ciò conformemente all'ordinamento giuridico (art. 1173 c.c.) da cui derivano, a carico

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[39] F.D. Busnelli, *Itinerari europei nella «terra di nessuno tra contratto e fatto illecito»: la responsabilità da informazioni inesatte*, in *Contratto e impresa,* 1991, p. 563. L'a. afferma che «la responsabilità da informazioni inesatte costituisca il nucleo centrale della responsabilità da affidamento e la riconduce entro l'alveo della responsabilità extracontrattuale, nella quale rientrano i danni meramente patrimoniali, escludendo così qualsiasi dilatazione del campo di applicazione della disciplina della responsabilità contrattuale».

[40] S. Rodotà, *Le fonti di integrazione del contratto*, Giuffrè, Milano, 1969, p. 159 ss.; U. Natoli, *L'attuazione del rapporto obbligatorio*, in *Tratt. di dir. civ. e comm.*, diretto da Cicu-Messineo, XVI, 1, Giuffrè, Milano, 1984, p. 24 ss.

[41] Vedi, Corte Cass., 21 dicembre 1978, n. 6141; Corte Cass., 24 marzo 1979, n. 1716; Corte Cass., 13 marzo 1998, n. 2750.

[42] Cass., sez. III, 22 novembre 1993, n. 11503, in *Giurisprudenza italiana*, 1994, I, 1, c. 557 s.

[43] Cass., 10 gennaio 2003, n. 157, in *Foro italiano*, 2003, I, c. 78.

[44] S. Morelli, *La responsabilità per atti illegittimi della pubblica amministrazione secondo il giudice amministrativo: aquiliana, precontrattuale o contrattuale da contatto sociale*, in *Giustizia civile*, 2002, I, p. 2685.

[45] Corte Cass., ord. 28 aprile 2020 n. 826, in *Nuova giurisprudenza civile commentata*, 2020, I, 1074 ss.

delle parti, non obblighi di prestazione ma obblighi reciproci di buona fede, di protezione e di informazione (artt. 1175, 1176, 1337 c.c.). In tal guisa, partendo dalla responsabilità precontrattuale, si perviene alla conclusione che «la responsabilità che grava sulla pubblica amministrazione per il danno prodotto al privato a causa della violazione dell'affidamento dal medesimo riposto nella correttezza dell'azione amministrativa non sorge in assenza di rapporto, come la responsabilità aquiliana, ma sorge da un rapporto tra soggetti – la pubblica amministrazione ed il privato che con questa sia entrato in relazione – che nasce prima ed a prescindere dal danno e nel cui ambito il privato non può non fare affidamento nella correttezza della pubblica amministrazione» [46].

Senza voler incappare nel rischio di pervenire a una definizione troppo ampia della categoria della responsabilità da violazione di un obbligo di protezione, è utile recuperarne gli aspetti di maggiore interesse sia sul piano metodologico sia su quello rimediale, al fine di consentire di approntare una tutela effettiva alle singole fattispecie concrete, già dotate di un primo livello di protezione offerto dall'ordinamento giuridico e «meritevoli di una tutela più penetrante» [47].

5. *L'*insider trading *nel sistema giuridico statunitense*

Un aspetto correlato agli obblighi informativi di cui discorre anche la normativa europea in merito all'attuazione delle politiche del *Green Deal*, è quello delle asimmetrie informative [48] e dell'*insider trading*, che trova la sua origine nell'esperienza statunitense [49].

È la sua origine a giustificare la scelta dello studio del sistema statunitense nell'area della famiglia della *common law.*

La mancanza di obblighi di *disclosure* nei rapporti commerciali, vale a dire di obblighi di rivelare informazioni rilevanti relative a tali operazioni, affiorò per la prima volta nel 1817.

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[46] Così, § 33.2, ord. 28 aprile 2020 n. 826.

[47] E. Vincenti, *La responsabilità da contatto sociale nella giurisprudenza di legittimità*, in *Responsabilità civile e previdenza*, 2016, p. 2067.

[48] G.A. Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism,* in *The Quarterly Journal of Economics*, 1970, 84, p. 488.

[49] Lo sviluppo delle teorie anti-*insider trading* prende avvio negli U.S.A. a partire dal 1910 con un articolo di Wilgus. L'a. facendo riferimento ai concetti di *fairness* e di moralità affermava l'idea che la pratica dell'*insider trading* fosse *moraly offensive*. V. H.L. Wilgus, *Purchase of Shares of Corporation by a Director from a Shareholder*, in *Michigan Law Review*, 1910, 4, p. 267 ss. Cfr., G.H. Manne, *Insider trading and the stock market*, New York Press, New York, 1966, *passim*.

L'esigenza degli obblighi di *disclosure* nei rapporti commerciali emerse nel caso *Laidlaw v. Organ* [50], deciso dalla Corte Suprema degli Stati Uniti d'America. Il *Chief Justice* John Marshall affermò che l'utilizzo di informazioni che ingannano la controparte può rendere un contratto *voidable* per motivi di equità, ma dichiarò che «[t]he court is of opinion that he was not bound to communicate it». In tal modo venne formalmente riconosciuta l'insussistenza dell'obbligo, per i contraenti, di rivelare informazioni di propria conoscenza capaci di influire sulle condizioni del negozio o sulla stessa volontà di contrarre dell'altra parte. Dato che *each party must take care not to say or do anything tending to impose upon the other*, la causa in questione venne rinviata alla Corte distrettuale della Louisiana con le indicazioni di procedere mediante la convocazione della giuria. Il convenuto, nell'acquistare grandi quantità di tabacco, aveva taciuto al venditore l'avvenuta stipula, non nota alla controparte, del Trattato di Ghent tra Stati Uniti e Inghilterra che, stabilendo la fine della guerra del 1812, avrebbe comportato un aumento dei prezzi del tabacco.

Le ipotesi di truffa, nell'esperienza statunitense, sono sanzionate mediante gli istituti della *fraud* e della *misrepresentation*; dichiarazione, quest'ultima, non rispondente a verità resa da una delle parti del contratto per indurre l'altra a sottoscriverlo. Se tale falsa affermazione risulta non intenzionale si ha la *rescission* del contratto, nel caso essa sia dolosa delinea un *tort,* sanzionabile anche con la condanna al risarcimento del danno (*fraudolent misrepresentation*).

Nel 1909 la Corte Suprema nel caso *Strong v. Repide* [51] affermò che gli «obblighi di comunicare informazioni rilevanti nelle contrattazioni con i soci po[ssono] sorgere in capo al *management* al ricorrere di particolari circostanze». È nel 1933 che intervenne il legislatore il quale emanò il *Securities Act* e nel 1934 il *Securities Exchange Act*. Essi riconoscono la presenza di obblighi informativi nelle negoziazioni finanziarie ma soltanto nel 1942 la *Securities and Exchange Commission* (SEC) emana la *Rule* 10(b), norma a tutela del fenomeno dell'*insider trading*.

L'*insider trading*, o abuso di informazioni privilegiate, costituisce una pratica di *market abuse* e si concretizza nella realizzazione di operazioni di acquisto o vendita di strumenti finanziari realizzate da soggetti, c.d. *insider*, i quali posseggono informazioni privilegiate in grado di influire, se divulgate, sul valore dei titoli oggetto delle negoziazioni stesse.

Sebbene la *Securities and Exchange Commission* avesse affrontato la questione più volte, l'*opinion* che ha stabilito l'*an* del sorgere di un obbligo di divulgazione a norma della *Section* 10(b) è stata formalizzata dalla Corte Suprema nel 1980 nel caso *Chiarella v. United States*.

[50] *Peter Laidlaw and Company v Hector M. Organ*, 15 U. S. 178 [1817].

[51] *Strong v. Repide*, 213 U.S. 419 [1909].

A più di quarant'anni da tale pronuncia è ancora ben chiaro che «[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5 and Section 10(b) and, thus, does not constitute fraud». Le parti hanno il diritto «to keep silent (about good news as well as bad news) unless positive law creates a duty to disclose […] even if it is information a reasonable investor would very much like to know» [52].

Con i *Securities Acts* del 1933 e 1934 la SEC crea un diritto federale dei valori mobiliari fondato su due tipi di regole. Il primo fondato sulla *mandatory disclosure* che prevede obblighi di trasparenza delle offerte di valori mobiliari; il secondo riguarda il divieto di frode contenuto nella *Rule* 10(b)-5.

Secondo la *Rule* 10(b)-5 l'operatore che detiene informazioni rilevanti e riservate è tenuto a renderle pubbliche. Talvolta questo non gli è possibile; nel caso non possa o non voglia divulgarle deve astenersi dall'utilizzarle. Si tratta di una *Rule* dotata di flessibilità applicativa. È possibile ampliare il suo ambito di applicazione fino comprendere nel *duty of disclose or abstain* [53] tutti i soggetti che si trovano in una *special relationship with a company and privy to its internal affair*.

A norma della *Rule* 10(b)-5, che teorizza la *misappropriation*, il soggetto è responsabile per frode ogni volta che utilizza un'informazione privilegiata violando l'obbligo verso la fonte dell'informazione e, dunque, ogni volta che si appropria dell'informazione per uno scopo diverso da quello per il quale ne dispone. Si prescinde, così, dal rapporto con gli investitori. La responsabilità verso questi ultimi nasce soltanto perché l'*insider* non ha rispettato il rapporto fiduciario che intercorre con il soggetto interessato.

In merito alla *misappropriation theory* sembra profilarsi una frizione nel dialogo tra i formanti. La teoria viene sottoposta al giudizio della Corte Suprema nel caso *Winans-Carpenter v. United States* [54]. Mr. R. *Winans*, giornalista del *Wall Street Journal*, collaborava alla redazione della rubrica *Heard on the Street*, nella quale offriva valutazioni sulla redditività di alcune azioni, sulla base di informazioni reperite da fonti pubbliche o direttamente intervistando dirigenti e funzionari di società. Si trattava di una rubrica giornalistica molto autorevole, la cui importanza avrebbe potuto avere un impatto notevole sulle quotazioni dei titoli e, nonostante il regolamento interno vietasse ai giornalisti di rivelare a terzi o di servirsi delle notizie prima della loro pubblicazione *Winans*, *Carpenter* e *Brant* fecero delle negoziazioni sui titoli, anticipando gli esiti che le recensioni del giornalista avrebbero avuto sulle quotazioni.

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[52] *Burlington Coat Factory Sec. Litig*., 114 F.3d 1410, 1432 [3d Cir. 1997].

[53] *SEC v. Texas Gulf Sulfur Co*, 401 F2d 833 [2d Cir. 1968].

[54] *Carpenter v. United States*, 108 U.S. 316 [1987].

Nei primi due gradi di giudizio [55] si riconobbe la responsabilità degli imputati per aver frodato il giornale in seguito all'appropriazione di informazioni riservate di proprietà del giornale, causando alla testata ingenti danni d'immagine, nonostante il *Wall Street Journal*, vittima della frode, non fosse coinvolto in nessuna operazione di mercato.

Le condanne derivanti dal primo e dal secondo grado di giudizio furono emesse, aderendo alla *misappropriation theory*, per violazione della *Rule* 10(b)-5.

Il giudizio della Corte Suprema [56] non fu risolutivo. Infatti, quattro giudici si espressero a favore della *misappropriation theory* e quattro contro. A superare quella frizione, anche in un'ottica di allineamento dei formanti, è stato dapprima il Congresso e poi la Corte Suprema. Nel 1984, il Congresso ha emanato l'*Insider Trading Sanction Act* e successivamente nel 1988, l'*Insider Trading and Securities Fraud Enforcement Act* accogliendo la *misappropriation theory* mediante l'introduzione, a norma della *Section* 5, di una nuova *Section* 20, del *Securities Exchange Act* del 1934. Tale norma prevede il risarcimento dei danni provocati dalle condotte vietate di tutti coloro i quali hanno negoziato i titoli oggetto dell'operazione di *insider trading* in posizione contrattuale opposta e *contemporaneously* alle operazioni dell'*insider*.

L'accoglimento della *misappropriation theory* da parte della Corte Suprema si realizza dopo quasi un decennio dalla codificazione della stessa a opera del Congresso. Essa avviene nel caso *O'Hagan* nel 1997 [57], dove venne contestata all'avvocato *James Herman O'Hagan* la violazione della *Rule* 10(b)-5, in seguito al compimento di una serie di transazioni sul mercato mobiliare sfruttando, in maniera illecita, informazioni privilegiate. L'imputato, *partner* dello studio legale *Dorsey & Whitney* di Minneapolis, era venuto a conoscenza del lancio di una *tender offer* sui titoli della *Pillsbury Company* a opera della società londinese *Grand Met*, la quale era stata assistita nello svolgimento dell'operazione dalla *Law Firm*. Sulla base di queste informazioni, il legale acquistò le azioni, ottenendo, rivendendo tali titoli al pubblico, un profitto di milioni di dollari in quanto vi era stato un incremento di valore delle *securities.*

La condanna fu riformata nel giudizio d'impugnazione dinanzi la Corte d'Appello dell'*Eight Circuit*, la quale prosciolse l'imputato disconoscendo sia la *misappropriation theory* sia la legittimità della *Rule*. La causa giunse dinanzi

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[55] *United States v Winans*, 612 F. Supp. 827 [1985].

[56] P. Carbone, *Tutela civile del mercato e Insider Trading*, Giuffrè, Milano, 1993, p. 95. Cfr., S. Galli, *Insider trading: l'accoglimento da parte della Supreme Court federale statunitense della misappropriation theory. Alcune conseguenti riflessioni sulla condotta di "trading" vietata, come definita nel cosiddetto "Testo Unico Draghi"*, in *Giurisprudenza commentata*, II, 1998, p. 729.

[57] *United States v. O'Hagan*, 92 F 3d 612 [8th Cir. 1996].

la Corte Suprema. Il giudice *Ginsburg* sottolineò come un'informazione ricevuta in via confidenziale, senza comunicarne l'utilizzo alla fonte stessa, fosse da ritenersi conforme alla struttura della *Rule* 10(b)-5. Egli rilevò la sussistenza, nella ricostruzione della teoria, sia del requisito della *deception* sia quello della *connection*.

Se ogni informazione è un *asset*, di cui è titolare chi la crea, vi è la possibilità di trasferirla a terzi e creare profitto. In tal modo, «l'*enforcement*, rimesso al titolare garantisce l'incentivo a produrre informazione; il mercato vien fatto muovere nella direzione corretta» [58].

6. Segue: *nel sistema eurounionale e italiano*

Anche la normativa europea si è occupata del fenomeno dell'*insider trading*. L'obiettivo di ridurre le asimmetrie informative nelle relazioni finanziarie riguardo all'integrazione dei rischi di sostenibilità, agli effetti negativi per la sostenibilità, la promozione delle caratteristiche ambientali o sociali obbligano i partecipanti ai mercati finanziari a effettuare informative precontrattuali e continuative destinate agli investitori finali.

Il percorso che ha condotto l'Unione Europea a elaborare una disciplina in materia inizia con l'emanazione della Direttiva 89/592/CEE del Consiglio, del 13 novembre 1989 [59]. Il funzionamento corretto del mercato dei valori mobiliari dipende, in larga parte, dalla fiducia che gli investitori ripongono in esso; pertanto, la pratica dello sfruttamento di informazioni privilegiate, può fendere tale fiducia e compromettere il buon funzionamento del mercato [60].

Al tempo dell'emanazione della Direttiva erano pochi gli Stati membri che disponevano di una disciplina in materia; soltanto Regno Unito, Francia e Danimarca. Al tavolo del negoziato si manifestarono le prime difficoltà dovute alla presenza di posizioni diverse [61]. Se questa era la situazione esistente, il

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[58] R. Pardolesi-C. Motti, *«L'idea è mia!»: lusinghe e misfatti dell'economicis of information*, in *Diritto di informazione e informatica*, 1990, p. 345.

[59] Direttiva 89/592 sul coordinamento delle normative concernenti le operazioni effettuate da persone in possesso di informazioni privilegiate (*insider trading*).

[60] G. Carcano, *La direttiva CEE sull'«insider trading»*, in *Rivista delle società*, 1989, p. 1026.

[61] Nel Regno Unito, la cui disciplina era ispirata a una concezione di *insider trading* alquanto ristretta, la violazione era circoscritta alla relazione fiduciaria nei confronti della sola società i cui titoli erano oggetto di informazione privilegiata. A. Tizzano-G. Godano, «*Cronache comunitarie: La direttiva comunitaria sull'«Insider trading*, in *Foro italiano*, 1990, Vol. 113, c. 41 ss.; G. Carriero, *Il problema dell'«insider trading»*, in *Foro italiano*, 1988, V, c. 156. In Germania, che disponeva di un corpo di regole di comportamento condivise su base volontaria da quasi

legislatore europeo tentò di rendere più armoniose le garanzie offerte agli investitori dei mercati dei valori mobiliari assicurando, da un lato l'incontro della domanda e dell'offerta favorendo, così, l'uguaglianza degli investitori, dall'altro facilitando un'effettiva inter-penetrazione dei mercati all'interno dell'Unione.

Nel 2003 [62] il legislatore europeo ha riformato la disciplina in materia di abusi di mercato, sia per adattare il dettato normativo agli sviluppi dei mercati finanziari sia per modificare i risultati non soddisfacenti, in termini di tutela, prodotti dalle normative degli Stati membri, attuative della Direttiva 89/592/CEE. La Direttiva 2003/6 si propone di reprimere i *market abuse* lesivi dell'integrità del mercato e della fiducia degli investitori, senza, però, alcun riferimento alla parità di informazione. Il legislatore, al fine di giungere a una armonizzazione completa, nel 2014 ha emanato il Regolamento (UE) n. 596/2014 [63], che istituisce un quadro normativo comune in materia di abuso di informazioni privilegiate, comunicazione illecita di informazioni privilegiate e manipolazione del mercato, nonché misure per prevenire gli abusi di mercato (art. 1).

Nell'ordinamento giuridico italiano, il fenomeno dell'*insider trading*, seppur già affrontato dalla dottrina, è stato disciplinato per la prima volta dal legislatore nel 1991 con la legge 17 maggio 1991, n. 157 [64], che ha recepito la Direttiva 89/592/CEE.

Il legislatore nazionale perseguì l'abuso informativo mediante la previsione di un reato, di tipo delittuoso, sia per i casi di *insider trading* sia per quelli di *tipping* [65], prevedendo sanzioni identiche sia per gli *insider* primari sia per quelli secondari, sebbene la normativa europea non obbligasse a una tale radicale repressione, rimettendo, così, agli Stati (art. 13 della Direttiva) la scelta delle sanzioni più adatte e «sufficientemente dissuasive da indurre al rispetto».

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tutte le società tedesche quotate in borsa, vigeva il divieto di sfruttare le informazioni privilegiate. P. Welter, *Ragioni di un intervento della CEE nel campo dell'insider trading*, Relazione al convegno *Il dovere di riservatezza nel mercato finanziario: l'insider trading*, a cura di C.R. Bedogni, Giuffrè, Milano, 9-10 ottobre 1989, p. 98 ss.

[62] Relativa all'abuso di informazioni privilegiate e alla manipolazione del mercato (abusi di mercato).

[63] Regolamento (UE) n. 596/2014 del Parlamento europeo e del Consiglio, del 16 aprile 2014 relativo agli abusi di mercato (regolamento sugli abusi di mercato) e che abroga la direttiva 2003/6/CE del Parlamento europeo e del Consiglio e le direttive 2003/124/CE, 2003/125/CE e 2004/72/CE della Commissione Testo rilevante ai fini del SEE.

[64] Norme relative all'uso di informazioni riservate nelle operazioni in valori mobiliari e alla Commissione nazionale per le società e la borsa.

[65] Riguarda il divieto di comunicare le informazioni privilegiate ad altri, al di fuori del normale esercizio del lavoro, della professione, della funzione o dell'ufficio o di un sondaggio di mercato. Sull'argomento, F. Parmeggiani, *La disciplina dell'*insider trading, in *www.reatisocietari.it*, 2005.

L'incompatibilità con i principi generali del diritto penale presentati dalla legge n. 157, così come la dottrina [66] ha evidenziato, indusse il legislatore a riformulare la disciplina in occasione del riordino delle disposizioni in materia finanziaria, attuata dal d.lgs. n. 58 del 24 febbraio 1998 [67], che abrogò la normativa precedente. La nuova formulazione stabiliva in maniera più precisa il nesso di causalità tra la funzione ricoperta dal soggetto e il conseguimento del vantaggio informativo, richiedendo che la notizia fosse acquisita in ragione della carica rivestita.

Il mancato riferimento, nel testo della norma, alla figura dell'emittente, dato contrastante anche con la norma europea (art. 2, Direttiva 89/592/CEE), identificava un ambito soggettivo esteso che acuì i fini di *parity of information* perseguiti dalle normative nazionali.

Una differenza con il modello statunitense che concepisce l'*insider trading* come violazione di obblighi fiduciari, anche nell'ottica della *misappropriation theory*, accettata dalla *Supreme Court* nel caso *O'Hagan*, ma con riferimento alla violazione di doveri fiduciari. Le correzioni alla normativa previgente si sono avute con il recepimento della Direttiva 2003/6, avvenuta con legge n. 62/2005. Il comma 4 dell'art. 1 definisce l'informazione privilegiata e introduce il concetto di ragionevolezza, equiparabile al criterio del *reasonable investor* elaborato nell'esperienza giurisprudenziale statunitense [68].

Interessante risulta il comma 2 dell'art. 187 che assegna a una Commissione la legittimazione all'esercizio dell'azione nel processo penale relativo a *market abuse* [69]. La norma ha sollevato perplessità in dottrina, indicandone la natura sanzionatoria più che risarcitoria alla stregua dei *punitive damages* di *common law* [70].

Nella normativa nazionale, nella quale la fattispecie penale prevale sulla dimensione civilistica, vi è una ricerca (in)feconda della determinatezza e tassatività.

Tentando di tracciare una soluzione, si potrebbe affermare che con riferimento

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[66] S.D. Zannino, *L'insider trading negli Stati Uniti d'America: appunti critici alla disciplina comunitaria e domestica, I parte*, in *Diritto del commercio internazionale*, 1996, p. 59.

[67] Testo unico delle disposizioni in materia di intermediazione finanziaria.

[68] *TSC Industries, Inc. v Northway, Inc.*, 426 U.S. 438 [1976].

[69] «La Consob può costituirsi parte civile e richiedere, a titolo di riparazione dei danni cagionati dal reato all'integrità del mercato, una somma determinata dal giudice, anche in via equitativa, tenendo comunque conto dell'offensività del fatto, delle qualità personali del colpevole e dell'entità del prodotto o del profitto conseguito dal reato».

[70] F. Sgubbi-D. Fondaroli-A.F. Tripodi, *Diritto penale del mercato finanziario. Abuso di informazioni privilegiate, manipolazione del mercato, ostacolo alle funzioni di vigilanza della Consob, falso in prospetto*, Cedam, Padova, 2008, p. 186.

al danno subito dalla società emittente esisterebbe un obbligo per l'*insider* di rimettere alla società i profitti realizzati mediante l'utilizzo di informazioni *price sensitive*. Questo consentirebbe di collocare su un piano diverso da quello risarcitorio la fattispecie e potrebbe appagare l'esigenza di efficacia e di prevenzione al quale il rimedio risarcitorio non sempre riesce a offrire adeguata rispondenza [71]. Ribaltando il ragionamento si potrebbe dire che in caso di mancata diffusione di informazioni privilegiate si assiste(rebbe) a un danno all'integrità informativa dell'intero mercato. L'emittente che non adempie al dovere di garantire che le vie del mercato finanziario siano prive di avvallamenti informativi sarà tenuto a risarcire il danno subito da tutti coloro che hanno negoziato i titoli a un prezzo diverso da quello dovuto. Il danno, in tal caso, è costituito dalla lesione del diritto dell'investitore all'autonomia contrattuale, ascrivibile, secondo parte della dottrina, nell'incerta categoria del danno all'integrità patrimoniale [72].

Se l'art. 2395 c.c. sanziona con la disciplina della responsabilità extracontrattuale una fattispecie di danno meramente patrimoniale che è riconducibile alla responsabilità da informazioni inesatte, non si comprende la ragione per la quale la mancata diffusione delle informazioni privilegiate non possa dare luogo a responsabilità extracontrattuale [73].

7. *Considerazioni a margine*

L'Unione Europea, come affermato nelle prime pagine, deve affrontare e risolvere una serie di problematiche legate alla promozione di uno sviluppo sostenibile che riverbera i suoi effetti anche nell'espansione dei mercati finanziari ben comprendendo che la distorsione dell'economia finanziaria può determinare un «rapporto direttamente proporzionale tra assenza di trasparenza e circolazione della ricchezza» [74]. Sono, pertanto, necessari interventi per mobilitare capitali non soltanto mediante politiche pubbliche ma anche da parte del settore dei servizi finanziari [75]. Tale necessità richiama il ruolo svolto dalle informazioni,

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[71] In tale direzione, E. Macrì, *Informazioni privilegiate e* disclosure, Giappichelli, Torino, 2010, p. 114.

[72] P.G. Monateri, *La responsabilità civile*, in *Trattato di diritto civile diretto da Sacco*, Giappichelli, Torino, 1998, p. 588. Nella medesima direzione, Corte Cass., 3 marzo, 2001, n. 3132.

[73] F.D. Busnelli, *Itinerari europei nella 'terra di nessuno tra contratto e fatto illecito'*, cit., p. 572.

[74] A. Ferrara, *La democrazia e il potere assoluto dei mercati finanziari disancorati*, in *Pol. soc.*, 2015, 1, p. 11.

[75] Regolamento (UE) 2019/2088 del Parlamento europeo e del Consiglio del 27 novembre 2019 relativo all'informativa sulla sostenibilità nel settore dei servizi finanziari (Considerando 8).

questione che, seppur si atteggia in maniera non identica, negli ordinamenti di *civil law* e in quelli di *common law*, rappresenta un'occasione per la messa a punto di un sistema di verifica della correttezza e della validità delle informazioni fornite da imprese e intermediari al fine di consolidare la fiducia negli strumenti della finanza sostenibile. Il contesto descritto, in qualche modo, mette alla prova la tenuta degli istituti civilistici classici, dal momento che «un mercato finanziario che è *altro* dal paradigma utilitario di quel mercato classico composto da *atti di commercio*, una finanza […] i cui complessi tecnicismi aziendali di ingegnerizzazione del rischio solo con un alto tasso di problematicità può pensarsi di iscrivere nella tassonomia concettuale classica del diritto civile» [76].

Con riferimento alla sorte di un contratto concluso sulla base di una valutazione economica non corretta i sistemi di *common law* e di *civil law* offrono risposte diverse. Nel primo caso, il sistema inglese manifesta una certa riluttanza a sanzionare un dovere precontrattuale di informazione, con conseguente riduzione dei rimedi rispetto a quelli individuati in *civil law*. Il ruolo della buona fede nella fase della conclusione del contratto deriva dalla valutazione decisa dalle corti all'esigenze di correttezza e lealtà. Nei sistemi di *civil law*, la soluzione deriva dalla possibilità di individuare un dovere precontrattuale di informazione in capo alla parte che ha più facile accesso a reperire informazioni in grado di influenzare il consenso dell'altra parte, determinando, in termini rimediali, l'annullamento del contratto o il risarcimento del danno.

Tra le differenze in materia di *insider trading* si segnala, oltre alla diversità temporale tra le due regolamentazioni, la mancata definizione nell'ordinamento statunitense del fenomeno, basandosi l'intero sistema repressivo su di una norma elastica e flessibile, la *Rule* 10(b), in grado di reprimere le frodi nelle negoziazioni di strumenti finanziari. La lacuna legislativa è stata colmata dalla giurisprudenza. Le corti hanno individuato la nozione di informazione privilegiata mediante l'interpretazione del requisito della *materiality* [77]. Il legislatore nazionale, invece, sulla scia del legislatore europeo, ha ben definito il fenomeno sia con riferimento all'individuazione delle condotte vietate sia con riferimento al concetto di informazione privilegiata. La normativa italiana, ispirata alle teorie del *market egalitarianism* e della *parity of information*, allestisce una tutela che mira a garantire la stabilità e l'equità del mercato, laddove l'esperienza statunitense appronta una disciplina fondata sulla tutela di interessi individuali, ai

[76] Così testualmente, S. Pagliantini, *Ancora sulla «saga» dei derivati (note minime sul principio di effettività e sui c.d. vizi del XXI secolo)*, in A. Gentili-R. Di Raimo (a cura di), *Le negoziazioni del rischio finanziario, patologie dei rapporti e profili di sistema*, Edizioni Scientifiche Italiane, Napoli, 2016, p. 109.

[77] *TSC Industries, Inc. v Northway*, cit.

quali le pratiche di *insider trading* arrecano pregiudizio, in quanto violazioni di obblighi fiduciari.

In merito alla sostenibilità finanziaria, si segnala una diversità di tendenza in Europa e negli Stati Uniti d'America. In Europa ci si muove, come visto, lungo una traiettoria solida ben definita; negli Stati Uniti, nell'ultimo periodo, si segue una linea che apre nuovi interrogativi riguardo il futuro della finanza sostenibile [78] e le relazioni tra i due Paesi. La tensione si profila tra obiettivi socialmente orientati ed efficienza del mercato. Si riporta qualche dato. Secondo l'ultimo Rapporto di *Morningstar Sustainalytics* nel quarto semestre del 2024 gli acquisti netti di fondi sostenibili globali si sono dimezzati rispetto ai livelli del 2023. Questa tendenza pregiudica lo sviluppo di una regolamentazione (federale e statale) che dovrebbe attrarre i fattori ESG nella disciplina dei processi di investimento, con riferimento alle informazioni e alle regole di condotta, favorendo la *product governance and intervention* e l'educazione finanziaria [79]. Si profila, invece, un cambio di paradigma che potrebbe condurre la regolamentazione su di una posizione contraria a tali obiettivi [80], con conseguenze che riverberano gli effetti (anche) sui rapporti tra i medesimi e che, già allo stato, richiederebbero valutazioni puntuali per poter affrontare le sfide che tale discrasia determin(erà)a.

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[78] Per i primi orientamenti giurisprudenziali, v. *Indus. & Fin. Markets Ass'n v Ashcroft*, No. 23-CV-04154-SRB [W.D. Mo. Aug. 14, 2024].

[79] Così, C. Mignone, *Finanziarizzazione del* welfare *e funzione degli atti di autonomia*, in *Rassegna di diritto civile*, 2021, p. 567.

[80] A.L. Norman, *The ESG war: public pension fiduciaries and anti-ESG laws*, in *Washington University Journal of Law & Policy*, 2024, 74, p. 245.

TOWARDS A NEW NORMATIVE MODEL: REASSESSING EU EXTERNAL STRATEGIES FOR SUSTAINABLE DEVELOPMENT

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SUMMARY: 1. Introduction. – 2. The origins of the EU conditionality policy. – 3. Overview of the different forms of conditionality. – 4. The Legal Effects of Conditionality Mechanisms in International Agreements. – 5. Conditionality as a Mechanism for Advancing Sustainable Development. – 6. Towards an Ecocentric Approach. – 7. Assessing different normative models. – 8. Conclusions.

1. *Introduction*

This chapter stems from the research conducted by the University of Cagliari within the PRIN PNRR Project "*Make it Better: In Search of a New Normative Model for the Promotion of Sustainable Development in the EU External Action*". It offers a revised and updated version of the third and final working paper produced in the context of the above mentioned project. It builds on the two previous working papers, the first of which examined the legal nature of sustainable development and its prospects in international law, while the second analysed the legal frameworks on sustainable development adopted by some EU's trade partners, identifying possible direct or indirect EU influences on domestic regulation. Against this background, the present chapter focuses on the

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* This chapter constitutes a revised and updated version of the third Working Paper drafted by the University of Cagliari, within the framework of the PRIN PNRR project *Make it Better (MiB): In Search of a New Normative Model for the Promotion of Sustainable Development in the EU External Action*. The project is led by Prof. Luca Pantaleo, Associate Professor of EU Law at the University of Cagliari, who acted as Principal Investigator. Under his guidance and supervision, sections 2 to 5 were written by Dr. Adriana Brusca, Lecturer at LUMSA University; section 6 was written by Dr. Felipe Tomazini de Souza, Research fellow at the University of Cagliari; sections 7 and 8 were written by Prof. Luca Pantaleo, Associate Professor of EU Law at the University of Cagliari. Instead, section 1 is the result of the joint efforts of Adriana Brusca and Felipe Tomazini de Souza.

various normative models currently implemented by the EU to promote sustainable development objectives, and explores potential avenues for their improvement.

The main normative approaches to sustainability in international relations may be broadly categorised into three models: the first based on negative conditionality and a sanctions-oriented approach; the second relying on positive conditionality, grounded in incentives; and the third, rooted in an ecocentric perspective that prioritises the intrinsic value of nature.

Accordingly, Sections 2 to 5 are dedicated to conditionality. They trace the origins of this technique in the EU external relations law, examine the various forms of conditionality and their legal effects within international agreements, and consider its function as a mechanism for advancing sustainable development objectives.

The chapter then turns to the ecocentric approach, which advocates a paradigm shift away from the prevailing anthropocentric perspective towards one that acknowledges the intrinsic value of nature. This model calls for a reconfiguration of the human-nature relationship, placing the environment, rather than human interests, at the centre of sustainability discourse. In this perspective, section 6 explores the normative and institutional implications of this approach and considers how it could be incorporated into the existing EU legal framework governing the external promotion of sustainable development.

The following section presents a critical and comparative reflection on the normative models examined, building on the analysis developed throughout the project. It considers how these models, though grounded in international cooperation and legal standards, increasingly rely on conditionality as a tool of influence. The analysis questions the consistency of coercive forms of conditionality with the EU's identity as a normative power, and explores the implications for legal coherence, sovereignty, and legitimacy. It concludes by assessing the theoretical appeal and practical limits of incorporating an ecocentric perspective within the EU's external action.

The final section offers some conclusions by focusing on some open questions and remaining challenges that could be the subject of future research.

2. *The origins of the EU conditionality policy*

Conditionality is a particularly complex phenomenon involving multiple factors. Due to its inherently political nature and the absence of concrete and universally recognised guidelines accepted by the international community as a whole, it proves especially difficult to provide a comprehensive definition of the concept of conditionality. Moreover, it must be acknowledged that conditionality is often shaped by geopolitical, strategic, commercial, and economic interests. [1] A commonly accepted definition holds that conditionality is a mechanism through which, within a relationship of economic interdependence, financial instruments are employed with the aim of inducing the receiving party to undertake actions it would not otherwise have pursued. [2] In this perspective, conditionality becomes effective only insofar as the recipient state undertakes reforms or policy changes that it would not have otherwise implemented in the absence of pressure exerted by the donor. [3] At any rate, conditionality can assume different forms. Indeed, despite the previous definition, it has also been implemented to encourage policies already independently adopted by a state or to preserve a *status quo* within a designated area. [4]

The conditionality policy in the European Union's external action has developed for the first time in the enlargement policy framework, specifically with reference to Spain's accession. Indeed, in January 1962, it was asserted[5] that "the guaranteed existence of a democratic form of state, in the sense of a free political order, is a condition for membership". [6] For this reason, in July 1967 the European Community offered Spain only a mere preferential agreement on commercial trade, under Article 113 of the Treaty of Rome, a politically neutral instrument that found increasing acceptance within the Community in the aftermath of the 1967 military coup in Greece, an event which marked the first instance of suspension of an association agreement grounded in political considerations. [7] However, the EU conditionality policy in the external action found its application also in the fields of foreign policy and development cooperation policy. With regard to the protection of human rights, the European Commission had long emphasised the principle that, under international law, the adoption of appropriate measures in the event of serious human rights violations is

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[1] E. Fierro, *The EU's Approach to Human Rights Conditionality in Practice*, Martinus Nijhoff Publishers, The Hague, 2003, p. 93.

[2] *Ivi*, p. 96.

[3] P. Ulvin, *Do as I say, not as I do: The Limits of Political Conditionality*, in G. Sorensen (ed.), *Political Conditionality*, Routledge, London, 1993, p. 63 ff., p. 74.

[4] E. Fierro, *The EU's Approach to Human Rights Conditionality*, cit., note No. 1, pp. 96-97.

[5] Report on behalf of the Political Committee on the political and institutional aspects of accession or association to the Community. EP Working Documents 1961-1962, Document 122, 16 January 1962.

[6] The political conditions have been institutionalized within the Copenhagen criteria, established by the Copenhagen European Council in 1993, and currently mentioned in Article 49 of the Treaty on European Union.

[7] C. Powell, *The Long Road to Europe: Spain and the European Community, 1957-1986*, in *Elcano Royal Institute, Working Paper*, 11 June 2015, p. 9.

permissible and does not constitute a breach of the prohibition against interference in the internal affairs of a state. [8] Following the same approach, in 1993 the European Parliament adopted a resolution [9] of particular significance, given the considerable attention devoted to examining the relationship between the Community's policy in its relations with third countries and the application of conditionality mechanisms. The Parliament emphasised the importance of including standard clauses in all future association and cooperation agreements, establishing these clauses as a central instrument of the Community's external action, with a view to fulfilling its role in the promotion and consolidation of human rights. From a strictly legal perspective, the resolution underscored that, in order to ensure the binding nature of such clauses, they should be incorporated into the operative part of the agreements rather than merely referenced in the preambles. Finally, the EU Parliament proposed that all agreements include an appropriate response mechanism to be activated in the event of serious violations. In the same vein, the Communication adopted by the Commission in 1995, concerning foreign policy and human rights [10], presented a comprehensive framework outlining the various types of conditionality clauses applicable, as well as the fundamental principles governing their implementation. In this context, the Commission has repeatedly emphasised the importance of incorporating clauses designated as essential elements of the agreements concluded with third countries, with a view to enabling the Community to respond appropriately in cases of human rights violations or instances of democratic backsliding. [11]

It is in this very framework that this approach aimed at implementing conditionality has been institutionalised through the systematic incorporation of dedicated clauses into international agreements concluded between the EU and its partner countries. A social clause was first introduced into the Community's external trade relations in 1978, following an initiative by the European Commission's Directorate-General for Development, primarily due to the perceived link between foreign aid and labour standards. [12] On the other hand, the

[8] European Commission, *Development cooperation policy in the run-up to 2000*, SEC(92) 915 final, 15 May 1992.

[9] European Parliament, *Human Rights in the World and Community Human Rights Policy for the Years 1991-1992*, OJ C 115/1993, 26 April 1993.

[10] European Commission, *The European Union and the External Dimension of Human Rights Policy: From Rome to Maastricht and Beyond*, COM(95) 567 def., 22 November 1995.

[11] European Commission, *Implementation of Measures to Promote Respect for Human Rights and Democratisation*, COM(95) 191, 12 July 1995.

[12] A. Vatta, *The Social Clauses in EU Trade Agreements: contents and prospects*, in *Poliarchie/Polyarchies*, 2/2018, pp. 286-306, p. 289.

European Community began incorporating explicit conditionality into its agreements in the 1990s, initially with several Latin American and Central and Eastern European countries, such as the 1992 agreements with Brazil, [13] the Baltic States, [14] and Albania. [15] In this regard, one of the first human rights clauses appeared in the 1990 Argentina-EU Cooperation Agreement, [16] at the behest of Argentina, which emerged from a dictatorship. [17] In 1995, the European Union adopted a formal policy of systematically including such provisions in all subsequent trade agreements. [18] From this perspective, international agreements have constituted one of the main instruments through which the European Union has sought to advance its political objectives outside its borders, notably those pertaining to the promotion of democracy and the protection of human rights. [19]

Over the years, the conditionality policy has been articulated along two main lines: on the one hand, the promotion of measures aimed at encouraging the fulfilment of some specific objectives; on the other, the implementation of a sanctions-based approach designed to identify the most effective instruments for responding to the violations of the essential elements of the agreements under consideration.

3. *Overview of the different forms of conditionality*

The European Union's conditionality policy, as a technique employed within the framework of its relations with third countries, is predominantly implemented

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[13] Framework Agreement for Cooperation between the European Economic Community and the Federative Republic of Brazil, 1992.

[14] Agreement between the European Economic Community and the Republic of Estonia on trade and commercial and economic cooperation, OJ L 403, 31 December 1992; Agreement between the European Economic Community and the Republic of Latvia on trade and commercial and economic cooperation, OJ L 403, 31 December 1992; Agreement between the European Economic Community and the European Atomic Energy Community and the Republic of Lithuania on trade and commercial and economic cooperation, OJ L 403, 31 December 1992.

[15] Agreement between the European Economic Community and the Republic of Albania, on trade and commercial and economic cooperation, OJ L 343, 25 November 1992.

[16] Framework Agreement for trade and economic cooperation between the European Economic Community and the Argentine Republic, OJ L 295, 26 October 1990.

[17] L. Bartels, *Human Rights and Sustainable Development Obligations in EU Free Trade Agreements*, in *Legal Issues of Economic Integration*, 40(4), 2013, pp. 297-314, p. 298.

[18] For a broader analysis of this topic, see I. Zamfir, *Human rights in EU trade agreements The human rights clause and its application*, in *European Parliament Briefing, European Parliamentary Research Service*, 2019.

[19] S. Angioi, *Il principio di condizionalità e la politica mediterranea dell'Unione europea*, Editoriale Scientifica, Napoli, 2006, p. 205.

through the incorporation of specific clauses, usually designated as essential elements, into international agreements. In such cases, it is not appropriate to refer to pure conditionality, meaning it as a unilateral expression of the Union's policies, insofar as these agreements are the result of negotiations between the parties and are subsequently subject to approval, signature, and ratification. Therefore, they reflect a mutually agreed set of reciprocal commitments capable of producing effects on both sides of the agreement. A different scenario arises with regard to financial instruments unilaterally established by the Union: in these instances, the EU autonomously defines the conditions for access, with a view to giving binding strength to the principles often established in its soft law instruments.

The first distinction to be drawn is between *ex ante* and *ex post* conditionality. *Ex ante* conditionality entails the imposition of certain requirements that must be fulfilled prior to the establishment of relations, generally of a contractual nature, with a given State.[20] *Ex post* conditionality, by contrast, refers to situations in which such conditions are applied only after the conclusion of agreements or, more broadly, once a system of relations with the country in question has already been initiated. This latter form of conditionality has been the subject of criticism, based on the argument that the very notion of a condition presupposes its imposition prior to the commencement of the relationship.[21] Nevertheless, this form of conditionality has been widely implemented by the EU through the consistent and widespread inclusion of clauses in bilateral agreements. As is well known, such clauses provide for the possibility of suspending the agreement or adopting alternative response measures, which operate *ex post*, only after the agreement has entered into force. One of the main reasons for the broader use of *ex post* conditionality lies in the difficulty of identifying specific conditions to be imposed *ex ante*, which are instead often deliberately vague and generic, in order to grant donor countries greater flexibility in their application. From a purely political perspective, it is also readily apparent that the imposition of stringent conditions *a priori* could easily hinder the establishment of cooperative relations.[22]

Within the classification of the various forms of conditionality, a further distinction is made between positive and negative conditionality. The former, also referred to as an incentive-based policy, relies on the granting of various forms of benefits in return for compliance with the conditions imposed by the donor country. These incentives may include the provision of grants, funding, technical and financial assistance, or the opening of trade relations. This form of

[20] E. Fierro, *The EU's Approach to Human Rights Conditionality*, cit., note No. 1, p. 98.

[21] H. Selverivik, *Aid as a tool for promotion of human rights and democracy: what can Norway do?*, in *Michelsen Institute, Evaluation Report*, No. 7, 1997, p. 16.

[22] E. Fierro, *The EU's Approach to Human Rights Conditionality*, cit., note No. 1, p. 99.

conditionality is generally implemented through the inclusion of clauses in both bilateral and unilateral regulatory instruments. A notable example is the Generalised System of Preferences (GSP), which conditions access to the scheme, and the resulting trade advantages, on the prior ratification by the beneficiary country of the most significant ILO conventions. [23] Negative conditionality, on the other hand, is implemented through the reduction or suspension of benefits in cases where the recipient country fails to comply with imposed conditions. Specifically, it may involve the suspension of trade or diplomatic relations, the imposition of sanctions or embargoes, or the interruption of cooperation programs. Generally, this type of conditionality constitutes a reactive policy: states respond *ex post*, only after harm has occurred. This reactive nature often results in significant shortcomings in the development of serious and systematic strategies. In practice, efforts have been made to limit the use of negative conditionality, as such measures have frequently led to a further deterioration of the social and economic conditions of the civilian population. [24] In this regard, negative conditionality faces the challenge of directing pressure at governments without simultaneously harming the population. The principle that sanctions should exclusively target governments and never civilian populations has rarely been implemented effectively; in fact, practice shows that conditionality often punishes civilians while leaving the actual perpetrators unscathed.

Ultimately, the policy of conditionality is characterised by its dual nature, which encompasses, on the one hand, incentives, subsidies, and cooperation schemes, and on the other, the application of punitive measures. This approach is commonly referred to as the carrot and stick strategy: the “stick” relies on the deterrent effect of threats and the potential to achieve objectives through coercive measures, while the “carrot” embodies the core principles of cooperation, primarily through the implementation of cooperative frameworks.

4. *The Legal Effects of Conditionality Mechanisms in International Agreements*

The use of the conditionality clauses within association and cooperation agreements does not constitute an entirely novel element from a legal point of view. Conditionality mechanisms, in fact, had already been widely implemented in the economic sphere by international financial institutions such as

[23] Council Regulation (EC) No 3281/94 of 19 December 1994 applying a four-year scheme of generalized tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries, OJ L 348, 31 December 1994.

[24] E. Fierro, *The EU’s Approach to Human Rights Conditionality*, cit., note No. 1, p. 101.

the International Monetary Fund and the World Bank, which, for a long time, advanced policies based on the imposition of conditions on beneficiary countries. These conditions often included the adoption of structural reform programs, which were frequently regarded as particularly stringent and capable of having significant socio-economic impacts.[25] The type of conditionality adopted by the Union is distinguished by a certain degree of flexibility in its application, stemming directly from its political nature. In the field of the Union's external relations, conditionality assumes a dual function: the Union may opt to implement sanctioning measures (negative conditionality) or to promote the use of incentive-based instruments, accompanied by conditions aimed at fostering reform processes (positive conditionality). The structuring of conditionality clauses as a systematic legal-technical mechanism was gradually developed by the Union, through a lengthy process aimed at identifying a suitable legal basis for determining the suspension or termination of an association or cooperation agreement. The objective was, in fact, to establish a causal link between the violation of certain standards and norms and the implementation of association or cooperation agreements, thereby allowing for the suspension of economic aid mechanisms closely tied to those agreements. From the perspective of international law, it may be observed that, pursuant to Article 60 of the Vienna Convention on the Law of Treaties, the right to withdraw from a treaty is conditional upon the existence of a breach that may be regarded either as "a repudiation of the treaty not sanctioned by the present Convention" or as a "violation of a provision essential to the accomplishment of the object or purpose of the treaty".[26] The Union succeeded in securing the applicability of Article 60 of the Vienna Convention to the association and cooperation agreements it concluded by developing and incorporating conditionality mechanisms. These conditionality clauses explicitly equate violations of some specific principles with breaches of essential provisions of the agreement. The approach that led to

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[25] The policy in question has been described by some scholars as a modern gunboat diplomacy. See also J. Kranz, Lomé, le dialogue et l'homme, in *Revue trimestrielle de droit européen*, 1988, p. 454 ff., p. 454. This policy, which had a strong socio-economic impact, has been the subject of strong criticism. The Nobel Prize-winning economist J. Stiglitz, in Globalization and Its Discontents, Penguin, 2003, p. 45, referring to the policies implemented by the International Monetary Fund, affirmed that while conditionality has succeeded in generating resentment, it has failed to generate development; studies conducted by the World Bank and other institutions have shown that not only has conditionality not ensured that funds were well spent or that countries grew more rapidly, but it is not even clear whether it has ever worked.

[26] Vienna Convention on the Law of the Treaties (1969), Article 60(3): "*A material breach of a treaty, for the purposes of this article, consists in: (a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty*".

this structuring of association and cooperation agreements was marked by a gradual and progressive evolution. [27] It should be noted, however, that non-compliance does not necessarily lead to the termination of the agreement; rather, a range of measures may be adopted, following a graduated approach in both severity and scope. [28]

Alongside the essential elements clause, the Union initially introduced an ancillary clause, particularly in the association agreements concluded with Eastern European countries (specifically the Baltic States and Albania), with the aim of strengthening the effectiveness of the essential clause and facilitating a more appropriate and workable mechanism for the suspension or possible termination of the agreement. Within this category of ancillary clauses, a distinction can be made between the so-called "Baltic clause" and the "Bulgarian clause". The former is described as an "explicit suspension clause", [29] as it allows for the immediate, total or partial suspension of the agreement in the event of a serious breach of one of its provisions. The "Baltic clause" was included in the agreements signed with the Baltic Republics (Estonia, Lithuania, and Latvia), as well as with Albania. The "Bulgarian clause", by contrast, represents a less incisive solution and is referred to as a "general non-compliance clause", [30] as it allows for the adoption of appropriate, graduated measures by the parties. In this case, the suspension of the agreement is subject to various consultation procedures between the parties, except in cases of particularly serious conditions, defined as "emergency situations". The measures to be adopted must always prioritise those that are least detrimental to the preservation of the agreement.

Practice has shown how the European Union preferred employing the Bulgarian clause, as it constitutes a less radical and more flexible approach. Indeed, it has also been included in agreements concluded with Mediterranean and ACP countries, as well as with other countries geographically and politically distant

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[27] This gradual process, however, did not result in the establishment of a uniform model applicable to all agreements concluded by the Community with third countries. Rather, the approaches adopted varied depending on the type of agreement and the contracting country. In this regard, a first significant distinction was made between association agreements concluded with European countries that are members of the Organization for Security and Cooperation in Europe (OSCE), and agreements signed with countries from other geographical regions. In the case of the former, due to the prospects of future enlargement and geographical proximity, strict reaction mechanisms were introduced to ensure effective compliance with the obligations undertaken. For the latter (countries from other regions classified as developing countries) the conditionality mechanisms applied differed in both form and intensity. See also S. Angioi, *Il principio di condizionalità e la politica mediterranea*, cit., note No. 19, p. 231.

[28] M. Sorensen, *Manual of Public International Law*, Macmillan, New York, 1968, p. 239.

[29] S. Angioi, *Il principio di condizionalità e la politica mediterranea*, cit., note No. 19, p. 234.

[30] *Ivi*, p. 235.

from the Union. Moreover, it is worth highlighting that, in instances where the suspension of agreements has been affected through the mechanism of the "essential elements" clause, such action has invariably been accompanied by a political assessment carried out by the Council, within the context of the Union's Common Foreign and Security Policy. Accordingly, the decision to suspend an agreement or to adopt coercive or sanctioning measures entails a political evaluation that directly implicates the intergovernmental dimension of the EU integration process, thereby requiring the involvement of the EU Member States.

5. *Conditionality as a Mechanism for Advancing Sustainable Development*

The integration of conditionality into the European Union's external relations, as a mechanism to advance sustainable development, represents a relatively recent evolution in its legal framework, even though the first Free trade agreement that mentioned sustainable development was concluded in 1993, with Hungary. [31] However, this topic assumed an increasingly importance only in recent times, and in the context of the 2022 Communication *The power of trade partnerships: together for green and just economic growth*, [32] a new strategy was launched, on the basis of which the European Union no longer limits itself to merely promoting sustainability in its international agreements; it now seeks to monitor compliance, enforce commitments, and, where necessary, impose sanctions for serious violations. This marks a more dynamic, rigorous, and integrated approach, designed to reinforce the effectiveness of trade as a tool for green and inclusive growth. This development reflects a broader normative turn in the EU's external action, whereby compliance with fundamental principles is increasingly established as a condition for the conclusion or continuation of trade agreements, development cooperation, and other forms of partnership with third countries. Over the years, the European Union's agreements have progressively expanded in scope, addressing an increasingly broad range of thematic areas. Notably, sustainability considerations have been integrated into these instruments. [33]

[31] Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, OJ L 347, 31 December 1993.

[32] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Power Of Trade Partnerships: Together For Green And Just Economic Growth*, 22 June 2022, COM(2022) 409 final.

[33] B. Rudloff, *The EU between unilateral sustainability approaches and bilateral trade*

Starting with the 2008 EU-Cariforum Economic Partnership Agreement, [34] the EU has begun incorporating dedicated chapters on sustainable development (TSD chapters) into its trade agreements, setting out commitments related to the protection of labour rights and environmental standards. [35] This approach was confirmed with the conclusion of the free trade agreement with South Korea in 2010. [36] These provisions typically encompass three key elements regarding environmental protection: first, the "contextualisation" of existing international commitments on sustainable development, with explicit references to multilateral environmental agreements; second, the commitment to maintain a level playing field, whereby parties agree not to lower environmental standards to gain trade advantages or attract investments, while ensuring their effective enforcement; and third, the establishment of specific institutional mechanisms tasked with monitoring the implementation and enforcement of the TSD chapters. [37] Accordingly, the chapters on sustainable development establish a dual structure of obligations with respect to labour and environmental standards. First, they impose minimum requirements to implement selected multilateral commitments. Second, they include a non-regression clause, whereby the parties undertake not to lower existing levels of protection, while also being encouraged to progressively enhance such standards, on the condition that any upward adjustment is not pursued for protectionist ends. [38] However, it is important to highlight that sustainable development has never been established as a binding enforceable obligation on its own; indeed, none of the agreements allow for breaches of the "principle of sustainable development" itself. [39] For example, in the Association agreement concluded with Chile in 2002, [40] sustainable development is considered as a guiding principle of the agreement, but

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agreements. Paths to better partnerships, in *Research Division EU / Europe | Working Paper* No. 05, March 2025, p. 8.

[34] Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, OJ L 289, 30 October 2008.

[35] L. Bartels, *Human Rights and Sustainable Development Obligations*, cit., note No. 17, p. 297.

[36] Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L 127, 14 May 2011.

[37] G. D'Agnone, *Sviluppo sostenibile: una condizionalità ambientale… soft? Alcune brevi osservazioni sull'accordo commerciale negoziato tra l'Unione europea e la Nuova Zelanda*, in *BlogDUE*, 2022, www.aisdue.eu, p. 2.

[38] L. Bartels, *Human Rights and Sustainable Development Obligations*, cit., note No. 17, p. 307.

[39] V. Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, in *European Journal of International Law*, Vol. 23(2), 2012, pp. 377-400, p. 385.

[40] Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, OJ L 352, 30 December 2002.

never as a real obligation. Consistent with this approach, the Free Trade Agreement between the European Union and New Zealand, [41] entered into force on 1 May 2024, introduces the possibility of trade sanctions as a measure of last resort in cases of serious breaches of the fundamental principles and obligations set out in the Paris Agreement on climate change, but the agreement does not contain a specific clause which recognises sustainable development as an essential element of the agreement and trade sanctions are not permitted in response to any breach of the Paris Agreement, but only in the event of serious violations of its core provisions. Furthermore, the adoption of sanctions is explicitly ruled out in relation to environmental obligations that go beyond those formally undertaken under the Paris Agreement. [42]

With regard to the social dimension of sustainable development, conditionality has been extensively employed, with the most notable example being the conditionality applied within the framework of the GSP, even though this example represents a case of promotion of sustainable development through unilateral measures. In this context, it is important to note that the social dimension often intersects with the protection of human rights. As a result, certain social standards here already benefit from a degree of protection under the essential elements clause concerning human rights, contained in the agreements concluded with the same countries.

By contrast, environmental conditionality in the EU external relations is a more recent phenomenon. Examples of such environmental conditionality may include, for instance, the implementation of actions aimed at promoting high-efficiency combined heat and power generation, the consideration of national climate change adaptation strategies, the adoption of necessary measures to achieve targets related to preparation for reuse and recycling, as well as the existence of one or more frameworks for transport investments that comply with the legal requirements for strategic environmental assessment. [43] This form of conditionality, linked to environmental standards, is found not only in purely commercial agreements but also in other types of instruments, such as the agreements concluded with some developing countries (Arts. 208-211 TFEU). In such cases, although environmental protection is explicitly included among the objectives of the agreement and gives rise to specific obligations, it is not treated

[41] Free Trade Agreement between the European Union and New Zealand, OJ L, 2024/866, 25 May 2024.

[42] G. D'Agnone, *Sviluppo sostenibile: una condizionalità ambientale… soft?*, cit., note No. 37, p. 4.

[43] P. Valerio, *Il dialogo tra condizionalità ambientale, tutele costituzionali e libertà economiche nel contesto della crisi naturale e climatica*, in *DPCE*, *Sezione Monografica: Condizionalità europea e identità costituzionali*, 4/2023, pp. 3401-3415, p. 3406.

as an essential element for the purposes of conditionality. [44] In this perspective, in the area of environmental conditionality significant further efforts remain necessary to ensure a more robust and effective normative framework. Therefore, whereas the mechanism of conditionality traditionally employed in relation to human rights and democratic principles appears to be firmly embedded within international agreements and structured so as to ensure a degree of normative effectiveness, albeit subject to political discretion in its application, the same cannot be affirmed with regard to conditionality linked to sustainable development, especially with regard to the environmental dimension of sustainability. In this latter context, the legal architecture remains comparatively underdeveloped, and its enforceability is often limited by the absence of robust compliance and sanctioning mechanisms.

However, the EU is progressively favouring unilateral measures over bilateral trade agreements as a means to enforce sustainability standards at the international level. The most prominent example, as mentioned, is the GSP, adopted under Article 207, par. 2, TFEU. [45] This type of scheme grants benefits conditional upon the ratification of 27 core international conventions concerning human rights, labour standards, environmental protection, and good governance, as well as on the effective implementation of the obligations arising therefrom. In this perspective, the environmental conditionality embedded in the GSP constitutes a paradigmatic example of positive conditionality, insofar as the European Union exerts its influence through the promise of specific incentives. Such measures are generally easier to implement than negotiated agreements, as they do not require protracted discussions with trading partners. [46] At any rate, this

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[44] G. D'Agnone, *Environmental conditionality in EU-Latin America trade relations*, in *Latin American Journal of European Studies*, 1(1), 2021, pp. 38-63, pp. 51-52.

[45] In this regard, see R. Leal-Arcas-S.M. Saveljeff, *Environment-led conditionality in the EU's and US's Generalized System of Preferences*, Queen Mary University of London, *School of Law Legal Studies Research Paper*, No. 335/2020.

[46] In this respect, the suspension to these preferences has been applied to Belarus for the violation of the ILO Conventions on freedom of association and on collective bargaining (See Council Regulation (EC) No. 1933/2006, of 21 December 2006, temporarily withdrawing access to the generalised tariff preferences from the Republic of Belarus), to Myanmar/Burma for Forced labour (See Council Regulation (EC) No. 552/97, of 24 March 1997, temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar), to Sri Lanka (see Implementing Regulation (EU) No. 143/2010 of the Council, of 15 February 2010, temporarily withdrawing the special incentive arrangement for sustainable development and good governance provided for under Regulation (EC) No. 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka), as well as to Cambodia, because of the serious and systematic violations of the human rights principles enshrined in the International Covenant on Civil and Political Rights (see Commission Delegated Regulation (EU) 2020/550, of 12 February 2020, amending Annexes II and IV to Regulation (EU) No. 978/2012 of the European Parliament and of the

approach may complicate the conclusion of new agreements, since trading partners are subject to these unilateral rules without having had the opportunity to participate in their formulation. [47] Under this perspective, the use of conditionality in this field confirms that the EU's approach of guidance and encouragement must always be balanced with broad legal and political sensitivities, and it still encounters limitations in reconciling these with other prerogatives recognised by supranational law as a whole. [48]

6. *Towards an Ecocentric Approach*

As discussed in the previous sections, the EU's external relations are marked by a commitment to promote, through its external action, respect for the principles and objectives of sustainable development. [49] While the conditionality-based models presented above may differ in their features, they remain grounded in a traditional anthropocentric approach. Although certain norms may exhibit some ambiguity as to whether they lean toward an anthropocentric or ecocentric orientation, the former appears to prevail. In practical terms, this means that within these norms, human beings remain the central element of the normative content, relegating nature to a subsidiary role within the legal relationship. [50]

Council as regards the temporary withdrawal of the arrangements referred to in Article 1(2) of Regulation (EU) No. 978/2012 in respect of certain products originating in the Kingdom of Cambodia C/2020/673). On this point, see G. D'Agnone, *Environmental conditionality*, cit., note No. 44, pp. 53-54.

[47] B. Rudloff, *The EU between unilateral sustainability approaches*, cit., note No. 33, p. 9-10.

[48] P. Valerio, *Il dialogo tra condizionalità ambientale, tutele costituzionali e libertà economiche*, cit., note No. 43, p. 3404.

[49] The EU's commitment to sustainable development permeates both its internal and external action, as reflected in primary law sources such as Articles 6 and 21 of the Treaty on European Union, Article 37 of the Charter of Fundamental Rights, and Articles 205 and 208 of the Treaty on the Functioning of the European Union. *Consolidated version of the Treaty on European Union*; *Consolidated version of the Treaty on the Functioning of the European Union*; *Charter of Fundamental Rights of the European Union*, 2012, in OJ C 326, 26 October 2012, p. 391.

[50] F. Ippolito, *Children's Environmental Rights Under International and EU Law: The Changing Face of Fundamental Rights in Pursuit of Ecocentrism*, T.M.C. Asser Press, The Hague, 2023, pp. 21-23, https://link.springer.com/10.1007/978-94-6265-547-8 accessed 23 May 2025; on the Anthropocentrism versus Ecocentrism discussion see: V. De Lucia, *Beyond Anthropocentrism and Ecocentrism: A Biopolitical Reading of Environmental Law*, in 8 *Journal of Human Rights and the Environment*, 2017, p. 181; H. Kopnina *et al.*, *Anthropocentrism: More than Just a Misunderstood Problem*, in 31 *Journal of Agricultural and Environmental Ethics*, 2018, p. 109; N. Hoek *et al.*, *Implementing Rights of Nature: An EU Natureship to Address*

Yet, if that is the case, this observation prompts a deeper question: what would constitute an ecocentric approach in the EU's promotion of sustainable development in its external action, and how could the current framework evolve to incorporate it? The objective of this section is to explore the notion of ecocentrism, tracing its conceptual origins and examining how the EU could integrate such a perspective within its external legal instruments to further the promotion of sustainable development through its external action.

As a starting point, it is worth noting that this line of thinking is not novel. In fact, it can be traced back to the 1970s, a period marked by the emergence of ecological concerns demanding a shift in orientation, and the rise of international environmental law, notably initiated by the 1972 UN Conference on the Human Environment in Stockholm. During this same period, Christopher Stone, in his pioneering work, advocated for an ecological shift in human relations with nature, one that seeks to reorient the intrinsic relationship between human beings and the natural world by placing the latter at the heart of this relationship. He put forward a thought-provoking essay on the possibility and, in his view, the necessity of granting legal rights to natural objects. Stone began by asserting that, although this idea was initially deemed 'unthinkable', when viewed from a historical perspective it could find support in the natural progression and evolution of law, as demonstrated by the recognition of rights to new categories of rights holders, such as the extension of rights to previously excluded groups (e.g., enslaved persons, or women) or the attribution of legal personhood to companies, which were likewise once considered inconceivable. For this reason, he contended that the proposal to recognise the independent rights of nature could similarly emerge. [51]

Consequently, in order for natural objects to be recognised as holders of rights, this author brought forward three criteria: *legal standing*, meaning the capacity to bring claims in their own name; *recognition of harm*, in which environmental degradation must be acknowledged as a direct injury to the legal subject; and that the *relief must be in favour of the natural object*, aiming to restore or preserve the degraded natural entity. [52] Furthermore, to refute the simplistic idea that legal standing should be rejected on the basis that natural objects

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Anthropocentrism in Environmental Law, in 19 *Utrecht Law Review*, 2023, p. 72; R. Emmett-T. Lekan, *Whose Anthropocene? Revisiting Dipesh Chakrabarty's "Four Theses"*, in *RCC Perspectives: Transformations in Environment and Society*, 2016; E. Daly-J.R. May, *Learning from Constitutional Environmental Rights*, in J.H. Knox-R. Pejan (eds), *The Human Right to a Healthy Environment*, 1st edn, Cambridge University Press, Cambridge, 2018, https://www.cambridge.org/core/product/identifier/9781108367530%23CN-bp-3/type/book_part accessed 10 June 2025.

[51] C.D. Stone, *Should Trees Have Standing? Law, Morality, and the Environment*, 3rd edn, Oxford University Press, Oxford, 2010.

[52] *Ibid.*, p. 458.

cannot represent themselves due to their inability to communicate, the author proposes a guardianship model resembling those applied to infants and companies, which, due to their incapacity to properly represent themselves in legal affairs, rely on the representation of a third party. [53]

In the author's reasoning, the granting of legal rights to natural objects would influence the legal interpretation, resulting in greener outcomes in environmental litigation, further arguing that such rights recognition would not require the reinvention of the legal system per se, but only an adjustment to a more inclusive and ecological approach. [54] In practice, however, the recognition of such an ecocentric approach has proven challenging to adopt, and its acceptance appears to find greater adherence in legal traditions marked by the influence of indigenous cultures and populations. Examples include the Ecuadorian [55] Constitution and the "Mother Earth" law in Bolivia, [56] as well as the Māori influence in New Zealand, where legal acts and a bill have respectively recognised the legal entity status of the Whanganui River, [57] the Te Urewera National Park, [58] and Mount Taranaki. [59]

Turning to the EU legal framework, it becomes apparent that only a modest shift towards an ecocentric approach can be identified, as at the time of writing, no explicit recognition of a 'right to nature' has been formally established under

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[53] *Ibid.*, p. 464.

[54] *Ibid.*, pp. 458, 466-467.

[55] Within the Ecuadorian Constitution, the indigenous concept of nature as Pachamama is recognised as a subject of rights. Furthermore, the Constitution adopts a guardianship model, whereby any person may demand the enforcement of nature's rights before the courts. See Arts 71-74, *Constitución de la República del Ecuador*, 2008.

[56] Differently from the Ecuadorian example, the Bolivian approach is not enshrined in the Constitution but rather in its statutory legal framework. "Mother Earth" is recognised in Law No. 071 of 2010, Article 5, as a legal collective entity of public interest, and a series of rights of nature are set out in Article 7 of the same law. Furthermore, this legal instrument is complemented by Law No. 300, which provides the foundational law with the mechanisms, institutions, and procedures necessary for its operationalisation. For a more comprehensive review of Bolivian environmental law, see the previous Working Paper of this project. *Ley No. 071 de Derechos de la Madre Tierra (Law 071 on the Rights of Mother Earth)*, 2010; *Ley No. 300 Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien (Framework Law on Mother Earth and Integral Development for Living Well)*, 2012; F. Tomazini de Souza-A. Brusca, *Assessing the EU Partner Countries' Legal Framework on Sustainable Development: What Is the Role of the EU?*, in *Working Paper Make it Better (MiB): in search of a new normative model for the promotion of sustainable development in the EU external action*, 2024.

[57] *Te Awa Tupua (Whanganui River Claims Settlement) Act*, 2017 (New Zealand Statutes).

[58] *Te Urewera Act*, 2014 (New Zealand Statutes).

[59] At the time of writing, this legal instrument remains at the status of a bill and has yet to be enacted into law.

EU law. This observation stems from the tendency of legal sources to address environmental concerns through the lens of 'sustainable' exploitation and management of natural resources, or the pursuit of 'high levels' of environmental protection. [60] It is important to note, however, that this choice of terminology may lead to ambiguous interpretations, due to the lack of conceptual clarity. For instance, questions may arise as to who bears responsibility for failing to meet such standards, or the extent of discretion available to parties in interpreting these obligations. [61]

Further ecocentric elements can be identified in the affirmation of the intrinsic value of the environment, as reflected in the Preamble to the Convention on Biological Diversity (CBD), [62] of which the EU is a party, and in the development of key environmental instruments such as the Habitats Directive [63] and the Birds Directive. [64] Moreover, the case law of the Court of Justice of the European Union (CJEU), notably in Case C-88/19, [65] which addressed the interpretation of Article 12(1) of the Habitats Directive, demonstrates that ecocentric reasoning has been acknowledged within the jurisprudence.

More promising developments can be observed in relation to procedural rights and the gradual emergence of a guardianship model, as proposed in Stone's ecocentric thought, whereby civil society is assigned the role of representing natural objects. Most notably, this procedural dimension is reflected in Article 9(3) of the Aarhus Convention, [66] as implemented into the EU legal

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[60] See Arts 3(5) and 21(1)(f) TEU, *Consolidated Version of the Treaty on European Union* (n 1); see Arts 191(2) and 191(4) TFEU, *Consolidated Version of the Treaty on the Functioning of the European Union* (n 1).

[61] F. Ippolito, *op. cit.*, note 50, pp. 21-22.

[62] The Preamble reads as follows: "Conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components…" *Convention on Biological Diversity*, 1992.

[63] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, 1992.

[64] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.

[65] Notably, in paragraph 61, the Court held that the capture and transport of the protected wolf in question could not be regarded as duly authorised under the Habitats Directive, even where the species had left its 'natural range' and entered areas occupied by human settlements. The ecocentric element emerges from the Court's recognition that the protection afforded by the Directive is not confined by territorial borders, placing environmental protection at the forefront rather than subordinating it to an anthropocentric perspective. *Asociația "Alianța pentru combaterea abuzurilor" v TM, UN and Asociația DMPA*, [2020] Court of Justice of the European Union, C-88/19, ECLI:EU:C:2020:458; F. Ippolito, cit., note 50, p. 56.

[66] *Aarhus Convention – Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, 1998.

order by Regulation (EC) No 1367/2006 [67] and subsequently amended by Regulation (EU) 2021/1767. [68] Moreover, soft law instruments also indicate progress in supporting this guardianship role, for example, through the administrative guidelines known as the Single Entry Point (SEP) mechanism, [69] issued by the European Commission's DG Trade, which enhance the monitoring capacity of the Civil Society Mechanism [70] established under the Trade and Sustainable Development chapters of EU trade agreements.

Thus, although environmental protection under EU law holds a higher status than in many other international legal instruments, being enshrined as both a principle and an objective, these provisions stop short of recognising it as a substantive right. Instead, they reflect a prevailing preference for incorporating ecocentric elements or ecological language, rather than endorsing the recognition of a self-standing right to nature. In light of these elements, it also becomes clear that it would be inaccurate to characterise the EU's legal framework as purely anthropocentric, grounded solely in the instrumental utility of nature, as such a characterisation risks presenting a misleading picture. [71]

Part of the challenge in recognising an independent right to nature may be attributed to the European legal tradition and cultural background, which tend to favour an evolutionary interpretation of existing human rights, as evidenced, for example, in the case law of the European Court of Human Rights

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[67] Regulation (EC) No 1367/2006 sets out key provisions that give effect to the Aarhus Convention in the EU legal order. It addresses, for example, Access to Environmental Information (Title II), Public Participation (Title III), and Access to Justice (Title IV). Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies, 2006, OJ L 264, 25 September 2006, pp. 13-19.

[68] After the Aarhus Convention Compliance Committee (ACCC) found in 2017 that the EU and certain Member States were not in compliance with the Convention, the amendment introduced by Regulation (EU) 2021/1767 sought to bring the EU into compliance by broadening the scope of internal review. Regulation (EU) 2021/1767 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention, 2021; European Parliament, Directorate General for Internal Policies of the Union, *The EU and the Aarhus Convention: Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters*, Publications Office, 2016, https://data.europa.eu/doi/10.2861/29891 accessed 13 June 2025.

[69] European Commission, *Operating Guidelines for the Single Entry Point and Complaints Mechanism for the Enforcement of EU Trade Agreements and Arrangements*, 2023, Ref. Ares (2023) 8670907, https://trade.ec.europa.eu/access-to-markets/en/form-assets/operational_guidelines.pdf.

[70] For a comprehensive overview of Domestic Advisory Groups and other EU civil society mechanisms, see: D. Martens-D. Potjomkina-J. Orbie, *Domestic Advisory Groups in EU Trade Agreements – Stuck at the Bottom or Moving up the Ladder?*, in *Friedrich Ebert Stiftung*, 2020, p. 1.

[71] F. Ippolito, *op. cit.*, note 50, pp. 21-22.

(ECtHR).[72] Nevertheless, incremental efforts to elevate environmental protection to the level of a substantive right have emerged, such as Resolution 2396 (2021)[73] of the Parliamentary Assembly of the Council of Europe, which advocates for the drafting of an additional protocol to the European Convention on Human Rights (ECHR) recognising a 'right to a healthy environment'. An approach that mirrors developments in other regions, such as the African Charter on Human and Peoples' Rights[74] and the Additional Protocol of San Salvador to the American Convention on Human Rights.[75]

Turning to the external dimension, the adoption of an ecocentric approach within instruments of EU external action, particularly in the context of the Common Commercial Policy (CCP), initially appears to conflict with the objectives of trade liberalisation.[76] Since the object and purpose of trade agreements is to open markets and facilitate commercial exchange between partners, they are inherently linked to the exploitation of natural resources.[77] Consequently, the inclusion of provisions granting legal personhood or autonomous rights to natural entities, such as a mining site, could, on the one hand, restrict or even prohibit resource extraction, thereby affecting a state's competitive advantage or being perceived as a barrier to trade. This perception may give rise to considerable political resistance, undermining the consensus required to recognise such rights within international trade regimes.

On the other hand, this inherent conflict does not exclude the possibility of advancing ecological concerns through the use of trade regimes. On the contrary, the stalling of the Doha Round and its failure to meaningfully address

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[72] *Ibid.*, p. 34; C. Voigt, *The First Climate Judgment before the Norwegian Supreme Court: Aligning Law with Politics*, in 33 *Journal of Environmental Law*, 2021, p. 697.

[73] Parliamentary Assembly of the Council of Europe, *Resolution 2396 (2021) – Parliamentary Assembly of the Council of Europe – Anchoring the Right to a Healthy Environment: Need for Enhanced Action by the Council of Europe*, Council of Europe, 2021, https://pace.coe.int/en/files/29483/html.

[74] *African Charter on Human and Peoples' Rights*, 1981.

[75] *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* ("Protocol of San Salvador"), 1988.

[76] F. Munari, *Do Environmental Rules and Standards Affect Firms' Competitive Ability?*, in 4 *European Papers – A Journal on Law and Integration*, 2019, p. 207; M. Petel, *The Illusion of Harmony: Power, Politics, and Distributive Implications of Rights of Nature*, in 13 *Transnational Environmental Law*, 2024, p. 12; L. Schimmöller, *Paving the Way for Rights of Nature in Germany: Lessons Learnt from Legal Reform in New Zealand and Ecuador*, in 9 *Transnational Environmental Law*, 2020, p. 569.

[77] For a critical perspective on trade liberalisation, see: H.-J. Chang, *Kicking Away the Ladder*, in *Real World Economics*, 2020, p. 231; A. Escobar, *Encountering Development: The Making and Unmaking of the Third World*, Princeton University Press, Princeton, 2011.

environmental issues at the multilateral level [78] has contributed to a preference for more politically feasible approaches, particularly through regulatory cooperation embedded in bilateral trade agreements. A clear example of this is the European Union's TSD chapters, [79] which seek to balance trade liberalisation and sustainable development objectives [80] by introducing binding commitments on labour and environmental standards related to trade.

In this context, if we consider that the pursuit of balanced development as envisioned in these chapters cannot be deemed ecocentric, or even as significantly shifting the ecological orientation of the agreement's nature and objectives, due to its inability to elevate the environmental pillar of sustainable development above the economic one, we may then be faced with a broader question: how could such agreements incorporate a more ecocentric approach without necessarily recognising the legal personhood of natural objects?

As such developments have not yet materialised, we can only operate within the realm of a hypothetical new trade regime, where several options could be explored. For instance, given that EU TSD chapters already require the 'effective implementation' of a range of Multilateral Environmental Agreements (MEAs), [81]

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[78] For a comprehensive analysis of the sustainable development debate during the Doha Round and the resulting stagnation of the multilateral trade regime, see: R. Tarasofsky-A. Palmer, *The WTO in Crisis: Lessons Learned from the Doha Negotiations on the Environment*, in 82 *International Affairs*, 2006, p. 899; D. Brack-T. Branczik, *Trade and Environment in the WTO: After Cancùn*, in *The Royal Institute of International Affairs – Sustainable Development Programme – Briefing Paper*, 2004; K. Hopewell, *Breaking the WTO: How Emerging Powers Disrupted the Neoliberal Project*, Stanford University Press, Stanford, 2016.

[79] The EU first introduced Trade and Sustainable Development (TSD) chapters in its new-generation FTAs with the EU-South Korea Agreement in 2011. These chapters include provisions such as 'high levels', 'minimum level', 'non-regression', and 'non-enforcement' clauses. Together, they seek to ensure the promotion of sustainable trade practices within the trade regime. For comprehensive reviews of EU agreements and TSD chapters, see: B.A. Melo Araujo, *The EU Deep Trade Agenda: Law and Policy*, in *Oxford Studies in European Law*, 2016; A. Delgado Casteleiro, *The European Union's Preferential Trade Agreements: Between Convergence and Differentiation*, in *Yearbook of European Law*, 2023, p. 1; G. Marin Duran, *The EU's Evolving Approach to Environmental Sustainability in Free Trade Agreements*, in *Faculty of Laws University College London Law Research Paper*, No. 03/2023, 2023; I. Alexovičová-D. Prévost, *Mind the Compliance Gap: Managing Trustworthy Partnerships for Sustainable Development in the European Union's Free Trade Agreements*, in 6 *International Journal of Public Law and Policy*, 2019, p. 236.

[80] See Court of Justice, Opinion 2/15, where the Court refers to sustainable development within its conventional tripartite framework—economic growth, social development, and environmental protection. Opinion 2/15, [2017] Court of Justice of the European Union (CJEU), ECLI:EU:C:2017:376.

[81] See Article 270, EU-Colombia, Peru, and Ecuador Trade Agreement, 2013; see Article 13.5, EU-South Korea Free Trade Agreement, 2011; see Article 24.4, *Comprehensive Economic and Trade Agreement* (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part; see Article 19.5, EU–New Zealand Free Trade Agreement, 2022.

these provisions could be redrafted to include stronger commitments. For example, the provision that underpins the parties' commitments to MEAs is considerably weaker compared to the one governing commitments to Multilateral Labour Standards. The latter expressly incorporates a series of core labour standards that must be respected by the trade partner's domestic legislation. As demonstrated in the *South Korea Labour Commitments* [82] case, the explicit reference to these principles and standards enabled the EU to initiate proceedings despite South Korea's failure to ratify the relevant ILO Conventions. [83] Thus, defining with greater precision which environmental standards and principles are to be respected by trade regime partners can support a more balanced integration of the sustainable development pillars.

Furthermore, profiting from the ongoing review aimed at improving the enforcement of TSD chapters, as proposed in the already introduced Communication entitled *The Power of Trade Partnerships*, [84] it would be advisable to include in the MEA-related provisions a paragraph similar to that introduced in the EU–New Zealand and EU–Mercosur Agreements. Respectively, Article 19.5.4 of the agreement with New Zealand [85] and Article 18.5.6 of the signed, but not yet in force, TSD chapter with Mercosur [86] recognise the parties' right to invoke the General Exceptions regime, as set out in Article XX of the GATT, in relation to environmental measures. This approach further strengthens the legitimacy of unilateral measures adopted by the EU in the field of environmental protection, such as the CBAM [87] and the EU Deforestation Regulation. [88] In the event of a dispute concerning the regulatory aspects of such measures, the TSD panel would be required to interpret the unilateral action through a more ecologically oriented lens. [89] Consequently, this increases the likelihood of the

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[82] *South Korea – Labour Commitments* case.

[83] On this issue, see the Chapter of this volume written by Francesca Tammone.

[84] European Commission, *The Power of Trade Partnerships*, cit., note No. 32.

[85] See Article 19.5.4, EU-New Zealand Free Trade Agreement.

[86] See TSD Chapter, Article 18.5.6, EU-Mercosur Agreement, Texts of the Agreement – September 2025, , 2025.

[87] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism (Text with EEA relevance), *CBAM Regulation*, 2023, p. 52.

[88] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, *EU Deforestation Regulation*, 2023 (OJ L 150), p. 206.

[89] The panel assembled for the *Wood Export Ban* case already recognized the necessity to take the relevant context of the TSD Chapter into account when interpreting trade provisions of

measure being recognised as necessary and not constituting an unjustifiable restriction on trade.

Possibilities related to sanctions and the withdrawal of trade liberalisation could also be envisaged. First, as already proposed by the European Commission, future agreements are expected to include a unified dispute settlement mechanism that would allow recourse to trade sanctions where a trade partner fails to comply and adopts measures that materially defeat the object and purpose of the Paris Agreement. [90] Although the climate crisis constitutes the current global emergency, the negotiation of such elements within trade regimes could also encompass other MEAs within the sanctioning procedure, such as the Convention on Biological Diversity (CBD), thus adopting a more ecocentric approach.

A second possibility would be to explicitly permit trade partners to unilaterally suspend trade liberalisation for non-compliant products. [91] To offer a more concrete example, if stronger provisions on deforestation were to be incorporated into the agreement in principle between the EU and Mercosur, [92] the agreement could authorise the withdrawal of preferential market access for non-compliant products or condition such access on stricter and more clearly defined environmental standards embedded within the trade framework, such as those introduced by the EU Deforestation Regulation. Accordingly, the inclusion of express references to the EU's deforestation standards would not only ensure preferential access for compliant products and compel greater efforts by trade partners to meet those standards but would also contribute to the externalisation of the EU's regulatory model, [93] thereby reducing the likelihood of such regulations being challenged within a trade dispute mechanism.

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the agreement, even those contained in the general part (i.e., outside the TSD Chapter). *Ukraine wood export ban*.

[90] European Commission, *op. cit.*, note 35.

[91] For a perspective more focused on the enforcement of sustainable development commitments through sanctions and trade remedies, see: G. Gruni, *The Unsustainable Lightness of Enforcement Procedures: Environmental Standards in the EU-Mercosur FTA*, in *Blog Droit Européen*, 2020, p. 1; M. Bronckers-G. Gruni, *Retooling the Sustainability Standards in EU Free Trade Agreements*, in 24 *Journal of International Economic Law*, 2021.

[92] On the EU-Mercosur Agreement, civil society has expressed concern that its implementation could exacerbate deforestation. See: E. Arima et al., *Dynamic Amazonia: The EU-Mercosur Trade Agreement and Deforestation*, in 10 *Land*, 2021; J. Cáceres et al., *Environment and Climate Change in the Draft EU–Mercosur Trade: Legal Analysis and Proposed Provisions*, Centre for International Sustainable Development Law (CISDL), 2021.

[93] A. Bradford, *The Brussels Effect: How the European Union Rules the World*, 1st edn, Oxford University Press, New York, 2020, https://academic.oup.com/book/36491 accessed 4 November 2024.

Finally, although more legally challenging to establish, the trade regime could pursue a model of trade liberalisation that recognises more eco-friendly tiers. In theory, emissions-intensive products could be excluded from the scope of trade liberalisation without breaching the 'substantially all trade' requirement under Article XXIV of the GATT, [94] thereby limiting preferential access to environmentally sustainable products. Although the expression 'substantially all trade' has been interpreted as not requiring the coverage of all trade between partners, thus allowing a degree of discretion, it must not result in trade distortions or selective protection, and must still encompass the majority of trade between the parties. [95] Consequently, while such differentiated treatment may be permissible within bilateral agreements, it could face legal challenges at the multilateral level within the WTO framework. Furthermore, the exclusion of high-emission products from preferential access under a bilateral regime would not amount to their absolute removal from the market, as such products could still 'leak' into the European market through access granted under the multilateral trading system.

In conclusion, the substantive 'right to nature' remains largely underdeveloped within both European and global normative frameworks, as its recognition would require a significant shift towards an ecocentric legal approach. For such a transformation to take place, profound changes at the cultural, political, and legal-traditional levels would be necessary. Rather than pursuing a sweeping overhaul, the European response is more likely to follow an evolutionary path, gradually integrating ecocentric elements into the existing legal framework and continuing to address environmental concerns primarily through the lens of human rights.

7. *Assessing different normative models*

Following the brief overview of the main normative models available for promoting and protecting sustainable development in the Union's external action carried out in the preceding sections, we may now offer some general considerations.

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[94] Article XXIV states that: "A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories." *General Agreement on Tariffs and Trade*, 1994 – *GATT/94*.

[95] *Turkey – Textiles: Turkey – Restrictions on Imports of Textile and Clothing Products*, [1999] WTO Appellate Body, WT/DS34/AB/R.

To begin with, the EU's promotion of sustainable development at the international level is primarily achieved through the endorsement by its partners of legal standards that foster, and in some cases advance, sustainable development. Crucially, in most cases these standards are not unilaterally imposed but are drawn from internationally agreed instruments, such as MEAs or international labour law conventions. This distinguishes them fundamentally from unilateral standards imposed through domestic legal instruments with extraterritorial reach, such as domestic laws or, in the EU's case, regulations and directives. [96] Accordingly, the common criticism directed at extraterritorial legislation – namely, that it constitutes an unfair and undemocratic imposition – does not apply here. [97] As Gibney has astutely observed, the «most remarkable aspect of extraterritoriality […] is that it represents such a vastly different conception of the law than what exists under the norms and principles of democratic rule [where] those who create and pass the laws are ultimately held accountable to "the people." This, however, is not the situation in the extraterritorial context [given that] lawmakers in the country promulgating laws that will be enforced in other countries are not accountable to "the people" in these other lands». [98] This concern, however, is largely inapplicable to the EU's external sustainable development instruments, which, as noted above, presuppose the consent of international partners, typically formalised through an international agreement. Even in the most muscular negative conditionality-based agreements, the underlying premise remains mutual consent. As such, no democratic or rule of law deficit arises, since the legitimacy of the Union's partners is presumed on the basis of their own internal political and constitutional systems. [99]

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[96] A recent, controversial case of legislation with extraterritorial effects is the so-called Deforestation Regulation. See Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010. For a comment, see L. Pastorino, *Gli accordi bilaterali UE – Paesi terzi e il nuovo Regolamento contro la deforestazione*, in *Alimenta*, 2, 2024, p. 611 ff.

[97] Not to mention the international law issues related to the tensions between extraterritoriality and the notion of jurisdiction, on which see C. Ryngaert, *Jurisdiction in International Law*, Oxford University Press, Oxford, 2015, especially at 50 ff.

[98] See M.P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, in *Boston College International & Comparative Law Review*, 19, 1996, pp. 305-306.

[99] One might ask whether, beyond the formal dimension of consent, the same considerations hold true for agreements of an asymmetrical nature, namely, those concluded between the EU and a partner that has considerably less economic and political weight. In cases where the imbalance is particularly stark, it may be legitimate to question the weaker party's actual capacity to negotiate on equal footing, raising concerns that the agreement may, in substance, resemble an imposition rather than a genuinely mutual arrangement.

While the various models are all unproblematic from the perspective of democratic legitimacy, being grounded in mutual consent, they differ significantly in other respects that are central to our analysis. As a global actor, the EU is traditionally associated with the concept of *normative power*, whereby diplomatic cooperation is regarded as the primary means of addressing international challenges. [100] EU external relations are rooted in the promotion of its foundational values, setting it apart from other global powers whose foreign policies are primarily driven by their national interest. [101] In this context, Ian Manners famously identified two main channels through which EU norms, and by extension, EU values, are diffused: *contagion*, encapsulated by the notion of "leading by example", and *transference*, embodied in what he described as «the "carrot and stick-ism" of financial rewards and economic sanctions […] facilitated by the conditionality which is required in all EC agreements with third countries». [102] In this Chapter, we are not concerned with the first channel. As regards the second, from the standpoint of the Union's role as a global normative power, it is submitted that not all forms of transference based on conditionality are equally suited to the promotion of sustainable development. The following seeks to explain why.

At this stage, it is necessary to take a step back and consider the origins of conditionality, which were amply outlined in the preceding sections. The rise of conditionality is linked to the concept that the very existence of the EU is inextricably linked to the upholding of its foundational values. From the outset, being admitted to the political and legal community that is the EU has implied, above all, adherence to a core set of fundamental principles. As noted above, the earliest, informal application of this idea can be traced back to the rejection of Spain's accession request in 1962, on the grounds that it lacked democratic governance and respect for the rule of law. [103] Within the EU, this requirement was later formalised in what are now known as the Copenhagen criteria for candidate countries, and enshrined in Article 2 TEU as binding upon Member States. This concept was soon extended to the EU's external relations, signifying that non-EU countries, much like EU Member States, are expected to respect a core set of foundational values as a condition for engaging

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[100] See the much celebrated essay written by I. Manners, *Normative Power Europe: A Contradiction in Terms?*, in *Journal of Common Market Studies*, 40, 2002, pp. 236-237.

[101] This difference is aptly highlighted by R. Leal-Arcas-S.M. Saveljeff, *Environment-led Conditionality*, cit., note No. 45, p. 1, who, comparing the EU and US GSPs, point out that the EU approach is based on values, while the "American policy is economy-led". This is obviously not to say that the Union's interest has no bearing in the external action of the EU.

[102] I. Manners, *Normative Power Europe: A Contradiction in Terms?*, cit., p. 245.

[103] See L. Bartels, *Human Rights and Sustainable Development Obligations*, cit., note No. 17, p. 298.

in a relationship with the Union. Consequently, the EU began to implement human rights clauses with the 1990 EU-Argentina Cooperation Agreement, gradually extending this practice to trade agreements, preferential schemes such as the GSP, and instruments of financial and technical cooperation. [104] The human rights clauses serve a clear legal function: they provide a basis for suspending or terminating the agreement in question, in accordance with the law of treaties, in response to serious and systematic human rights violations.

The practice indicates that these clauses are intended as a last resort, to be triggered only in exceptional circumstances. Indeed, whenever they have been invoked, "there was a component of political unrest", such as in the aftermath of a coup d'état. [105] Precisely because of their exceptional nature, human rights clauses are regarded as an effective tool to ensure that the Union "can withdraw from any commitment that would imperil its obligation to respect human rights and democratic principles in its external relations". [106]

The inclusion of provisions on sustainable development is a relatively recent development, and the incorporation of conditionality mechanisms is even more novel – the EU-New Zealand FTA possibly being the first example. [107] From the standpoint of international law, the principle of sustainable development, assuming it qualifies as a legal principle, which remains contested, is difficult to articulate in terms of concrete, standalone legal obligations beyond best efforts commitments. [108] This stands in marked contrast to fundamental rights

[104] *Ibid*., p. 299.

[105] See A.C. Prickartz-I. Staudinger, *Policy vs Practice: The Use, Implementation and Enforcement of Human Rights Clauses in the European Union's International Trade Agreements*, in *Europe and the World: A Law Review*, 3, 2019, p. 20.

[106] See L. Bartels, *Human Rights and Sustainable Development Obligations*, cit., note No. 17, p. 311.

[107] On which see the considerations made by G. D'Agnone, *Sviluppo sostenibile: una condizionalità ambientale… soft?*, cit., note No. 37. However, it should be noted that in instruments other than free trade agreements, the inclusion of sustainable development conditionality is less recent. The most obvious examples are the GSP+ scheme and development cooperation agreements. See G. D'Agnone, *Environmental Conditionality in EU–Latin America Trade Relations*, cit., note No. 44, pp. 51 ff.

[108] See V. Barral, *Sustainable Development in International Law*, cit., note No. 39, p. 385. Recently, in the landmark Advisory Opinion concerning the *Obligations of States in Respect of Climate Change*, the International Court of Justice has held that "the principle of sustainable development guides the interpretation of certain treaties and the determination of rules of customary international law" (see ICJ, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 147), confirming that, in the ICJ's view, sustainable development is an interpretive means rather than a standalone legal principle. For a discussion on the legal nature of sustainable development, see the Chapters in this volume written by Karin Arts and Ivan Ingravallo.

obligations, such as those relating to democracy and the rule of law, which are more clearly defined and enforceable. Second, under EU law, the promotion of sustainable development is a Treaty-based objective to be pursued alongside other objectives, such as the eradication of poverty. [109] In this context, it must be acknowledged that access to the markets of developed countries "remains a significant barrier for developing countries, and while tariff barriers have decreased, non-tariff measures restricting trade have risen". [110] Imposing (negative) conditionality to limit trade with less developed partners may therefore generate tensions among EU constitutional objectives, each of which carries equal legal weight. Third, and as a corollary, the achievement of sustainable development goals, particularly those focused on future generations, cannot be attained "without first resolving current global issues such as poverty, hunger and lack of sanitation" [111] in many developing countries. For all these reasons, the adoption of coercive mechanisms to promote sustainable development in the EU's external policies should be approached with considerable caution and careful deliberation.

More fundamentally, a theoretical concern arises regarding the EU's nature as a normative power, that is, its very identity as an actor grounded in the promotion of values and principles. As an international relations scholar has aptly observed, "conditionality is considered a mechanism through which states and international institutions aim at influencing the behavior of other states by using material incentives. As a concept, conditionality is closely linked to a rational choice logic that defines actors as cost–benefit calculators and strategic utility-maximizers. Building on a logic of consequentialism, international institutions and states aim to change the behavior of other states not by influencing their preferences but rather by influencing their cost–benefit calculation". [112] In political science, conditionality is often contrasted with socialisation – the process

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[109] See Arts 3(5) and 21(2)(d) TEU. On the conceptualisation of sustainable development in the EU external relations legal framework see B.O. Giupponi-H. Hofmeister, *"Green Conditionality" in the EU's Trade and Investment Policy: Quo Vadis?*, in R. Wessel-J. Bergamaschine Mata Diz-J. Peret Tasende Társia-S.E. Akdogan (eds), *EU External Relations Law and Sustainability*, Asser Press/Springer, The Hague, 2024, pp. 68 ff.

[110] See S. Alam, *Trade and Sustainable Development in the Global South: The Role of Special and Differential Treatment in Achieving SDGs*, in K. Sumaiya-S. Alam-M.E. Haque (eds), *Implementation of Sustainable Development in the Global South: Strategies, Innovations, and Challenges*, Hart Publishing, Oxford, 2024, p. 219.

[111] See S. Kahir-S. Alam-M.E. Haque, *Reimagining Routes to Sustainability: Pathways, Obstacles and Innovations in the Global South*, in K. Sumaiya-S. Alam-M.E. Haque (eds), *Implementation of Sustainable Development in the Global South: Strategies, Innovations, and Challenges*, cit., p. 10.

[112] See S. Koch, *A Typology of Political Conditionality Beyond Aid: Conceptual Horizons Based on Lessons from the European Union*, in *World Development*, 75, 2015, p. 98.

by which norms and standards are internalised through persuasion and social learning. [113] Notably, the EU's ex-post negative conditionality in trade and sustainable development chapters of FTAs has been described as occupying "a grey area between conditionality and social learning". [114] However, the EU's recent approach in this domain appears to be shifting away from the socialisation model.

Conditionality also raises important sovereignty concerns. As de Moerloose effectively explains in her study of the World Bank conditionality, the agency theory can be used to conceptualise this dynamic. In that context, the "Bank (the principal) has imperfect control over the Borrower (the agent), but the terms of the conditionality give the agent an incentive to behave in a way that promotes the preferences of the principal. The degree of aversion and resistance of the Borrower and the likely violation of sovereignty depends in each case on whether or not insertion of the safeguards by the Bank concurs with the preference of the Borrower". [115] *Mutatis mutandis*, this logic applies to EU sustainable development conditionality as well. Within this framework, the EU acts as the principal and the partner country as the agent. The sustainable development obligations imposed through an international agreement function as safeguards. While these obligations are often formally reciprocal, the reality – particularly in asymmetrical partnerships – is that it is the sovereignty of the partner country, not that of the Union and its Member States, that is most constrained. This limits the full applicability of agency theory but does not eliminate the underlying imbalance inherent in the use of conditionality in this context.

At first glance, the use of conditionality may appear to be a natural consequence of so-called normative power Europe. Upon closer inspection, however, it reveals potential tensions with that very concept. Being a global normative power presupposes a rejection of coercive instruments, whether direct or indirect. While positive conditionality may be broadly compatible with this ethos – encouraging compliance through incentives – the same cannot be said of negative conditionality, particularly when it takes the form of punitive measures such as sanctions. As Ian Manners has noted, the EU's actions "are likely to be more normatively sustainable if they involve persuasion, argumentation, and the conferral of shame or prestige, rather than coercion or solely material

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[113] See J.T. Checkel, *Why Comply? Social Learning and European Identity Change*, in *International Organization*, 55, 2001, *passim*.

[114] See S. Koch, *A Typology of Political Conditionality Beyond Aid: Conceptual Horizons Based on Lessons from the European Union*, cit., p. 102.

[115] See S. de Moerloose, *World Bank Environmental and Social Conditionality as a Vector of Sustainable Development*, Schultess éditions romandes, Geneva, 2020, p. 224.

motivations”. [116] From this perspective, the adoption of sanctions with a punitive intent risks distancing the EU from its traditional role as a normative actor.

This aspect becomes especially apparent when contrasting the EU with the US, often seen as the primary advocate of a more muscular, interest-driven approach. Commenting on labour provisions in EU and US agreements, Kathleen Claussen aptly observed that the two adopt fundamentally different perspectives: while “the EU typically treats issues of labor as related to sustainable development or human rights […] the USA treats it as matter of competitive advantage”. [117] Based on this distinction, Claussen observed that the Union has traditionally favoured a promotional model, while the US has embraced a conditional, enforcement-driven one. By reasoning *a contrario*, one might argue that it is inherently inconsistent to frame sustainable development as a matter of value promotion – as the EU does – and simultaneously impose negative conditionality, which inherently reflects a logic of economic reciprocity and retaliation. This contradiction risks undermining the coherence of the EU’s normative identity. While there has been a clear preference for positive conditionality, [118] this approach has shifted in recent years. The change was formalised in the *The power of trade partnerships* policy document elaborated by the Commission, [119] and has been confirmed by the most recent practice, as discussed above.

It is true that human rights clauses are also constructed as instruments of negative conditionality, through essential elements and suspension clauses that allow the EU to withdraw benefits in response to serious human rights violations. However, they operate in practice within a broader framework that blends negative and positive conditionality, prioritises dialogue and cooperative measures, and applies sanctions only selectively. They therefore cannot be fully reduced to a pure negative conditionality paradigm, even though that paradigm is central to their legal design. Moreover, they are intended to be triggered only in cases of particularly serious human rights violations, as demonstrated by the practice briefly recalled above. In the context of sustainable development, a similar paradigm should be applied to ensure conformity with the Union’s traditional normative power approach.

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[116] See I. Manners, *The Social Dimension of EU Trade Policies: Reflections from a Normative Power Perspective*, in *European Foreign Affairs Review*, 2009, p. 793.

[117] See K. Claussen, *Reimagining Trade-Plus Compliance: The Labor Story*, in *Journal of International Economic Law*, 23, 2020, p. 33, fn 32.

[118] See A.C. Prickartz-I. Staudinger, *Policy vs Practice: The Use, Implementation and Enforcement of Human Rights Clauses in the European Union’s International Trade Agreements*, cit., pp. 5-6.

[119] European Commission, *The Power of Trade Partnerships*, cit., note No. 32.

Before turning to the conclusions, one final observation is warranted on the model that, as of yet, does not exist in practice: the ecocentric approach. This paradigm would entail a radical shift in the drafting of EU agreements and, more broadly, a novel legal framework for addressing sustainability, one in which the environmental component is systematically prioritised over the social and, above all, economic dimensions of sustainable development. [120] As discussed in section 6, adopting an ecocentric model would require a fundamental rethinking of the EU's external instruments, especially its trade agreements. The main issue with this paradigm, in our view, lies in its theoretical foundations. It is often argued that, when tracing the concept of sustainability to its origins, "the core essence of sustainable development becomes clear: ecological sustainability". [121] Yet this view also has a darker side. As the same author notes, the "term 'sustainable development' was first documented in laws governing forest industry management practices in Europe toward the end of the eighteenth century. The laws permitted harvesting of only as much of the forest as would grow again each year, so that the forest as a whole would be maintained". [122] This dynamic – with its political, economic, social and environmental implications – is powerfully illustrated in Giuseppe Dessì's much-celebrated historical novel *Paese d'ombre* (1972), in which the depletion of the forests around Villacidro, Italy, in blatant violation of the rules on forest management, plays a central role. At that time, many European states had adopted laws allowing deforestation only in line with natural regrowth, an early and undeniably ecocentric manifestation of sustainability. However, these same societies were marked by widespread social injustice. Large segments of the population lived in miserable conditions, while small elites held a disproportionate share of wealth. Ideas of social justice and more equitable resource distribution were still the preserve of a few pioneering thinkers. This is not to suggest that inequality no longer exists – far from it. But the original ecological focus of sustainability partly reflected a historical context in which social and economic rights were not widely recognised. Today, by contrast, the social and economic pillars of sustainability are firmly established, particularly in liberal democracies based on the rule of law. The fact that these dimensions are now considered equal in importance to the environmental one is a welcome development – and, in our view, one that should not be reversed.

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[120] See K. Bosselmann, *The Principle of Sustainability: Transforming Law and Governance*, Routledge, Abingdon, 2017, p. 34 ff. On this issue, see also the Chapter in this volume written by Ivan Ingravallo.

[121] See K. Bosselmann, *Sustainable Development: Contested Notions*, in K. Sumaiya-S. Alam-M.E. Haque (eds), *Implementation of Sustainable Development in the Global South: Strategies, Innovations, and Challenges*, Hart Publishing, Oxford, 2024, p. 41.

[122] See K. Bosselmann, *Sustainable Development: Contested Notions*, cit., p. 37.

8. *Conclusions*

At the end of this analysis of the instruments used by the Union to promote and protect sustainable development in the international arena, a number of concluding remarks can be offered. Before doing so, it is helpful to briefly summarise the main findings of this Chapter.

Firstly, conditionality is a long-established tool in the EU's institutional arsenal. Originating as an accession criterion, it has gradually expanded to cover virtually all areas of EU law, especially in recent years. While this paper does not focus on internal instruments, it is worth noting that even within the Union, conditionality has become an *incontournable*, as illustrated by developments related to the Next Generation EU programme and the rule of law crisis. It is therefore unsurprising that conditionality plays a central role in the EU's external efforts to promote and protect sustainable development.

Secondly, conditionality is a highly versatile instrument. It can take many different forms, all of which are deployed to varying degrees in the field of sustainable development.

Thirdly, while multiple forms of conditionality exist, recent years have seen a clear shift towards more muscular variants. The increasing use of negative conditionality and the emergence of sanction-based approaches are emblematic of this trend.

Fourthly, not all forms of conditionality are normatively equivalent for our purposes. From the standpoint of the EU's role as a normative global actor, negative conditionality is far more problematic than positive conditionality, which aligns more closely with the Union's traditional Kelsenian posture in the international community.

Fifthly, and perhaps most obviously, conditionality remains the EU's principal, if not sole, instrument for promoting and protecting sustainable development externally.

Sixthly, while it would be inaccurate to characterise the EU legal order, including its external instruments, as purely anthropocentric, it is clear that ecocentrism has struggled to gain meaningful traction in the Union's external action.

Seventhly, ecocentrism itself may be difficult to reconcile with the EU's constitutional DNA. An approach that systematically prioritises environmental concerns over economic and social considerations would sit uneasily with the Treaties' explicit commitment to a balanced and integrated model of sustainable development.

Moving beyond these findings, a few additional considerations seem warranted.

First, discussions surrounding the promotion of sustainable development on the international stage are often shaped, if not distorted, by a Eurocentric, or Westcentric, narrative. This narrative assumes that "our" standards are the most advanced and ought to be adopted by others, particularly developing countries, which are often perceived as being unduly focused on their right to develop *tout court*, rather than developing *sustainably*. This assumption is flawed. When we seriously engage with legal traditions beyond our own, such as indigenous systems, as briefly mentioned in this chapter, we may find that these frameworks are not necessarily less advanced, [123] but simply different.

Second, promoting sustainable development as a self-standing objective, disconnected from related issues, may produce unintended and undesirable consequences. While this may appear counterintuitive, closer inspection reveals increasing overlap between human rights and sustainable development. [124] Indeed, under a broad understanding of sustainable development, human rights are inextricably linked. Treating them separately, therefore, may prove counterproductive. A telling example is provided by a US case in which the murder of a trade union leader was deemed irrelevant under the US GSP because it was classified as a violation of human rights rather than labour rights – only the latter being relevant for GSP eligibility. [125] This suggests that the integration of human rights and sustainable development obligations warrants serious consideration – a question that, so far, has received insufficient attention and may merit further research. [126]

Finally, as noted by Gracia Maria Duran, the new approach proposed by the Commission in 2022 – seemingly the basis for the Union's current negotiating posture – does not appear to rest on solid normative foundations. Its purported advantages remain unproven and seem motivated more by prevailing political

[123] See, for example in the context of the EU-Vietnam Free Trade Agreement, N.T. Nhung-H.Y. Trinh, *Demystifying the Sustainable Development Chapter in the EU-Vietnam FTA*, in *Legal Issues of Economic Integration*, 2022, p. 226, who argues that while "[o]ne may see that Vietnam accepts the EU model of sustainable development chapter as a trade-off to gain market access for goods […] an analysis of Vietnam's legal framework […] reveals that this issue has been considered in Vietnam's social and economic development strategy for a long time before the conclusion of the EVFTA".

[124] L. Bartels, *Human Rights and Sustainable Development Obligations*, cit., note No. 17, pp. 312-313; as well as the Chapter in this volume written by Karin Arts.

[125] See B. Hepple, *Labour Laws and Global Trade*, Hart Publishing, Oxford, 2005, p. 96.

[126] In this regard, the adoption of a uniform dispute settlement mechanism is a welcome development. See G. Gruni, *Labour Standards in EU Free Trade Agreements: Substantive Issues and Recent Developments Concerning Their Enforcement*, in G. Vidigal-K. Claussen, *The Sustainability Revolution in International Trade Agreements*, Oxford University Press, Oxford, 2024, p. 102 ff.

sentiment than by principled reasoning.[127] A shift away from the EU's traditional Kelsenian stance, from a value-based actor to one driven by geopolitical weight, would mark a significant departure. Such a choice should not be made lightly, and certainly not for the sake of pure politics.

[127] G.M. Duran, *The EU's Evolving Approach to Environmental Provisions in Free Trade Agreements*, in R. Wessel-J. Bergamaschine Mata Diz-J. Peret Tasende Társia-S.E. Akdogan (eds), *EU External Relations Law and Sustainability*, Asser Press/Springer, The Hague, 2024, p. 270 ff.

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