Alessandra Mignolli

Sapienza
Università di Roma

The European Union and Sustainable Development

A study on unilateral trade measures

Edizioni Nuova Cultura

Cooperazione & Sostenibilità

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Foreword

I have been studying the relationship between trade and sustainable development in the EU's external action for several years, preparing classes for my course on European Union Law and Human Rights at Sapienza University and discussing the many accomplishments but also the shortcomings and weaknesses of the Union's policies for sustainable development with students coming to Rome from all over the world. I am convinced that trade is the most relevant expression of the projection towards the outer world of the Union's fundamental principles and values, since market access is the most powerful instrument of incentive and leverage the Union has at its disposal to influence the behaviour of partner countries. The European Union is indeed a strange creature. It has, in its DNA, not only the ambition to be one of the largest markets and one of the most influential trade actors in the globalised economy, but also the mission to spread the values and principles which lie in the foundations of the European integration process: democracy, the rule of law, respect and protection of human rights and fundamental freedoms, environmental protection and sustainable development.

This twofold mission is at the origin of the adoption, in the context of the common commercial policy – which is even more powerful because of its character of exclusive competence – of several acts, generally regulations, disciplining trade in the pursuance of non-economic goals or, more specifically, using the trade instrument to pursue non-economic goals. The practice of integrating sustainable development (a concept which, according to the most recent international evolution, can be understood in a comprehensive way, encompassing all the elements included in its three pillars, economic, social and environmen-

tal) into the EU's trade policy was accentuated even more after the entry into force of the Lisbon Treaty and the introduction of Article 21 in the Treaty on the European Union. This provision can be considered as the cornerstone of the principle of coherence of the external action of the Union, which must be achieved through the convergence of all external actions in the different areas which form the object of EU competence towards common and shared objectives, including sustainable development.

The focus of this research is the role of the Union in pursuing sustainable development in third countries through the use of trade instruments. The only measures that will be considered are the unilateral ones. This is for several reasons. The first reason is that the legal literature has mostly studied the many international agreements the Union has concluded over the years in the field of trade, analysing the clauses for the promotion of sustainable development and human rights and their evolution. On the contrary, the use of unilateral measures has not been systematically explored, despite their relevance in the reconstruction of the foreign policy of the Union.

A second reason for this choice is that unilateralism is *per se* problematic, as it implies the lack of agreement of the trading partners to EU regulatory measures which often affect, to a greater or lesser extent, the behaviour of third States or economic operators from third States. For this reason, unilateral measures can collide with international law norms and multilateral trade rules in the framework of the World Trade Organisation (WTO) and can entail forms of extraterritorial reach. Both aspects have significant relevance in the analysis of these kinds of measures, and, as a matter of fact, have raised many trade disputes and heated debate in the legal doctrine. An additional reason for the decision to focus the investigation on unilateral measures is that it offers the opportunity to compare the different methods the Union adopts in pursuing sustainable development objectives in its external action through trade: incentives and conditionality to market access, trade bans, certification requirements, process and production method measures as conditions for market access, and due diligence obligations for European economic operators and traders.

The methodology of this book follows the rules of legal research: analysis of the legal acts and their scope, legal value, objectives and effects, analysis of the implementation practice, and analysis of the relevant case-law, at the EU level as well as at the international and WTO levels, with constant reference to the work of legal scholars.

The "constitutional" background of the role of sustainable development in the legal order of the Union will be set taking account of the legal framework of the Treaties and the Charter of Fundamental Rights and the most recent jurisprudence of the Court of Justice on the matter, as well as the most relevant strategy and policy documents published by the EU institutions.

Further, the investigation considers the policies of the Union with respect to the connection between trade and human rights in third countries through an analysis of the incentives and conditionality policies in the framework of the Generalised System of Preferences and the ban on trade in goods that can be used for torture and for the death penalty. In the same direction goes the analysis of two different but connected regulations: the regulation implementing for the Union the Kimberley Process for trade in rough diamonds in order to break the link between diamond trade and violent conflict, and the regulation on due diligence in the supply chain for minerals from conflict areas: both aim at reducing violent conflict and ultimately contributing to the improvement of human rights protection in the affected areas. Other EU measures address the environmental side of sustainable development, with a specific focus on the fight against climate change: in this perspective, the study looks at the trade impact of EU measures that pursue the objective of the sustainable use and management of natural resources (seal products, timber, fishery products, biofuels). At the end of the work, I try to pick up the threads on the tensions between unilateralism and multilateralism in the EU policies for sustainable development, with a focus on the issue of the extraterritorial reach of EU measures.

Chapter I
Sustainable Development in the European Union Legal Order

1. Sustainable development in the Treaties

The notion of sustainable development appears in the Treaties five times and twice in the Charter of Fundamental rights[1]. To stress the importance that is attached to this concept, the first reference to sustainable development is in the Preamble of the Treaty on the European Union (hereinafter TEU): "Determined to promote economic and social progress for their peoples, taking into account the principle of sustainable development (…)". There are four elements we can learn from this statement in the Preamble. First, the framers of the Treaty[2] refer to sustainable development as a "principle". This definition confers on it the role of legal guidance in the shaping of EU policies; in fact, "principle" is a term that has a legal meaning and legal effects, and it is not a merely cultural or even economic or political notion, as will be discussed later. Second, sustainable development must be taken into account in promoting "economic and social progress for their peoples"; in other words, sustainable development is the first guidance for the promotion of progress inside the Union and for its own peoples. The primary role of this principle thus relates mainly to internal action. Third, it relates to the *economic* and *social* progress of the peoples, meaning that the notion

[1] I refer to the text of the Treaties that are in force at the time of writing, based on the revision accomplished by the Treaty of Lisbon of 2007.

[2] The reference to sustainable development was added to the Preamble by the Amsterdam Treaty in 1997.

of sustainable development goes beyond the borders of economic development to encompass a larger notion of social and human development[3]. Fourth, the central position in the Preamble and the commitment of the contracting parties to take into account the principle confer on sustainable development an overarching role in the action of the Union in all its areas of competence[4]. We can affirm that this is the first clue revealing the horizontal, integrated position of this principle in the EU system.

The second (and third) places where sustainable development appears in the Treaties are in Article 3, the provision devoted to the aims of the Union. Here, it begins to adopt its double face, internal and external, the former in paragraph 3, which affirms that the internal market's role is to "work for the sustainable development of Europe", and the latter in paragraph 5, where the Union is given the task of contributing to the "sustainable development of the Earth". Aside from the solemnity of the objective (acting for the sustainable development of Europe and the Earth is no little thing), the cited provisions again stress the role of this principle, which is at the core of all the Union's activity.

The role of sustainable development is further confirmed in Article 11 of the Treaty on the Functioning of the European Union (hereinafter TFEU), which is located among the provisions having general application. Article 11 TFEU states that "[e]nvironmental 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". This is the enunciation of the principle of the integration of environmental protection into all the EU's policies, both internal and external. Sustainable development here appears as the central objective of environmental protection, and as such, it is integrated into all EU activities. But, at the same time, the principle

[3] In accordance with the accepted international definition of the three pillars of sustainable development: economic, social and environmental.

[4] On the legal value of the Preamble and its possible role as an important element in the interpretation of the Treaty, see C. Curti Gialdino, "Preambolo", in *Codice dell'Unione europea operativo*, ed. C. Curti Gialdino (Napoli, Simone, 2012), 40 *ff.*; C. Curti Gialdino, "Osservazioni sul contenuto e sul valore giuridico del preambolo del Trattato sull'Unione europea", *Studi sull'integrazione europea* (2011): 457 *ff.*

apparently loses part of its wider meaning, as its scope is limited to the substantive boundaries of environmental protection. This might appear to be in contrast with what is affirmed in the Preamble, as well as in Article 37 of the Charter of Fundamental Rights of the Union (hereinafter the Charter), whose Preamble clearly states that the Union "seeks to promote balanced and sustainable development". Article 37 of the Charter considers sustainable development to be in the realm of environmental protection, with a formulation that echoes the previously cited Article 11 TFEU: "[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development". Such confinement of sustainable development in the environmental discourse is, however, more apparent than real. Despite the said apparent limitation, in fact, sustainable development indirectly acquires a cross-cutting role through the mentioned obligation for the institution to integrate environmental protection (and sustainable development) into all the actions and policies of the Union.

A last Treaty reference remains to be considered, and this is Article 21 (2), letters (d) and (f), TEU. Article 21 was introduced in the Treaty by the Lisbon Treaty, as one of the interventions made in order to enhance the coherence of the external action of the Union, and it can be considered the cornerstone of the Union's external action. The mentioned provision provides all the areas of the EU's external action with a wide set of common objectives shared by the European Common Foreign and Security Policy (hereinafter CFSP) and all the other areas of external action regulated in the TFEU, which include specific external areas such as international trade or cooperation policy (whose discipline is in Part Five of the TFEU), as well as the external dimension of internal policies. I will argue below that this provision has had enormous importance in shaping the layout of external action after the Lisbon Treaty, in accordance with the most recent case-law of the Court of Justice. Article 21 (2) (d), TEU establishes that the Union shall "foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty", and the following letter (f) is devoted to the contribution the Union

must give to global environmental protection, namely to "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".

The introduction of sustainable development at the level of primary law confers a constitutional role on it in the normative structure of the Union and, as has been noted, influences the legislative decision-making of the institutions and the interpretation of secondary law, particularly as an effect of the principle of integration of environmental protection in all the policies of the Union[5].

2. The notion of sustainable development

Two considerations are required after setting the Treaties' normative background on sustainable development. First of all, it is evident that sustainable development has acquired a pivotal role in the EU system. Its inclusion among the general objectives of the Union and the specific aims of its external action means that pursuing sustainable development in all EU actions, internal and external, is an obligation for the institutions and requires them to consider the sustainable development implications on a cross-cutting basis. The second consideration affects the position of sustainable development in the external action of the Union. Again, we can affirm that contributing to the sustainable development of developing countries is an obligation for all the external action of the Union. Such obligation affects not only the EU's development cooperation policy specifically, but also all the other areas of

[5] H. Unnerstall, "'Sustainable Development' as Legal Term in European Community Law: Making It Operable within the Habitats Directive and the Water Framework Directive" (UFZ-Disckussionpapiere n. 16-2005), 26. This author writes about the previous versions of the European Treaties, so he cannot take into account the modifications introduced by the Lisbon Treaty. Nevertheless, he emphasises the importance of the position of sustainable development in the Preamble of the TEU and in Articles 2 TEU and 2 TEC among the aims of the EU and the EC, noting that this concept must be considered the "yardstick" to be used wherever environmental and other interests need to be weighed.

external action, including the CFSP and, for the purpose of this study, the common commercial policy. This is confirmed by Article 208 (1), subsection (2): "The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries".

A final consideration, which opens the following analysis, is the lack of a definition of sustainable development in the European Treaties. The only clues that the Treaties provide are that sustainable development must involve the economic, social and environmental progress of the peoples and that the sustainable management of resources must be balanced and has, as a priority, the eradication of poverty. This is not very detailed, so in order to find a workable definition, or at least a framework definition of the contents of the concept of sustainable development, it is necessary to rely on different sources. In other words, there is not an EU definition of sustainable development, and the only one that has actually existed is no longer in force. I refer to Article 2 of Regulation 2493/00[6]: "[f]or the purposes of this Regulation: 'sustainable development' means the improvement of the standards of living and welfare of the relevant populations within the limits of the capacity of the ecosystems by maintaining natural assets and their biological diversity for the benefit of present and future generations"[7]. This definition acquires elements from the classical definition of sustainable development that can be found in the Report adopted by the UN Brundtland Commission in 1987: "[s]ustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs"[8]. This formulation is still largely valid, as it gives economic development an environmental dimension which expresses the need to preserve the environment and the natural resources

[6] Regulation n. 2493/2000 of the European Parliament and of the Council of 7 November 2000 on measures to promote the full integration of the environmental dimension in the developing process of developing countries, in *O.J.* L 288 of 15 November 2000, whose end of validity was December 31, 2006.

[7] On this definition, see S.R.W. van Hees, "Sustainable Development in the EU: Redefining and Operationalizing the Concept", *Utrecht Law Review* (2014): 61, 71.

[8] World Commission on Environment and Development (WCED), "Our Common Future", (1987), chapter 2, paragraph 1.

for the benefit of future generations. It seems to be a moral commitment[9], rather than a legal one. Nevertheless, it has many legal implications and consequences: first of all, the obligation to assess the environmental impact of human activities and to manage natural resources, both renewable and not renewable, in a way that does not lead to their depletion but to their preservation for our children and grandchildren. In addition to the intergenerational responsibility that is inherent to the Brundtland definition, there is another dimension to sustainable development, which is the intragenerational responsibility or intragenerational equity, which was later made more explicit in the Rio Declaration of 1992[10], wherein the principle of common but differentiated responsibility was first introduced. According to this principle, the industrialised States must support a larger share of the burden of environmental protection and reparation of environmental damages. At the same time, all States must take account of the principle of the equitable use of natural

[9] As Pope Francis put it, "we can no longer speak of sustainable development apart from intergenerational solidarity" (Encyclical Letter *Laudato si'* (24 May 2015), paragraph 159). The Holy Father refers to sustainable development as "integral and sustainable human development" (*ivi*, paragraph 17), stressing the broad notion of sustainable development, centred on the human being. Intergenerational justice entails a moral or philosophical approach to the issue; a more pragmatic approach has been suggested, which is to refer to the long-term interests of the community (A. Jakab, "Sustainability in European Constitutional Law" (July 1, 2016), Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2016-16. Available at SSRN: https://ssrn.com/abstract=2803304 or http://dx.doi.org/10.2139/ssrn.2803304, 2).

[10] The Rio Declaration was adopted by the UN Conference on Environment and Development held in Rio de Janeiro on June 3-14, 1992. Principle 3 of the Declaration states that "the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations", while the principle of common but differentiated responsibilities is established in Principle 7: "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth ecosystem. 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 pressure their societies place on the global environment and of the technologies and financial resources they command".

resources, which implies that the use by a State must take account of the needs of the other States[11], and again, this affects industrialised States more than developing countries.

The Brundtland definition, as well as the Rio Declaration[12], have the merit of starting the necessary integration of environmental concerns into economic development objectives and policies, and the EU definition recalled above adopts a similar approach. Since the latter is no longer in force, however, we must conclude that the EU has, in its law in force at the time of writing, no legal definition of a concept that plays a central role in its normative and institutional system. I think this is a good thing, because sustainable development is necessarily, on the one hand, a global concept, which was created to respond to global concerns, and on the other hand, it is a concept that is subject to constant evolution and change, according to the evolution of and changes in human societies and the needs of human societies. From this perspective, the Union may have a better ability to adapt its policy-making to such evolution without being limited by a frozen definition of the material content of the concept. It can be added that the Court of Justice, as we will see later, has started to develop its own jurisprudence on sustainable development and is giving shape, if not to an autonomous definition of this principle, at least to the elaboration of a number of elements that concur with its definition or that form part of the load of the container[13]. The primary method adopted by the Court is the constant reference to international legal instruments, as it is in the international framework that the concept of sustainable development was created.

What is relevant, however, is to stress that the notion of sustainable development, or more generally, the sustainability of policies, necessarily entails long-term economic and social challenges[14], which are

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[11] See the considerations of Unnerstall, "Sustainable Development", 6-7.

[12] Principle 4 thereof states that "[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it".

[13] For the notion of sustainable development as a "container concept", see *infra.*

[14] On this point, see the interesting remarks by Jakab, *Sustainability in European Constitutional Law*, 2, where the author stresses the difficulty in responding to such long-term challenges via democratic mechanisms, which are normally based

needed to address its intergenerational dimension, and a global approach, in order to address its intragenerational dimension and the interdependence of natural ecosystems and human societies.

The evolution of sustainable development in the international community is well known and widely studied in the international legal literature as well[15], and this is not the place to go through the analysis and legal implications of the debate. Suffice it here to say that it started in 18th century Germany as a guiding principle in the management of natural resources, especially forests. There, interestingly, it was called *das Prinzip Verantwortung*, a word that means responsibility, which illustrates very well the long-term approach to the sustainability of the use of natural resources[16]. In the international community, after the debate triggered by the Brundtland Commission mentioned above, sustainable development was at the centre of many international conferences and debates in international bodies, particularly at the United Nations level. In 2000, the UN launched several global commitments for the Millennium Development Goals (MDGs) to be achieved by 2015. Subsequently, in September 2015[17], the UN formulated a new challenge for the in-

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on election terms that are structurally short-sighted. In this sense, addressing sustainability in the framework of international cooperation, and particularly at the EU level, can provide that long-term perspective to common commitments that is lacking in national policy-making.

[15] See E. Reid, *Balancing Human Rights, Environmental Protection and International Trade* (Oxford and Portland, Hart Publishing, 2015), 8, and the rich bibliography she cites; G. Cordini, S. Marchisio, P. Fois, *Diritto ambientale. Profili internazionali europei e comparati*, 3rd ed. (Turin, Giappichelli, 2017); S. Marchisio, "Le convenzioni internazionali ambientali e lo sviluppo sostenibile", in *Il principio dello sviluppo sostenibile nel diritto internazionale ed europeo dell'ambiente,* XI Convegno SIDI, Alghero, 16-17 giugno 2006 (Napoli, Editoriale Scientifica, 2007), 181 *ff.*; S. Marchisio, "Il principio dello sviluppo sostenibile nel diritto internazionale", in Ed. Marchisio, Raspadori, Maneggia, *Rio cinque anni dopo* (Milano, Franco Angeli, 1998), 64 *ff.*

[16] H. Jonas, *Das Prinzip Verantwortung* (Frankfurt a/M, 1979); J. Schubert, *Das "Prinzip Verantwortung" als verfassungsstaatliches Rechtsprinzip: rechtsphilosophische und verfassungsrechtliche Betrachtungen zur Verantwortungsethik von Hans Jonas* (Baden Baden, Nomos, 1998), both cited by Jakab, *Sustainability in European Constitutional Law*, 3.

[17] J. Wouters et al., ed., *Global Governance through Trade* (Cheltenham, Edward Elgar, 2015) stress the relevant contribution the EU provided to the process of

ternational efforts with the Sustainable Development Goals (SDGs), a commitment that will involve the international community until 2030[18]. The SDGs are a very ambitious project that substantively modifies and extends the scope of the very notion of sustainable development and embraces all the element of its evolution over the years[19].

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shaping the post-2015 agenda in the UN institutions, particularly through the efforts of the European Commission.

[18] The SDGs are: 1. End poverty for all; 2. Freedom from hunger; 3. Health and wellbeing; 4. Quality education; 5. Gender equality; 6. Clean water and sanitation; 7. Sustainable energy for all; 8. Decent work and economic development; 9. Innovation and infrastructure; 10. Reducing inequalities; 11. Sustainable cities and communities; 12. Sustainable consumption and production; 13. Action on climate change; 14. Healthy oceans; 15. Sustainable ecosystems; 16. Peace and justice; 17. Global partnerships.

[19] It is interesting to read the "vision" of the UN Summit as expressed in the resolution that adopted the SDGs: "7. In these Goals and targets, we are setting out a supremely ambitious and transformational vision. We envisage a world free of poverty, hunger, disease and want, where all life can thrive. We envisage a world free of fear and violence. A world with universal literacy. A world with equitable and universal access to quality education at all levels, to health care and social protection, where physical, mental and social well-being are assured. A world where we reaffirm our commitments regarding the human right to safe drinking water and sanitation and where there is improved hygiene; and where food is sufficient, safe, affordable and nutritious. A world where human habitats are safe, resilient and sustainable and where there is universal access to affordable, reliable and sustainable energy. 8. We envisage a world of universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination; of respect for race, ethnicity and cultural diversity; and of equal opportunity permitting the full realization of human potential and contributing to shared prosperity. A world which invests in its children and in which every child grows up free from violence and exploitation. A world in which every woman and girl enjoys full gender equality and all legal, social and economic barriers to their empowerment have been removed. A just, equitable, tolerant, open and socially inclusive world in which the needs of the most vulnerable are met. 9. We envisage a world in which every country enjoys sustained, inclusive and sustainable economic growth and decent work for all. A world in which consumption and production patterns and use of all natural resources – from air to land, from rivers, lakes and aquifers to oceans and seas – are sustainable. One in which democracy, good governance and the rule of law, as well as an enabling environment at the national and international levels, are essential for sustainable development, including sustained and inclusive economic

Within the framework of the intergenerational and intragenerational relations and responsibilities, and from a more substantive point of view, the three fundamental pillars of sustainable development have been, traditionally, economic and social development and environmental protection[20]. In the SDGs Declaration, these pillars are pictured with a new focus on governance and the rule of law, respect for human rights and non-discrimination, peace and justice, and the interdependence and interconnection of peoples and societies. Further, new details are added to the more traditional topics of environmental protection and economic and social development. In addition, the resolution establishes that the SDGs are universal and indivisible, and that they entail a global responsibility shared by all the members of the international community, thus shaping a global, interdependent and broad concept of sustainable development. From a more strictly legal point of view, the resolution, like all the resolutions of the General Assembly of the United Nations, is a not binding act. Nonetheless, given the high profile of the world leaders present at the 2015 Summit, and the solemn form and substance of the resolution, it can be said that it surely has a very strong political meaning for the States.

3. A new framework for the EU's external action: Articles 21 and 22 TEU

Before discussing the most relevant cases on the possible overlaps between development cooperation policy and common commercial poli-

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growth, social development, environmental protection and the eradication of poverty and hunger. One in which development and the application of technology are climate-sensitive, respect biodiversity and are resilient. One in which humanity lives in harmony with nature and in which wildlife and other living species are protected" (A/RES/70/1, 25 September 2015).

[20] See the 2002 Johannesburg Declaration on sustainable development, whose Article 5 refers to the "collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development – economic development, social development and environmental protection – at the local, national, regional and global levels".

cy in the quest for a coherent, shared and comprehensive notion of sustainable development in the latest case-law of the Court of Justice, it is necessary to address the important changes in the structure of the EU's external action that were introduced by the Lisbon Treaty, with the objective of enhancing the coherence[21] and effectiveness of the EU's foreign policy. The latter must be intended in this context as the whole range of actions the Union can undertake in the framework of the competences conferred on it by the Treaties, thus including the Common Foreign and Security Policy and all the other areas of external action, regulated by the TFEU, as well as the internal competences in their external dimension[22]. As is well known, one of the objectives of the Lisbon Treaty is to strengthen the EU's role in international relations by making its external powers more coherent, coordinated and effective[23]. This aim has been pursued with several interventions on the decision-making procedures and powers, on the institutional structure of the Union, and on the normative framework of the external action[24]. Almost ten years after the entry into force of the new Treaty, it is possible to affirm that the strongest impact probably came from the introduction of Article 21 TEU on the common values and common objectives for the external action of the Union, which has become the true cornerstone of the EU's external action. This provision is applicable to the CFSP as well as to all the external policies disciplined in the TFEU, including the external dimension of internal policies. In the following

[21] The need to pursue coherence in the implementation of EU competences is also enhanced by the new Article 7 TFEU, introduced by the Lisbon Treaty: "The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers".

[22] I have written on the principle of coherence in the EU's external action elsewhere: see A. Mignolli, *L'azione esterna dell'Unione europea e il principio della coerenza* (Napoli, Jovene, 2009).

[23] Mandate of the 2007 Intergovernmental Conference, annexed to the Conclusions of the European Council of 23 June 2007, doc. 11177/07.

[24] These interventions include the institution of the High Representative for foreign affairs and security policy and of the European External Action Service, the concentration of treaty-making procedures in a single Treaty provision, Article 218 TFEU, and the concentration of all external action policies in Part Five of the TFEU.

pages, I will try to demonstrate that the existence of Article 21 has changed the approach of the Court to cases of overlaps between development cooperation and international trade. Further, it has permitted the development of a comprehensive European notion of sustainable development and has significantly contributed to the coherence of the EU's external action. Article 21 TEU has been interpreted as a provision that could attribute to the external policies of the Union the power to pursue general finalities and political orientations through actions based not on the CFSP, but on the external competences of the TFEU. According to this interpretation, the provision would contribute to the weakening of the principle of the conferral of powers. As a consequence, the boundaries between the CFSP and other areas of external action would be destined to fade[25]. This has not yet been the case, at least from the point of view of the choice of the legal basis for CFSP acts, because the CFSP, which is "protected" by the separation clause of Article 40 TEU, has only marginally been affected by the wide scope of the common objectives and values of the external action, although the latter apply also to the CFSP. It must be considered, in fact, that the CFSP has in itself very broad and general objectives. Nevertheless, the presence of common objectives has affected the Court's approach even to the CFSP's scope to some degree[26]. But Article 21 has affected the relationship between other areas of external actions, where the phenom-

[25] M.E. Bartoloni and E. Cannizzaro, "Articolo 21 TUE", in *Trattati dell'Unione europea*, ed. A. Tizzano (Milan, Giuffrè, 2014): 225-26.; M. Cremona, "The Two (or Three) Treaty Solution: The New Treaty Structure of EU", in *EU Law After Lisbon*, ed. A. Biondi, P. Eeckhout, and S. Ripley (Oxford, Oxford University Press, 2012): 46.

[26] See the judgment of June 14, 2016, case C-263/14, *European Parliament v. Council* (EU:C:2016:435) on the decision on the conclusion of an Agreement between the European Union and the Republic of Tanzania on the conditions for the transfer of suspected pirates and associated seized property from the EU-led naval force to the United Republic of Tanzania. Here, the Court held that the Agreement had been correctly concluded under the sole legal basis of Article 37 TEU (CFSP), *inter alia*, because provisions in the Agreement regarding compliance with the principles of the rule of law, human rights and respect for human dignity are covered by the common objectives of Article 21 TEU, which requires compliance with such principles in all actions of the European Union, including those in the area of the CFSP (paragraphs 47 and 55).

enon of the fading of boundaries has actually occurred through the overlapping of the objectives of the different policy areas.

Paragraph 1 of the provision recalls the founding principles and values of the Union, and extends them to the external action, whose implementation must be guided by and must promote those principles and values: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, the respect for human dignity, the principles of equality and solidarity, and the respect for the principles of the United Nations Charter and international law. These are not objectives in the strict sense of the word, but rather guiding principles and inspiring values. There is, however, the obligation for the Union to seek to advance them in the wider world. Through this commitment, which has been named "the Missionary Principle"[27], the Union is bound to the promotion of its values in the third countries with which it establishes relations and to spread the word of human rights in the outer world. But there is more. The article closes the part on principles and values by affirming: "[t]he Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organizations which share the principles referred to in the first subparagraph".

This provision seems to limit the scope of relations and partnerships the Union can establish only to those States and organisations that share the values and principles of the Union. In reality, it seems to be a codification of the conditionality policy of the Union[28] in the sense that the very basis for cooperation and partnership is the commitment to shared values and principles, and lacking such a commitment, the partnership can be suspended or even terminated. As will be discussed in the second chapter of this book, the conditionality policy is the instrument the Union uses most in implementing this "missionary"

[27] M.P. Broberg, "Don't Mess with the Missionary Man! On the Principle of Coherence, the Missionary Principle and the European Union's Development Policy", in *EU External Relations Law and Policy in the Post-Lisbon Era*, ed. P.J. Cardwell (The Hague, Springer, 2011), 181 *ff*.

[28] This interpretation has been proposed by Bartoloni and Cannizzaro, "Articolo 21 TUE", 224.

commitment, especially in the field of preferential trade treatment in favour of developing countries.

Paragraph 2 of the provision enumerates the list of objectives for the Union's external action:

> 2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:
>
> (a) safeguard its values, fundamental interests, security, independence and integrity;
> (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
> (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
> (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
> (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
> (f) 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;
> (g) assist populations, countries and regions confronting natural or man-made disasters; and
> (h) promote an international system based on stronger multilateral cooperation and good global governance.

This text not only puts together all the finalities of the different external policies of the Union, it does something more sophisticated: it unifies, in the name of coherence, the objectives that all the "foreign policy" of the Union needs to pursue if it wants to act according to its fundamental values and if it wants its foreign policy to be effective. There is a consequentiality in emphasising the values and principles before establishing the objectives, and there is an intrinsic coherence in the

whole provision. Such policy objectives entail another significant feature of the EU's external action. Article 21 in fact calls for actions that in themselves require or at least imply "extraterritorial" effects in the sense that the Union, if it wants to promote its values and objectives, must influence third countries and prompt them to change their behaviour, laws and policies according to the EU's principles. This is especially true with reference to unilateral actions, which have triggered a heated debate among commentators on the legality of such measures under international law and have been the origin of WTO disputes. The reverse is also true: in all its activities and policies towards third countries, the Union is under the obligation not to act in a way that is harmful to the human rights of the citizens of foreign countries and must itself adopt conduct respectful of its own principles and values[29]. At the same time, it must be considered that Articles 3(5) and 21 TEU do not confer new competences on the EU[30]. From this consideration, Enzo Cannizzaro draws the conclusion that, due to the fragmentation of the EU's external action structure, the Union could unconditionally use its Common Foreign and Security Policy (CFSP) instruments to promote and protect human rights in third countries, as the CFSP has wide and undetermined objectives. On the contrary, instruments pertaining to other policies could be used only within the limits of the scope of the substantive competences conferred on the EU, to attain the specific objectives assigned to them[31]. In my opinion, the introduction of Articles 3(5) and Article 21 TEU, notwithstanding the men-

[29] L. Bartels, "The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effect", *European Journal of International Law* (2015), 1971 *ff.*, adds that this obligation is, however, very difficult to enforce under EU law.

[30] Article 3 (6) TEU specifies that "[t]he Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties".

[31] E. Cannizzaro, "The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels", *European Journal of International Law* (2014) 1093 *ff.*, at 1098-99, who also observes that the EU does not have the competence to conclude human rights treaties. See also, by the same author, "Unity and Pluralism in the EU's Foreign Relations Power", in *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate*, ed. C. Barnard (Oxford, Oxford University Press, 2007) 193 *ff.*

tioned limitations, indeed confirmed by the Court of Justice[32], has the indisputable merit of providing the EU's external action with a unified set of binding common objectives which must be integrated with and within the specific objectives of the substantive competences. Interpreting these provisions in a different way would deprive them of any useful effect.

Article 21 TEU is recalled in the opening article of Part Five of the TFEU, Article 205, according to which the action of the Union on the international scene is based on the principles, pursues the objectives and is conducted in conformity with the general provisions of the TEU. It is also recalled in Article 23 TEU, which opens the part of the Treaty devoted to the CFSP, pursuant to which the latter is bound to the same objectives as the other areas of external action.

In this framework, sustainable development becomes a binding objective of the EU in its external action, and its scope is not limited to the development cooperation policy but is integrated in all the EU's policies[33].

The picture of the general provisions on the external action of the Union is completed by Article 22 TEU, which confers on the European Council an important role in determining the strategic agenda of the foreign policy of the Union as a whole. According to Article 22 TEU, it is a task of the European Council to determine, with its decisions, the strategic interests and goals of the Union on the basis of the values, principles and objectives set forth in Article 21. Such decisions are adopted by unanimity on a recommendation from the Council (pursuant to Article 22 (2), the High Representative for the CFSP and the Commission for all other areas of external action may submit a proposal to the Council). A decision on the strategic interests and objectives of the external action may adopt a geographic or a thematic approach. In other words, it can concern the relations of the Union with a country or a geographic region, or a specific international issue. The decisions establish the duration and the means the Union and the

[32] See the comment on Opinion 2/15, *infra.*

[33] See, for further considerations, S.R.W. van Hees, "Sustainable Development in the EU: Redefining and Operationalizing the Concept", *Utrecht Law Review* (2014), 63 *ff*.

Member States shall provide to achieve the planned goals. This implies that the European institutions and, for their competences, the Member States, are under the obligation to comply with the European Council decisions, the latter being legally binding. The choice to confer the power of strategic guidance on the European Council is another expression of the search for more coherence in the external action of the Union and of all the actors and areas involved: the CFSP, other areas of EU external action, and the Member States' foreign policies. It is likely that the binding effects of such a legal (and political) instrument have been considered too demanding. Thus, in practice, it has not been very appealing to the institutions, and the European Council so far has never adopted a decision based on Article 22 TEU. However, it has used the power conferred on it by Article 68 TFUE to adopt strategic guidelines for legislative and operational planning within the Area of Freedom, Security and Justice[34]. It has opted instead for acts less demanding on the EU institutions and the Member States, using the traditional instrument of the *Conclusions* to draw the strategic guidance for the Union, including in the field of the external action[35].

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[34] They are included in the *Conclusions* of the European Council of 27 June 2014 (EUCO 79/14). The inclusion in the *Conclusions* seems to suggest that even in the case of the guidelines for the Area of Freedom, Security and Justice, the European Council preferred not to adopt the formal act of a binding decision. It must be pointed out, however, that the formulation of article 68 TFEU is much less detailed, and fails to specify the form and procedure for the adoption of such strategic guidelines, thus leaving more discretionary power to the European Council in the choice of the form and effects of the act.

[35] See the *Strategic Agenda for the Union in Times of Change*, annexed to the *Conclusions* of the European Council of 26/27 June 2014 (EUCO 79/14), whose Chapter 5 (*The Union as a Strong Global Actor*) is devoted to four foreign policy priorities: a) maximise the Union's clout by ensuring consistency between the Member States' and the EU's foreign policy goals and by improving coordination and coherence between the main fields of EU external action, such as trade, energy, justice and home affairs, development and economic policies; b) be a strong partner in the Union's neighbourhood by promoting stability, prosperity and democracy in the countries closest to the Union; c) engage the Union's global strategic partners, in particular the transatlantic partners, on a wide range of issues – from trade and cybersecurity to human rights and conflict prevention, to non-proliferation and crisis management – bilaterally and in multilateral fora; d) develop security and

4. The 2016 Global Strategy and the concept of resilience

On June 28, 2016, the European External Action Service (EEAS) and the High Representative for Foreign Affairs and Security Policy, Federica Mogherini, presented an important document, the so-called *Global Strategy for the Union's Common Foreign and Security Policy*[36]. It was "welcomed" by the European Council on the same day that the Heads of State and Government had to acknowledge the outcome of the Brexit referendum[37]. The *Global Strategy*, therefore, is neither a European Council act, nor is it binding. The endorsement of the European Council and the invitation to the Member States, the Commission and the High Representative to start working on the implementation of the Strategy only means that it is fit as a political framework for action.

In the *Global Strategy*, which, it is worth recalling, is focused on the CFSP and not the external action as a whole[38], the High Representative confers a pivotal role on the concept of resilience, while sustainable development and the SDGs only have a marginal position[39]. Resilience is not a new concept in political and sociological studies, but it is not easy to analyse from a legal perspective. The task becomes even more challenging considering that the *Global Strategy* uses this concept in a very

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defence cooperation. Surprisingly, the European Council did not mention sustainable development inside these priorities, apparently focusing mainly on CFSP issues and urging institutions and Member States to improve the coherence in the external action.

[36] *Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy*, June 2016, available at: https://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf.

[37] See the *Conclusions* of the European Council of June 28, 2016.

[38] In my opinion, this is one of the limits of the document. The EEAS did not use all the potential of the new normative framework for the external action, in particular, Article 21 TEU, and did not expand the Strategy much beyond the scope of the CFSP. It considers trade policy and development policy, as well as the European Neighbourhood policy, of course, but only marginally, and mainly as tools for the achievement of the main political objectives of the Strategy, namely the security of the Union against threats, and the stability and resilience of States and societies.

[39] Resilience is mentioned 35 times in the Strategy, sustainable development 17, and the SDGs only seven times.

broad sense, which has even been criticised by political science commentators[40]. According to the *Global Strategy's* approach, resilience is to be considered as a priority both for the Union itself and for third countries, particularly candidate and neighbouring countries. But it is an objective of the development cooperation policy as well. Resilience is thought of as a remedy or a response to fragility (governmental, economic, societal or climate/energy), and even as a synonym of institutional and political reform. In this way, the *Global Strategy* goes beyond the objectives of Article 21 TEU, introducing a new objective to the CFSP (and to the external action) that was not included in the very broad range of common objectives mentioned in that provision. It is certainly true that foreign policy's main feature is the magnitude of its scope and the general character of its objectives, and from this perspective, it is perfectly possible for a new concept to assume a relevant role for contingent historical and political reasons. At the same time, however, it is disputable that a similar approach could not be adopted relying on concepts that are more rooted in the international and European normative framework, such as sustainable development. Resilience is indeed a very vague concept. According to the Merriam-Webster Dictionary, resilience is "1. The capability of a strained body to recover its size and shape after deformation caused especially by compressive stress; 2. An ability to recover from or adjust easily to misfortune or change". The concept has been used in the economic and socio-political literature to describe the capacity of individuals, families or groups and societies to react and recover from economic, natural and political crises. It includes elements of stability, flexibility, self-confidence, and empowerment[41]. It has also been considered to be a way of thinking, a

[40] A. Bendiek, "Cross-Pillar Security Regime Building in the European Union: Effects of the European Security Strategy of December 2003", European Integration online Papers (EIoP), Vol. 10, No. 9, 2006, available at SSRN: https://ssrn.com/abstract=929132, sees as problematic the exceptionally broad approach to resilience used in the Strategy, where this concept turns into a *mantra* that risks losing much of its meaning and its usefulness.

[41] The notion of resilience was created in psychology and geography. Only later was it adopted by social and political science scholars. The socio-political approach to the notion of resilience is thus rather recent. It is a multifaceted, dynamic notion, but it also has shadows and dark sides. For an interesting and critical

philosophy that needs to go hand in hand with sustainable development[42].

The concept of resilience has been used for many years by the European Commission in the field of development cooperation, and particularly, of humanitarian aid as an instrument to promote reaction to disasters. In 2012, the Commission published the *Communication* on *the EU Approach to Resilience: Learning from Food Security Crises*, where the EU institution noted:

> [r]esilience is the ability of an individual, a household, a community, a country or a region to withstand, to adapt, and to quickly recover from stresses and shocks. The concept of resilience has two dimensions: the inherent strength of an entity – an individual, a household, a community or a larger structure – to better resist stress and shock and the capacity of this entity to bounce back rapidly from the impact. Increasing resilience (and reducing vulnerability) can therefore be achieved either by enhancing the entity's strength, or by reducing the intensity of the impact, or both. It requires a multifaceted strategy and a broad systems perspective aimed at both reducing the multiple risks of a crisis and at the same time improving rapid coping and adaptation mechanisms at local, national and regional level.

At the same time, the Commission also wrote that resilience "is a part of the development process, and genuinely sustainable development will need to tackle the root causes of recurrent crises rather than just their consequences"[43]. In this *Communication*, resilience is taken into consideration in the fields of humanitarian aid and the response to disasters as an essential instrument to prevent the occurrence of crises

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analysis of the use of this concept in international politics, see Ph. Bourbeau, "Resilience and International Politics: Premises, Debates, Agenda," *International Studies Review* (2015), 374.

[42] It might be useful to read U. Pisano, "Resilience and Sustainable Development: Theory of Resilience, System Thinking and Adaptive Governance," *ESDN Quarterly Report* No. 26 (2012).

[43] European Commission, *Communication to the European Parliament and the Council. The EU Approach to Resilience: Learning from Food Security Crises*, Brussels, October 3, 2012, doc. COM(2012)586 final.

and improve the capacity for reaction and recovery in the affected societies.

In the broader view of the *Global Strategy*, resilience also includes good governance, transparency and institutional reforms. This broad notion, in my opinion, tends to overlap with sustainable development, which also includes most of the mentioned elements and can be considered a powerful and effective response to situations of fragility. It is significant that in the *New European Consensus on Development* of 2017, which will be analysed below, the term resilience appears only seventeen times, while sustainable development is cited sixty-six times. In the latter document, resilience is correctly considered as a consequence and an effect of sustainable development, as it is the latter that puts groups and societies in the condition of effectively reacting to shocks. From the *Global Strategy's* point of view, on the contrary, resilience is an autonomous objective, i.e. a guarantee of stability around European borders, in that it implies building transparent and rules-based institutions, fighting against corruption, and promoting human rights. In the *Global Strategy*, sustainable development (and the fulfilment of the SDGs) figures among the major objectives, but it is nevertheless considered only one of the elements of a resilient State: "[e]choing the Sustainable Development Goals, resilience is a broader concept [not limited to State institutions], encompassing all individuals and the whole of society. A resilient society, featuring democracy, trust in institutions, and sustainable development, lies at the heart of a resilient State"[44]. By stating the above, the *Global Strategy* fails to consider that sustainable development encompasses three pillars, i.e. economic, environmental and social, and that in the latter, the SDGs also include societal resilience, good governance, and the rule of law. In other words, a resilient State is a State that pursues and implements all the principles that are rooted in sustainable development. The two notions are complementary, but in the sense that resilience is a part of sustainable development and an effect of sustainable development, and not vice-versa, as it seems to be considered in the *Global Strategy*. At the same time, resilience is vital in order to achieve the SDGs in

[44] *Global Strategy*, 24.

that it allows States and societies to maintain, over time, the development progress that has been achieved, reducing the risk of collapse after a crisis, a disaster or an economic shock[45]. But resilience is also important when changes occur slowly, even imperceptibly, as is the case with climate change. People do not react, simply because they do not perceive the change. Here, resilience can provide a tool to anticipate the change and to act accordingly. To sum up, resilience and sustainable development are deeply interconnected with each other in the framework of a multifaceted and broad approach to development. However, for a correct approach to an effective external action, the EU must maintain a sharp focus on the whole notion of sustainable development, which, despite being a general concept with many shadows and uncertainties itself, is the result of a long elaboration and reflection by international institutions, and can provide a clearer reference point in the definition of development priorities, as it is also widely accepted and supported by international studies, elaborations and practice.

It is possible to find a confirmation of this assumption in the *Global Strategy* itself, which affirms the EU's commitment to "use our trade agreements to underpin sustainable development, human rights and rules-based governance"[46]; it further states that "implementing the SDGs will inform the post-Cotonou partnership and drive reform in development policy, including the EU Consensus on Development"[47]. In other words, the traditional external policies are still to be governed by the principles of sustainable development, where resilience is one of the objectives the EU activity must achieve.

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[45] A. Bahadur et al., "Resilience in the SDGs", *ODI Briefing*, August 2015, https//www.odi.org.

[46] *EU Global Strategy*, paragraphs 26/27.

[47] *EU Global Strategy*, paragraph 40. It is worth noting that the Cotonou agreement with the ACP countries, which was signed in 2000, will expire in 2020. Negotiations for a replacement are already taking place, while the trade part of the agreement is being replaced by Economic Partnership Agreements (EPAs), which are free trade agreements more in line with WTO requirements than the previous preferential treatment that was granted to ACP countries.

5. The European response to the SDGs: The 2017 New European Consensus on Development

After the entry into force of the Lisbon Treaty, the EU institutions have adopted several acts of a political and programmatic nature in order to orient the European action in light of the new normative background that emerged with the reform of the Treaties. In October 2015, the Commission published an important communication on the definition of a comprehensive trade policy, whose role is to enhance the coherence of the EU's external action and to effectively pursue the overarching objectives of Article 21 TEU[48], in particular, sustainable development. Chapter 4 of this communication is entirely devoted to "a trade and investment policy based on values", and paragraph 4.2. has the ambitious objective of building a "trade agenda to promote sustainable development, human rights and good governance"[49]. Indeed, this communication acknowledges the measures the Union had already put in place, such as those that will be addressed in the other chapters of this study: the Generalised System of Preferences, including the Everything but Arms scheme, the commitment to promote core labour standards in partner countries, and instruments to promote the sustainable use of natural resources and to reduce conflicts due to the illegal trade of natural resources. Apparently, there is nothing new in this document. What is new, however, is the systematic approach to the trade policy strategy, whereby political objectives such as sustainable development, social and human rights and good governance have become an integral part of the common commercial policy. And this is another positive effect of the introduction of Article 21 TEU.

The same can be said of the *New European Consensus on Development*[50], whose *raison d'être* is twofold: on the one hand, the introduc-

[48] European Commission, *Trade for All. EU Trade Strategy 2015*.

[49] "The EU Treaties demand that the EU promote its values, including the development of poorer countries, high social and environmental standards, and respect for human rights, around the world. In this regard, trade and investment policy must be consistent with other instruments of EU external action" (*Trade for All*, 22).

[50] *The New European Consensus for Development. 'Our World, Our Dignity, Our Future'* (*O.J.*, C 210 of 30 June 2017, 1) was solemnly adopted by the President of

tion of the common objectives for the external action and the new and stronger position of sustainable development as an integrated objective that affects all European policies, both internal and external, raised the need for a new comprehensive political approach to development. On the other hand, the international commitments adopted within the UN with the Agenda 2030 and the SDGs in 2015 made the previous *Consensus*, which had been adopted in 2005 and was entirely based on the MDGs, obsolete. The *New European Consensus* is a formally non-binding document that is a "joint statement" of the three political institutions and the Member States meeting within the Council, but it has a very high political meaning. Although it does not produce any legally binding effects, it is considered to be a political commitment for the subjects that adopted and subscribed to it[51]. The term "consensus", adopted in 2005 for the first outline of the European development policy, derives from the so-called *Washington Consensus*, a document that was written in 1989 by an eminent American economist with the Insti-

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the Commission, the High Representative for Foreign Affairs and Security Policy, the President of the European Parliament and the President of the Council in Brussels on June 7, 2017. It follows the 2005 European Consensus on Development, signed by the Presidents of the Commission, of the European Parliament and of the Council on 20 December 2005 (*O.J.* C 46 of 24 February 2006, 1).

[51] The discussion on the legal value of the Consensus can follow the same lines of the similar debate that followed the solemn adoption of the Charter of Fundamental Rights of the EU in Nice in 2000. It was argued at that time, before the Lisbon Treaty's recognition of the Charter as having the same legal value as the Treaties, that it had no legally binding character, but it could be assimilated to an interinstitutional agreement, not binding, but a source of political commitments for the institutions involved (U. Villani, "I diritti fondamentali tra Carta di Nizza, Convenzione europea dei diritti dell'uomo e progetto di Costituzione europea", in *La protezione internazionale dei diritti umani*, ed. U. Villani (Roma, Luiss University Press, 2005) 136-37; see also P. Bonetalli, "La tutela dei diritti fondamentali nell'Unione europea", in ed. G. Adinolfi and A. Lang, *Il Trattato che adotta una Costituzione per l'Europa: quali limitazioni per l'esercizio dei poteri sovrani degli Stati?* (Milano, Giuffrè, 2006), 120). Applying this solution to the *New Consensus* raises some doubts, however, since the Lisbon Treaty introduced a provision that provides a specific legal basis for the adoption of an interinstitutional agreement in the framework of interinstitutional cooperation, Article 295 TFEU, and this provision is not referred to in the *New Consensus*.

tute of International Economics as a list of ten policy points, mostly based on the liberalisation of the economy and of foreign investment, which the author claimed "were widely held in Washington to be widely desirable in Latin America" to promote development. In the view of the author, it was not meant to be a policy prescription, but a policy consensus[52]. The European Union, in an international environment that, in 2005, had changed radically since 1989, by using the same term, "consensus", expressed its will to elaborate its own independent development philosophy based on values shared by the Union and its Member States.

The *New European Development Consensus*, adopted in 2017, is inscribed in the framework of the *Global Strategy*[53], but is based on two pillars, namely the background of the principles and values of the EU action (democracy, the rule of law, gender equality, human rights and fundamental freedoms, respect for human dignity, equality and solidarity) and the 2030 Agenda and the SDGs, which provide the framework for action with reference to the five Ps: People, Planet, Prosperity, Peace, and Partnership. The instruments that the Union intends to use to strengthen the EU impact on development are based on the integration of sustainable development into all the Union's policies, in other words, on the coherence and coordination of the external action of the Union and the Member States in all policy areas: in the EU's language, the Policy Coherence for Development[54]. In this framework,

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[52] See J. Williamson, "The Washington Consensus as Policy Prescription for Development" (lecture delivered at the World Bank, Institute for International Economics, on January 13, 2004, https://piie.com/publications/papers/williamson0204.pdf). The reference to Washington includes not only the U.S. government, but also the international financial institutions that have their headquarters in that city (the World Bank and the International Monetary Fund).

[53] To tell the truth, the reference to the *Global Strategy*'s main priority, resilience, is rather weak, being limited to a general commitment by the Union and the Member States to "foster a dynamic and multidimensional approach to resilience, to deal with vulnerability to multiple interrelated risks" (paragraph 9 of the *New Consensus*). The main focus of this document is on sustainable development and the SDGs.

[54] Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, *Policy Coherence for Development.*

trade assumes a pivotal role among the five strategic areas (besides trade, there are finance, the environment and climate change, food security, and migration and security). Several relevant paragraphs of the *New Consensus*, from which four priorities for action emerge, are devoted to trade. The fight against the illegal trade in timber and wildlife is one of the priorities in the chapter devoted to the Planet in the framework of the EU's commitment to the conservation of biodiversity and ecosystems, including forests, river basins, coastal areas, seas and oceans (paragraph 44 of the *New Consensus*). The second priority is Aid for Trade, an initiative within the WTO whereby the developed WTO Members grant the developing countries a particular form of aid, financial and technical, specifically focused on supporting them in their integration into global trade. The EU also uses this instrument to support developing countries in integrating sustainable development into all levels of trade policy (paragraph 52 of the *New Consensus*). The third priority is to promote fair, transparent and ethical trade, including supporting a sustainable and responsible management and use of natural resources (paragraph 54 of the *New Consensus*). The EU institutions have not yet passed any legislation on fair trade, so there are no European rules on this subject. Fair trade is still based on trademarks regulated by private international organisations. The fourth and last priority concerning trade and sustainable development is focused on

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Accelerating progress towards attaining the Millennium Development Goals, doc. COM(2005) 134 final, which acknowledges the impact many policies have on developing countries. Actions in the field of trade, agriculture and fisheries, food security, energy, and environmental policy must take into account how they could possibly affect the economic, environmental and social situation of developing countries. So, policy coherence for development means the need to integrate development concerns in all other policies that might affect developing countries and to implement a development impact assessment for all relevant policies. The policy coherence was further developed by the Commission with a second Communication in 2009, *Policy Coherence for Development – Establishing the policy framework for a whole-of-the-Union approach*, doc COM(2009) 458 final, which, in the wake of the financial and economic crisis, requires a more integrated approach to policy coherence for development. The Lisbon Treaty provides a sort of codification of the policy coherence for development approach, since it mandates the integration of sustainable development in all policy areas.

the inclusion of sustainable development clauses in unilateral legal instruments on the preferential treatment of developing countries, such as the Generalised System of Preferences in its different forms, and in free trade agreements (paragraph 106 of the *New Consensus*).

Despite its lack of binding force, the *New European Consensus on Development* is an important instrument for coordination, both at the horizontal level – between the different EU policy areas – and at the vertical level – between the Union's and the Member States' action for development. We must keep in mind, in fact, that as the development cooperation policy is a parallel competence, both the Union and the Member States can conduct their own policies towards developing countries, but according to the Treaties, these actions must be consistent and coordinated. The common commercial policy, on the other hand, is an exclusive competence of the Union. Therefore, the parts of the *New Consensus* concerning trade are addressed to the EU institutions, which have exclusive policy-making power in this field.

6. The Court of Justice and sustainable development

The ECJ has addressed the issue of sustainable development in EU law in many cases and in different situations. It is possible to distinguish two main lines in the relevant case-law: a first line addresses the notion of sustainable development from the point of view of the environmental policy; it is particularly interesting to study the way the Court has tried to find a balance between environmental protection interests and economic and market interests[55]. In a second line of Treaty interpretation, typical of post-Lisbon case-law, the Court has addressed both development cooperation policy and trade policy in light of the general objectives of the EU's external action, which include sustainable development. Though the relevant cases were brought to the attention of the Court for the settlement of disputes related to the choice of the legal bases of EU acts, it is clear that they are not merely

[55] On this subject and the relevant case-law, see Reid, *Balancing Human Rights*, 74 *ff*.

technical matters addressing the choice of the correct legal basis but involve more generally the scope and coherence of EU actions towards developing countries. In the following pages, I will focus on the case-law addressing the subject of sustainable development in the EU's external action, which is more relevant to the present research.

6.1. *Development cooperation policy, environmental policy and trade policy: not merely an issue of legal basis*

In the past years, the Court of Justice has addressed the relationship between development cooperation policy[56], environmental policy[57] and common commercial policy exclusively from the standpoint of the definition of the material scope of the common commercial policy and, consequently, of the choice of the correct legal basis for EU acts. The task of the Court, even in these early cases, was to pursue the coherence of the EU's external action, but also, when possible, to expand the scope of the Community policies, particularly the common commercial policy, which is an exclusive power of the Union.

The landmark case on development cooperation policy is *Portugal v. Council*[58], wherein the Court held that development cooperation policy under Article 130Y EC Treaty (Maastricht version) could cover provisions in the Partnership Agreement between the EC and India concerning respect for human rights: "[b]y declaring that 'Community policy … shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms', Article 130U (2) requires the Com-

[56] On the development cooperation policy after the Lisbon reform, see M. P. Broberg, "What Is the Direction of the EU's Development Cooperation after Lisbon? A Legal Examination", *European Foreign Affairs Review* (2011): 539 *ff.*

[57] On the environmental policy after Lisbon, see M. Lee, "The Environmental Implications of the Lisbon Treaty", *Environmental Law Review* (2008): 131 *ff.*

[58] Judgment of 3 December 1996, C-268/94, *Portuguese Republic v. Council of the European Union*, EU:C:1996:461, on the application for annulment of Council Decision 94/578/EC of 18 July 1994 concerning the conclusion of the Cooperation Agreement between the European Community and the Republic of India on Partnership and Development (O.J. 1994, L 223, 23).

munity to take account of the objective of respect for human rights when it adopts measures in the field of development cooperation"[59]. This is applicable even when respect for human rights is declared to be an "essential element" of the agreement, thus giving the institutions the possibility to adopt sanctions in the form of the suspension or even termination of cooperation in the event of breaches of the essential element clause[60]. The Court went further, as it relied on the broad objectives of the development cooperation policy to specify that "it must be possible for the measures required for their pursuit to concern a variety of specific matters"[61]. A different solution, such as the requirement of another legal basis, or of the conclusion by the Member States, "would in practice amount to rendering devoid of substance the competence and procedure prescribed in Article 130Y"[62]. On the basis of these considerations, the Court ruled that provisions on energy, tourism and culture, drug abuse control, and intellectual property can fall within the boundaries of development cooperation policy, provided that they only aim at determining the areas of cooperation with the non-member country with the objective of pursuing the sustainable economic development and social progress of its people, and that they do not contain concrete prescriptions on the practical implementation of cooperation in each specific area[63]. The legal theories attached to this judgment are certainly the theory of the centre of gravity for the choice of legal basis, according to which all provisions of an act that are accessories to the main objective of the act fall within the legal basis of the main objective, multiple legal bases being considered a last resort exception. The second theory the Court applied in this case is the useful effect in the sense explained above: the development cooperation policy would

[59] *Portugal v. Council*, paragraph 23.

[60] For the so-called "democratic conditionality clauses", see L. Bartels, "Human Rights and Sustainable Development Obligations in EU Free Trade Agreements", in *Global Governance through Trade*, ed. J. Wouters et al. (Cheltenham, Edward Elgar, 2015), 73*ff*.; A. Tizzano, "L'azione dell'Unione europea per la promozione e la protezione dei diritti umani", *Diritto dell'Unione Europea* (1999): 163*ff*.

[61] *Portugal v. Council*, paragraph 37.

[62] *Portugal v. Council*, paragraph 38.

[63] *Portugal v. Council*, paragraph 45.

be void and meaningless without the opportunity to include different areas of cooperation that are essential for the pursuit of the sustainable development and wellbeing of the populations of developing countries.

From a substantial point of view, however, this judgment is even more important, because it draws very broad boundaries for the EU's development policy, adopting, almost ten years after the *Brundtland Report*, a comprehensive notion of sustainable development that includes human rights and democracy, as well as a number of different areas of economic cooperation. This approach will become even more extensive, as will be explained later, with the new normative framework provided by the Lisbon Treaty.

On the relationship between environmental policy and commercial policy from the point of view of attempting a definition of the respective fields of application, the landmark pre-Lisbon cases are Opinion 2/00[64], the *Energy Star* judgment[65], the two cases concerning the Rotterdam Convention on the export and import of dangerous substances[66], and the case on shipments of waste[67]. All these cases refer to international agreements or internal EU measures where environmental and commercial objectives tend to overlap. The Court's approach was always the search for a balance based on the centre of gravity of the measure: which one is the prevalent objective? And which one is merely an accessory?

The Cartagena Protocol, which was the object of Opinion 2/00, is a typical case of an agreement that pursues environmental finalities through measures that might affect international trade[68], but its main objective is to preserve human health and biodiversity by regulating the

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[64] Opinion 2/00, of 6 December 2001, on the conclusion by the EC of the 2000 Cartagena Protocol on Biosafety, EU:C:2001:664.

[65] Judgment of 12 December 2002, case C-281/01, *Commission v. Council*, EU:C:2002:761.

[66] Cases C-94/03, *Commission v. Council*, EU:C:2006:2, and C-178/03, *Commission v. Parliament and Council*, EU:C:2006:4.

[67] Judgment of 8 September 2009, case C-411/06, *Commission v. European Parliament and Council*, EU:C:2009:518.

[68] The Protocol regulates trade in genetically modified organisms, thus also giving rise to compatibility problems with WTO rules (on this point, see W.A. Kerr, "The WTO versus the Biosafety Protocol for Trade in Genetically Modified Organisms", *Journal of World Trade* (2000): 63 *ff*.

transboundary movements of genetically modified organisms (GMOs). This is an undisputable environmental objective. On the contrary, the *Energy Star* agreement between the EU and the United States aimed at coordinating labelling programs for the promotion of the energy efficiency of office equipment. In this case, the Council decision on the conclusion of the agreement, based on Article 175 (1) EC Treaty[69], was annulled by the Court on account of the prevalent commercial element of the labelling coordination program, which was destined to produce a strong impact on international trade. On January 10, 2006, the Court issued two more important judgments on the problem of the overlap between the trade and environment legal bases. The cases concerned the request by the Commission to annul the decision with which the Council had concluded the Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade, and a regulation implementing a part of the same Convention[70]. In both cases, the Court had to admit the unavoidable overlap of the objectives and content of the contested acts, and to resort to the exceptional solution of the dual legal basis. The last case dealt with waste shipments. The Commission asked for the annulment of a regulation on the shipment of waste in so far as it was based solely on Article 175 (1), and not on the dual legal basis of Articles 175 (1) and 133 EC Treaty[71]. The Court ruled in favour of the envi-

[69] Council Decision 2001/469/EC of 14 May 2001 concerning the conclusion on behalf of the European Community of the Agreement between the Government of the United States of America and the European Community on the coordination of energy-efficient labelling programs for office equipment (OJ 2001 L 172, 1).

[70] Council Decision 2003/106/EC of 19 December 2002 (OJ 2003 L 63, 27), concerning the approval, on behalf of the European Community, of the Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade, the contested decision in case C-94/03, and Regulation 304/2003/EC of the European Parliament and the Council of 28 January 2003, concerning the export and import of dangerous chemicals (OJ 2003 L 63, 1), the contested regulation in case C-178/03.

[71] Regulation 1013/2006/EC of the European Parliament and the Council of 14 June 2006 on shipment of waste (OJ 2006 L 190, 1), the contested regulation in case C-411/06, *Commission v. European Parliament and Council*, judgment of 8 September 2009, EU:C:2009:518.

ronmental legal basis, finding that the aim of the contested regulation was not to "define those characteristics of waste which will enable it to circulate freely within the internal market or as part of commercial trade with third countries, but to provide a harmonized set of procedures whereby movement of waste can be limited in order to secure protection of the environment"[72].

For the purposes of this study, these cases teach us that the Court, while maintaining its traditional extensive interpretation of the notion of common commercial policy in consideration of its exclusive character, has nevertheless also considered the primary objectives of the acts submitted to its attention and has ruled in favour of the environmental policy whenever the prevailing focus of the contested measure was related to environmental protection. With this approach, the Court has pursued both an extensive interpretation of the scope of the common commercial policy, and the identity and autonomy of the environmental policy. This is a difficult task indeed in a situation where, in effect, each policy was autonomous, with its own legal basis and its own objectives, but at the same time, the environmental policy already had a crosscutting dimension through the principle of the integration of environmental concerns in each EU action, and international trade was starting, within a globalised economy, to interact with many other interests, including development, foreign policy, health and environment[73]. What had started as a mere problem of legal basis thus became a much trickier problem of coherence and effectiveness of the EU's external action.

6.2. *Philippines and Singapore: in search of sustainable development between development cooperation and international trade*

Having set the background, it is now possible to examine how the new framework provided by the Lisbon Treaty has affected the Court's approach to the notion that is the main subject of this study: sustainable development in relation to international trade (and development co-

[72] Case C-411/06, paragraph 72.

[73] P. Koutrakos, *EU International Relations Law* (Oxford, Oxford University Press, 2006), 52.

operation). As mentioned above, sustainable development is one of the common objectives of the EU's external action under Article 21 TEU, which is integrated into all policy areas. The Court did not fail to consider this new structure and emphasised the need that is behind it, namely enhancing and strengthening the coherence of the foreign policy of the Union. The first judgment that must be taken into consideration concerns the Framework Agreement on Partnership and Cooperation between the European Union and the Republic of the Philippines[74]. The Commission requested the annulment of the Council decision on the signature of the mentioned agreement[75]. The ground for such request was the reference to additional legal bases, namely Article 79 (3) TFEU relating to the readmission of third-country nationals, Articles 91 and 100 TFEU on transport policy, and Article 191 (4) TFEU on the environmental policy. The proposal, submitted by the Commission to the Council, was in fact based solely on the legal bases of Articles 207 and 209 TFEU, relating, respectively, to the common commercial policy and to development cooperation. The Council, at the time of adopting the decision, included the additional legal bases in consideration of the wide scope of the cooperation the Agreement established with the third State and the many different policy areas it affected, none of which assumed a predominant role in the cooperation framework. This case offered the Court an opportunity for an assessment of the EU's post-Lisbon development policy. Article 209 TFEU is the legal basis for acts in the field of development cooperation, but this provision also must refer to the common objectives of the external action in Article 21 TEU. The Court observed that the primary aim of the development cooperation policy is the reduction and, in the long term, the eradication of poverty, and that the Union must take account of the objectives of development cooperation in the policies which it imple-

[74] Judgment of 11 June 2014, case C-377/12, *Commission v. Council*, EU:C:2014:1903.

[75] Council Decision 2012/272/EU of 14 May 2012 on the signing, on behalf of the Union, of the Framework Agreement on Partnership and Cooperation between the EU and its Member States, of the one part, and the Republic of the Philippines, of the other part (O.J. 2012 L 134, 3).

ments that are likely to affect developing countries[76]. This is the principle of integration, which is, as mentioned before, an important feature of the development cooperation policy. Article 21 TEU allowed the Court to affirm that EU policy in the field of development cooperation is not limited to measures directly aimed at the eradication of poverty but must also pursue "the objectives referred to in Article 21(2) TEU, such as the objective, set out in Article 21(2)(d), of fostering the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty"[77]. The Court, relying on the findings in the judgment in *Portugal v. Council*, mentioned above, confirmed the conclusion that "the fact that a development cooperation agreement contains clauses concerning various specific matters cannot alter the characterization of the agreement, which must be determined having regard to its essential object and not in terms of individual clauses, provided that those clauses do not impose such extensive obligations concerning the specific matters referred to that those obligations in fact constitute objectives distinct from those of development cooperation"[78]. In order for an agreement to be qualified as a development cooperation agreement, the development cooperation objective must be predominant, while the other matters concur in pursuing the main objective. The Council's objections to this conclusion derived from the evolution of EU competences after the *Portugal* case and the corresponding extension of the scope of development cooperation agreements such as the Philippines agreement, which, according to the Council, was of a different and broader nature, and also involved matters that are outside the scope of development cooperation. The Court responded to this objection by affirming that such an evolution "corresponds on the contrary to an increase in the objectives of development cooperation and in the matters concerned by it, reflecting the European Union vision for development which is set out in the European Consensus"[79]. In light of the broad notion of

[76] Case C-377/12, paragraph 36.

[77] Case C-377/12, paragraph 37.

[78] Case C-377/12, paragraph 39.

[79] Case C-377/12, paragraph 42. The Court refers here to the first version of the Consensus adopted in 2006 in the context of the MDGs.

sustainable development the Union has established in both the Treaties and in the 2005 *European Consensus*, the Court concluded that "migration (including the fight against illegal migration), transport and the environment are integrated into the development policy defined in the European Consensus"[80], and that "[i]t is apparent from these findings that the provisions of the Framework Agreement relating to readmission of nationals of the contracting parties, to transport and to the environment, consistently with the European Consensus, contribute to the pursuit of the objectives of development cooperation"[81].

A further step in the definition of sustainable development in the EU legal system can be found in Opinion 2/15[82]. This Opinion, delivered upon request from the Commission, concerned a free trade agreement negotiated between the EU and Singapore and addressed the issue of the scope of the common commercial policy after the Lisbon Treaty reform, with reference to several controversial matters, such as foreign direct investments and investor-State dispute settlement, public procurement, the commercial aspects of intellectual property rights, competition, trade in services, and sustainable development. The request from the Commission originated from the need to obtain from the Court a revision of sorts of the scope of the common commercial policy after the entry into force of the new Article 207 TFEU, which introduced substantial modifications to Article 133 TEC. The aim of the Commission was to obtain an all clear for the exclusive power to negotiate and conclude new generation free trade agreements with a broad scope. While the Opinion has been in the centre of legal and political debate, especially because of the Court's findings on the issue of investor-State dispute settlement and financial services, for which the Court ruled in

[80] Case C-377/12, paragraph 49.

[81] Case C-377/12, paragraph 55. For a comprehensive analysis of the notion of sustainable development in the context of the development cooperation policy and of the European Consensus, see the *Opinion* of the Advocate General Mengozzi in the same case.

[82] Opinion 2/15, of 16 May 2017, EU:C:2017:376, Opinion delivered pursuant to Article 2018(11) TFEU, on the Free Trade Agreement between the European Union and the Republic of Singapore.

favour of a shared competence[83], for the purposes of this study, the part on the role that sustainable development plays in the field of international trade is particularly interesting, as it shows once more, with great strength, the overarching character of the objective of sustainable development in the external action of the EU. As in the case analysed above, Opinion 2/15's reasoning started from the common objectives of the EU's external action, Article 21 TEU, also recalled in Article 207(1): "[t]he common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action", which include (Article 21(2)(f), TEU) sustainable development linked to the preservation and improvement of the quality of the environment and the sustainable management of global natural resources[84]. Interestingly, the Court also mentioned Articles 9 and 11 TFEU, "which respectively provide that 'in defining and implementing its policies and activities, the Union shall take into account requirements linked to … the guarantee of adequate social protection' and 'environmental 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'", and referred to Article 3(5), TEU, which obliges the Union to contribute, in its relations with the wider world, to "free and fair trade"[85]. The Court concluded that "it follows that the objective of sustainable development henceforth forms an integral part of the common commercial policy"[86]. The Court thus framed a systematic normative background for the overall structure of

[83] For a complete analysis of the Opinion, see A. Segura-Serrano, "The Recurrent Crisis of the European Union's Common Commercial Policy: Opinion 2/15", *European Papers* (2017): 829 *ff.*; this author sees the Opinion as an expression of an ongoing tension between the Commission and the Member States for the control of the definition and implementation of the common commercial policy and the findings of the Court as an expansive interpretation of the CCP after the Lisbon Treaty. In my opinion, the evolution of the CCP since Opinion 1/94 (Opinion of the Court of 15 November 1994, EU:C:1994:384) on the WTO Agreements of Marrakesh should not be underestimated, as it constitutes the background against which the Court draws the features of this policy.

[84] Opinion 2/15, paragraph 142.

[85] Opinion 2/25, paragraph 146.

[86] Opinion 2/15, paragraph 147.

the EU external action, thereby converting the new normative framework into a substantially coherent and comprehensive system of powers and objectives that have the role of supporting the EU's action on the international scene. Significantly, the Court clearly explained that the common objectives of the external action in Article 21 TEU have a mandatory legal character, and as such, they are compulsory for the institutions[87]. The conclusion, in my opinion, could not be different. Indeed, Article 21 was introduced with the aim of enhancing the coherence and effectiveness of the external action, which had been limited and hindered by the presence of a myriad of different legal bases with specific objectives and by the evolution of the external powers through the jurisprudence on the parallelism of competences, which meant the conversion of internal objectives into external ones any time the EU intended to conclude an international agreement on subjects covered by an internal competence[88].

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[87] On this point, see Ch. Beaucillon, "Opinion 2/15: Sustainable is the New Trade. Rethinking Coherence for the New Common Commercial Policy", in *European Papers* (2017): 822. She also observes that the normative nature of the common objectives, and the dynamic interpretation of the sustainable development objective and of the CCP as a whole might in the future become a pragmatic tool to avoid mixity in future trade agreements of the EU (826). In my opinion, what is more important is avoiding the need to resort to multiple legal bases for the new trade agreements, which involve multiple matters. In this way, the Union might finally be able to pursue a truly coherent external action.

[88] Actually, the issue is even more subtle, since the external competences founded on the *ERTA* case-law (the reference is to the Judgment of the Court of 31 March 1971, case 22/70, *Commission v. Council – European Agreement on Road Transport*, EU:C:1971:32) are mainly meant to pursue *internal* objectives, not *external* ones. In other words, the expansion of the EU competences in this field by the Court was driven, in the first place, by the need to avoid interference by the international commitments of the Member States with the internal common rules (agreements that may affect the common rules or alter their scope) and to allow the achievement of Treaty objectives when the conclusion of an international agreement proves necessary to that end (Opinion 1/76 of the Court of 26 April 1977, *Draft Agreement Establishing a European Laying-Up Fund for Inland Waterway Vessels*, EU:C:1977:63). Seen from this perspective, it appears even more important that Article 21 refers to the external action in all its elements, including the external dimension of internal policies.

The argumentation that follows offers more clues on the material content of the notion of sustainable development, as the Court examined all the matters that were included in the Agreement. First of all, the social protection of workers was considered by the Court as associated with the objectives of sustainable development, particularly with reference to issues such as the freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation[89]. Secondly, environmental protection and the sustainable management of natural resources, with an emphasis on timber, fish stocks and natural resources conservation measures, also form part of the notion of sustainable development[90]. Not only is sustainable development an integral part of the objectives of the common commercial policy, but it is apparent, according to the Court, that the mentioned measures, both social and environmental, have direct and immediate effects on trade, because they contribute to limiting the disparities in social and environmental standards[91], and as a consequence, disparities in the costs of the production of goods, with beneficial effects on the participation in free trade of economic actors in both contracting parties, the EU and Singapore, on an equal footing. In substance, the Court applied a twofold test in order to assess whether an EU act can be included within the common commercial policy (CCP): it has to be intended to promote, facilitate or govern trade, and it must have a di-

[89] The reference the Court makes here is to the principles of the ILO (International Labour Organisation) Declaration on Fundamental Principles and Rights at Work, adopted in Geneva on June 18, 1998 and revised on June 15, 2010.

[90] Opinion 2/15, paragraph 150.

[91] On the other hand, cooperation in social and environmental fields in the framework of the common commercial policy cannot extend to harmonising the social and environmental standards of the parties without affecting the distribution of competences between the Union and the Member States. The free trade agreement with Singapore in fact is intended only to govern trade between the parties by making the liberalisation of trade subject to the condition that the parties comply with their international obligations concerning the social protection of workers and environmental protection (Opinion 2/15, paragraph 165 and 166).

rect and immediate effect on it[92]. This evidently paves the way to an evolutionary and dynamic interpretation of the scope of the CCP, as is apparent from the Court's interpretation of the notion of sustainable development, which the Court anchored to its international meaning and scope, repeatedly referring to the Sustainable Development Goals of the United Nations. At the same time, the Court's interpretation of Article 21 TEU preserves the specificities of the several EU policies.

7. Conclusions

Sustainable development has earned a central position in the structure of the EU as a result of the Lisbon Treaty. It is now one of the general objectives of the Union, and one of the objectives of the Union's external action. As such, it has been integrated into all the external policies, and it must be taken into account whenever an EU action might affect developing countries.

But, the Union does not have an independent definition of sustainable development, and therefore, it must rely on the notion that is accepted at the international level. This makes it possible for EU institutions to adopt a flexible and comprehensive approach to sustainable development based on United Nations acts such as the 2030 Agenda. Sustainable development is a concept that is subject to an ongoing evolution on the basis of the evolution of the needs and the situation of the planet and its population. The EU, lacking a codified definition of the concept, can easily adapt to such an evolution.

On the other hand, from a strictly legal point of view, there is no unambiguous definition of sustainable development, and the only consideration we can make is that sustainable development is a comprehensive notion and a multidisciplinary concept. The Court of Justice has provided its contribution, through the definition of the common commercial policy and of the development policy, indirectly to the

[92] See Segura-Serrano, "The Recurrent Crisis", 834, and the judgments *Energy Star*, Opinion 2/00, Case C-347/03, *Regione Friuli-Venezia Giulia*, and C-411/06, *Commission v. European Parliament and Council*.

definition of the content of the notion of sustainable development and of the relationship between the two policies using an evolutionary and dynamic approach. In this process, an important role is also played by the *New European Consensus on Development*, which is based on the integration of sustainable development into all the areas of the external action of the Union in application of the common objectives of the external action established in Article 21 TEU.

From the above analysis, I think we can conclude that sustainable development has evolved into a "container concept," as it has been acutely defined[93]. This definition was meant to be critical in the sense that there is no specificity to the concept. On the contrary, I argue that it confers on it the flexibility necessary to adapt to the changing needs of the world's societies and to open up to new challenges. The content of this container can vary, and the interpreters can attribute more weight to one element or to the other according to their sensibilities, their culture, or the historical moment of the analysis. For example, in the literature, emphasis was placed on intergenerational equity as a possible legal framework for the implementation of sustainable development[94]. Later, the notion of resilience was put at the core of sustainable development by the EU *Global Strategy* for the CFSP. All these notions form part of the comprehensive notion of sustainable develop-

[93] J. Wouters et al., "The Search for a Post 2015 International (Sustainable) Development Agenda: Some Reflections from a European Perspective", Working Paper n. 141 (Leuven Centre for Global Governance Studies, June 2014), 15, observes that sustainable development is a "container concept", meaning that it covers a lot of ground without being very specific.

[94] L.M. Collins, "Environmental Rights for the Future: Intergenerational Equity in the EU", *Review of European Community and International Environmental Law* (2007): 322 n. 3. According to this author, sustainable development is a descriptive rather than normative concept that needs a comprehensive and functional legal framework. She concludes that this legal framework can be provided by intergenerational equity, in that this concept implies legal obligations (for the present generations) and legal rights (for the future generations). It can be disputed whether a generation that is not yet existent can legally be the subject of rights (for the controversial notion of future generations as new rights bearers, see Jakab, *Sustainability in European Constitutional Law*, 8), while, on the other hand, intergenerational equity, as has been discussed before in the text, is only one of the dimensions of sustainable development.

ment, which, as a container, has the capacity to accommodate a huge quantity of merchandise. From a legal perspective, however, sustainable development must be considered as a legal framework aimed at ensuring that all its elements/goals are harmoniously met. More than a container, I like to imagine sustainable development as the director of an orchestra whose task is to make sure that all the musicians play in tune and keep the right tempo. The role of violins or trumpets, or of drums can vary from one concert to the other, but the director is always there to preserve harmony, tempo and rhythm.

Against this background, it is no surprise that many acts of secondary legislation adopted in the framework of the common commercial policy pursue non-economic and non-commercial objectives, and are instead aimed at achieving sustainable development objectives. There is no contradiction and no inconsistency, and more importantly, there is no unlawfulness (lack of competence or overlap of competences) in a similar approach. It is the Court of Justice that will have the task, on a case-by-case basis, to ascertain whether a single measure exceeds the limit of the trade competence, but in doing so, the Court will take due account of the obligation of the Union to integrate sustainable development into all its policies. As was discussed above, the Court has adopted some very significant judgments that go in this direction.

The EU has enacted many acts that regulate international trade with a view to promoting sustainable development in its multifaceted dimensions[95]. In the following chapters, I will address some of the most significant among them in putting together trade aims and interests and sustainable development goals. The only acts that will be considered are the unilateral ones[96]. Unilateral measures are less influenced than international agreements by the negotiations, i.e. by the will of the other contracting States, and are not the fruit of diplomatic compromis-

[95] On the impact of the non-commercial aims on international trade law, see F. Francioni, ed., *Environment, Human Rights and International Trade* (Oxford/Portland, Hart Publishing, 2001).

[96] On the clauses for the promotion of sustainable development and human rights in EU international agreements see, recently, Bartels, "Human Rights and Sustainable Development", in *Global Governance through Trade* (2015), 73 *ff*.

es[97]. In other words, they better reflect the attitude of the Union and its policy-making. At the same time, however, unilateral measures – and this is another reason why they are interesting – aim at affecting the policies and behaviours of third countries, involving several issues of possible extraterritorial effects and inconsistencies with international trade rules, especially in the framework of the World Trade Organisation.

There are two main categories of unilateral acts that pursue non-economic aims through commercial legal instruments. The first category is composed of those acts that have a predominantly commercial objective, but also contain provisions aimed at incentivising the respect for sustainable development in all its components (human rights, good governance, the rule of law, environmental protection and sound resource management, social and labour rights[98]). This is the case of the Generalised System of Preferences, whose main objective is granting developing countries favourable treatment for their exports to the EU. In itself, this is an objective that is inherent to development cooperation, but the means fall entirely under the common commercial policy competence to fix customs duties, while the regulations that set the discipline for the different schemes of preferences establish conditionality rules based on the beneficiary countries' performance in terms of their respect for sustainable development principles.

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[97] A study has recently been published that covers the use of trade for non-trade objectives, but it is devoted to both treaty and unilateral measures, with more emphasis on the former than on the latter: J. Wouters et al., ed., *Global Governance through Trade*; another study that addresses the topic of the use on trade instruments for non-economic aims, but again, with a greater focus on trade agreements, is T. Takacs, A. Ott, and A. Dimopoulos, ed., *Linking Trade and Non-Commercial Interests: The EU as a Global Role Model?* (The Hague, CLEER Working Papers 2013/4).

[98] There is actually a difference between the two clauses – human rights, democracy, rule of law, and good governance, on the one part, and environmental protection and labour rights, on the other. This distinction, which affects the incisiveness of the measures that can be adopted in cases of breaches, will be pointed out in due course, but I prefer to consider the two types of clauses together as sustainable development clauses (on the distinction, see Bartels, "Human Rights and Sustainable Development").

The second category of acts includes measures which address trade in goods that are particularly sensitive in terms of either respect for human rights (goods that are used for the death penalty and torture instruments, conflict diamonds, etc.) or environmental protection (wildlife, timber, biofuels, fishery products, etc.). This category of acts is characterised by the use of trade regulations or other measures affecting trade in order to limit or control trade in cases where liberalisation might lead to harmful consequences on sustainable development.

Chapter II
The Generalized System of Preferences and Sustainable Development

1. Introduction

International trade is the field where the EU has been playing its most important role on the global stage for decades, gaining, over the years, the position of one of the most relevant actors. This success is due to many concurring factors. First of all, it stems from the fact that the common commercial policy has been, since the end of the transition period, an exclusive competence of the Union, which makes it possible for the institutions to negotiate and decide autonomously, without the need to find an agreement among the Member States, thus allowing the Union to act as a single bloc in multilateral trade fora[1]. Furthermore, the Union, in the exercise of its powers under the common commercial policy, has established an extensive network of international trade agreements with most States in the world and has adopted a huge number of autonomous measures regulating virtually all aspects of international trade.

In addition, trade is, with aid, the most important instrument in the Union's development cooperation policy. This has been true from the outset. The first agreements that included development cooperation clauses and trade clauses together were the Yaoundé and later the Lomé Conventions with the ACP (Africa, Caribbean and Pacific) coun-

[1] On the modifications introduced in the common commercial policy by the Lisbon Treaty, see R. Baratta, "La politica commerciale comune dopo il Trattato di Lisbona", in *Diritto del commercio internazionale* (2012), 403 *ff*.

tries, the first of which dates back to 1963. Thus, development cooperation and trade have always gone hand in hand.

As was explained in the previous chapter, the expansion of the notion of sustainable development at the international level, together with the introduction of an explicit reference to this principle in the EU Treaties, explains the relevance it has assumed in the EU's external action in recent years. The focus of a comprehensive trade policy on the integral development of the partner countries should take into account not only the need to boost the economy, but also the sound management of natural resources, the efficient development of institutions that can enhance good governance, as well as the respect for fundamental human and social rights, and the protection of the environment. In a world that is more and more interdependent, environmental and human rights/social rights standards necessarily become an element of international trade: the need to harmonise those standards, to avoid distortions of trade and investment flows, is at the basis for regulation in this area. The EU is no exception: together with the undisputable will to cooperate for the sustainable development of third countries, there is the desire to level the playing field, avoiding possible distortions to trade due to a disparity in sustainability and social standards.

Nevertheless, the integration of such non-economic concerns into international trade must not be taken for granted, as the international legal framework for global trade, the World Trade Organisation (WTO), and its predecessor, the General Agreement on Tariffs and Trade (GATT), allows only marginal measures limiting trade on grounds of human rights and environmental protection, as such measures can be used as a disguised means of protectionism, even if the disparities in human rights and environmental standards might themselves lead to distortions in a globalised market. The EU has taken the lead in integrating sustainable development issues into its trade measures. It has always been on the razor's edge of compliance with the WTO rules and has even been involved in dispute settlement procedures for non-compliance.

Before going into the analysis of the Generalised System of Preferences (GSP) and its utilisation for the promotion of sustainable development, it is useful to show how international trade rules have addressed the issue of integrating developing countries into international

trade, and later, the even more demanding issue of sustainable development. This adds new elements to economic and industrial development, which was the only aspect considered when the GATT Members permitted the adoption of differentiated treatments for developing countries.

2. The principles governing the GATT/WTO system

As anticipated above, the legal framework for international trade is the WTO and, before its institution, which was realised in 1994 when the Marrakesh Agreements were signed, it was the GATT. The latter was born in 1947 on the ashes of the project to establish an International Trade Organisation (ITO), which was imagined as a part of the Bretton Woods international system, together with the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD or World Bank). The founding agreement of this new organisation was signed by fifty-six States at the conclusion of the Havana Conference in 1948[2], but it never entered into force because of the opposition of many States, including the United States. The project was too ambitious, as it addressed not only trade liberalisation, but also economic development and reconstruction after the war, employment, competition and investments. At the core of the opposition against the ITO, however, was the conflict between the liberalisation of trade and the protection of the national interests of the States in a historical period where the world was recovering with difficulty from the disaster of the Second World War, and the international political situation was starting to radically change with the beginning of the Cold War and the conflicting positions between the Western States and the Soviet Union[3]. The General Agreement on Tariffs and Trade (GATT)

[2] The text of this agreement is known as the *Havana Charter.* On the origins of the multilateral trade cooperation, see M. Giuliano, *La Cooperazione degli Stati e il commercio internazionale* (Milano, Giuffrè, 1978): 149 *ff.*

[3] P. Picone and A. Ligustro, *Diritto dell'Organizzazione mondiale del commercio* (Padova, CEDAM, 2002), 8-9. P. Picone and G. Sacerdoti, *Diritto internazionale dell'economia* (Milano, Franco Angeli, 1982).

was signed during the Havana Conference by a group of twenty-three States meeting in Geneva on October 30, 1947. It was the text of Chapter IV of the Havana Charter concerning trade policy and trade negotiations. It was perceived as a more flexible instrument, as it allowed the States to freely negotiate and accept any trade commitment. The GATT was limited in fact to the establishment of some fundamental principles and criteria for trade liberalisation, and of the procedures to carry out multilateral trade negotiations, the so-called *Rounds*, during which tariff reductions were agreed upon and new agreements integrating the original GATT were concluded. The *Uruguay Round*[4] of the GATT, which lasted eight years, from 1986 to 1994, had a very ambitious agenda: reforming the GATT and creating a new international organisation, while at the same time expanding the scope of the GATT principles and rules, extending them to new areas of trade. The outcome of the Uruguay Round was the conclusion of the Agreements signed by 111 States in Marrakesh on April 15, 1994. The "Final Act embodying the results of the Uruguay Round of multilateral trade negotiations" entered into force on January 1, 1995[5]. Annexed to the Final Act are the Agreement establishing the WTO and a number of agreements on trade topics: the Multilateral Agreements on Trade in Goods, which include the GATT 1994, a revised version of the old GATT, and other agreements, the most important of which concern agriculture, trade-related investment measures, sanitary and phytosanitary measures, textiles and clothing, anti-dumping, technical barriers to trade, and the rules of origin; the General Agreement on Trade in Services (GATS); the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs); the Dispute Settlement Understanding (DSU); and the Trade Policy Review Mechanism (TPRM). WTO Members are under

[4] Launched at the Ministerial Conference of the GATT Contracting Parties held in Punta del Este, Uruguay, on September 20, 1986. G. Sacerdoti and C. Secchi, ed., *L'Uruguay Round del GATT* (Milano, Giuffrè, 1987).

[5] On the succession from the old GATT 1947 to the WTO, see R. Virzo, "Note sulla successione tra organizzazioni internazionali, con particolare riferimento alla trasformazione del GATT nell'OMC," in *La Comunità Internazionale* (1999), 296*ff.*; G. Sacerdoti, "La trasformazione del GATT nell'Organizzazione mondiale del commercio," in *Diritto del commercio internazionale* (1995), 73*ff.*

the obligation to accept and be bound by all the cited Agreements, also called multilateral agreements (principle of the *single undertaking*). However, for the other agreements annexed to the Final Act, the so-called plurilateral agreements, the Member States can decide whether to accept them or not[6].

In 2018, the WTO has 164 members, while twenty-three more States have observer status[7]. This makes the WTO a global organisation with a very large membership and a huge influence in international trade relations[8].

Without going into detail, which would be outside the scope of this work, it is useful, in order to better understand the compatibility problems that can arise in the application of favourable trade treatments to developing countries, to briefly address the fundamental principles governing international trade in the framework of the WTO. Reference will be made mostly to the GATT 1994, but we can safely affirm that the general principles are common to all the areas of competence of the Organisation.

The objective of the creation of the WTO was the liberalisation of international trade through the progressive reduction of trade barriers, customs duties and non-tariff barriers[9]. In the view of the framers of

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[6] The Plurilateral Agreements include the Agreement on Trade in Civil Aircraft, the Agreement on Dairy Products, and the Agreement on Bovine Meat.

[7] Under WTO rules, States must start accession negotiation within five years of acquiring observer status, with the exception of the Holy See, whose observer status is permanent.

[8] Its creation is considered, with the growing interdependence of the economies and the fast development of communication technologies, to be one of the elements at the origin of the phenomenon known as globalisation, with positive and negative consequences on human and interstate relations. For a particular point of view on the issue of how to reconcile the emerging globalisation with concerns for developing and poor countries, see Pontifical Council for Justice and Peace, *Trade, Development and the Fight against Poverty. Some Reflections on the Occasion of the World Trade Organization "Millennium Round"* (Vatican City, 1999), which I had the opportunity to cooperate in drafting.

[9] Quantitative restrictions as well as other non-tariff barriers to trade are considered in the WTO framework to be less transparent and more insidious because of their possible distortive effects on trade. Quantitative restrictions are thus prohibited under Article XI of the GATT (whose paragraph 1 reads as follows:

the Agreements, the liberalisation of trade would lead to widespread development and the prosperity and welfare of peoples, as well as to sustainable development, as is stated in the Preamble of the Agreement establishing the WTO[10]. This commitment to sustainable development is fulfilled by provisions concerning the specific situation of the developing countries, including those that provide for preferential treatment in their favour in order to help them boost their domestic productions.

In an extremely simplified description, the WTO system rotates around the principles of sovereign equality of States, which is a fundamental rule in international law, of reciprocity in the concession of liberalisation measures, and of non-discrimination and equal treatment. Thus, each State assumes the same obligations, and grants and receives the same concessions. The operational mechanism is the multilateral application of the *Most Favoured Nation Clause* (MFN) under Article I of the GATT 1994, defined as the cornerstone of the GATT system[11] whereby all trade concessions in terms of tariff reductions are automatically extended to all the WTO Members and applied in their

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"[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party"), with some derogation admitted by the provision. Specific agreements deal with other non-tariff barriers such as sanitary and phytosanitary measures and technical barriers to trade.

[10] The Contracting Parties recognise "that their relations in the field of trade and economic endeavor should be conducted with a view to 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, while 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 in a manner consistent with their respective needs and concerns at different levels of economic development".

[11] Picone and Ligustro, *Diritto dell'Organizzazione mondiale del commercio*, 102, where it is recalled that the MFN clause has a very ancient origin and has been used in trade relations since the Middle Ages.

relations on the basis of reciprocity and non-discrimination. In other words, the advantages and obligations that result from trade negotiations are, in principle, perfectly symmetrical.

There are some exceptions to the principle of reciprocity and the application of the MFN clause that have been introduced in order to take into account the existence and creation of more integrated trade systems, such as free trade areas and customs unions, trans-boundary and neighbourhood exchanges (Article XXIV GATT 1994[12]), and relations with developing countries, under Part IV of the GATT, which were introduced in order to deal with the needs of developing countries to be supported in their efforts to join the multilateral trading system.

As customs duties are the only allowed barriers to trade, no other burden can be placed on imported goods once they have been admitted to the territory of the importing States. This principle constitutes the second pillar of the WTO, the national treatment requirement (Article III of the GATT 1994[13]), according to which all imported goods must be subjected to exactly the same treatment as like domestic products (*like commodities* and *like merchandises*). Under this provision, all domestic taxes and other regulations shall be imposed without discriminating between domestic and imported goods.

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[12] According to paragraph 4 of Article XXIV, "[t]he contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories". The compatibility of such integration agreements is subjected to conditions that are established in the following paragraphs of Article XXIV.

[13] Whose paragraph 2 reads: "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products".

As mentioned before, reciprocity is another fundamental principle in the GATT/WTO system. It is at the basis of the functioning of the liberalisation process. There is no definition of the principle of reciprocity, which is recalled in the Preambles of the GATT and of the WTO founding agreement as an instrument to achieve the harmonious liberalisation of trade[14]. Trade concessions that are negotiated in the framework of the WTO are granted by the Member States on the basis of reciprocity, according to which each State that grants a concession will receive the same concession from the other Members. In addition to this formal application of reciprocity, there is a more substantial meaning of the principle. Trade concessions must achieve a substantial balancing of advantages on the basis of each State's needs and of the effects produced by liberalisation measures on their economies[15].

The system is completed by the possibilities for States to react to practices of unfair competition put in place by other States or by private subjects, such as producers or exporters. This is typically the case of dumping and subsidies, in reaction to which, according to Article VI of the GATT[16] and to specific and detailed annexed agreements, the Member States are allowed to introduce anti-dumping and anti-subsidies (countervailing) compensative duties to compensate for the margin of dumping and to restore the price of the goods to normal market prices.

The WTO Agreements also include a comprehensive and rather complex mechanism for trade dispute settlement, based on Articles

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[14] "Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce (…)".

[15] Picone and Ligustro, *Diritto dell'Organizzazione mondiale del commercio*, 120-21.

[16] "The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry" (Article VI, paragraph 1 of the GATT). The following paragraphs provide a definition of dumping comparing the practiced price to the ordinary market prices of the considered goods, and the criteria and conditions for applying anti-dumping duties.

XXII and XXIII of the GATT[17] and on the Dispute Settlement Understanding (DSU, Annex 2 to the Final Act of the Marrakesh Conference). The DSU establishes an integrated procedure for trade dispute settlement in the WTO[18], with a substantial evolution from the diplomatic system of the GATT to a quasi-judicial system where the consensus requirement for the adoption of panel reports is reversed to a negative consensus (consensus is required for the Dispute Settlement Body to reject the report). Panels of experts are established to examine disputes, and their reports, in order to produce effects for the parties to the disputes, must be approved by the Dispute Settlement Body (DSB, composed by all the Contracting Parties as provided for in Article XXIII of the GATT). The DSU has also introduced a second level of jurisdiction with the Appellate Body (AB), a permanent judicial body composed of seven experts in international trade law appointed by the DSB for a four-year term renewable only once. As with the panel reports, the appellate report must be adopted by the DSB by negative consensus (the report is approved unless the DSB unanimously decides to reject it). The execution stage of the dispute settlement procedure is where the system shows its flexibility. The succumbing State,

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[17] Article XXII provides for a very general obligation of the parties to start consultations in good faith on any matter affecting the operation of the Agreement, while Article XXIII confers on the CONTRACTING PARTIES (in capital letters in the text, to stress the institutional role they assume as a dispute settlement body) the task of taking care of any disagreement between the parties arising from the "nullification or impairment" of the benefits deriving from the Agreement. This formulation spurs the discussion about the grounds at the basis of trade disputes: the nullification and impairment of benefits rather than breaches of legal obligations (Picone and Ligustro, *Diritto dell'Organizzazione mondiale del commercio*, 587). In other words, what really matters is the production of damage, even where actual unlawful behaviour is lacking. In any case, it is generally presumed that the breach of a WTO rule will produce damage.

[18] See G. Sacerdoti, "The Dispute Settlement System of the W.T.O.: Structure and Function in the Perspective of the First 10 Years" (March 2007), Bocconi Legal Studies Research Paper No. 07-03. Available at SSRN: https://ssrn.com/abstract =981029 or http://dx.doi.org/10.2139/ssrn.981029 ; G. Sacerdoti, "The WTO Dispute Settlement System: Consolidating Success and Confronting New Challenges" (June 1, 2016), Bocconi Legal Studies Research Paper No. 2809122. Available at SSRN: https://ssrn.com/abstract=2809122 or http://dx.doi.org/10.2139/ssrn.2809122.

in fact, should comply within a reasonable timeframe with the findings of the report and the recommendations thereof. Nevertheless, this is not always the case. It sometimes happens that a State finds it more convenient for its own interests not to comply with the panel and Appellate Body requirements, insisting on the infringements. In this case, the winning State may be allowed by the DSB to adopt countermeasures. The latter are trade measures that can be symmetrical to the censured ones, or asymmetrical, i.e. targeted at a different trade sector than the censored measures. In both cases, countermeasures must be proportional to the unlawful measures of the counterpart and are implemented under the supervision of the DSB.

3. Part IV of the GATT and the preferential treatment of developing countries. The background of the Generalised System of Preferences

At the time the GATT entered into force, the most urgent need of the international community was to recover from the destruction of the war and to overcome the protectionism that had characterised the prewar period. The GATT rules were the perfect setting for such a task, together with the IMF, which had rearranged the international monetary system with fixed exchange rates between currencies based on the gold exchange standard, and the World Bank, which was committed to help finance the reconstruction after the war.

In the following years, however, decolonisation completely changed the composition of the international community. A large number of newly independent States acceded to the United Nations and the other international institutions. In a few years, these countries gained the majority in the General Assembly of the UN and started presenting their own needs. The former colonies, worn out by centuries of colonial rule, were mostly poor countries just starting their development process. Taking advantage of the majority they held in the General Assembly, they immediately engaged in an attempt to change the international legal system, whose fundamental rules had been established without their

participation. In this international environment, the UN bodies started to produce initiatives aimed at favouring developing countries and their special needs, particularly the expansion of trade between developed and developing countries and among the latter *inter se*[19]. The United Nations Conference on Trade and Development (UNCTAD), convened by the General Assembly in 1962, was held in Geneva in 1964[20]. Its outcome was a Final Act embodying sixteen General Principles and thirteen Special Principles. Principles One and Two reiterated the consolidated principles of the sovereign equality of States and of non-discrimination, while Principle Eight, after emphasising that "[i]nternational trade should be conducted to mutual advantage on the basis of the most-favoured-nation treatment and should be free from measures detrimental to the trading interests of other countries," introduced a new principle based on the need to support developing countries in expanding and diversifying their trade:

> However, developed countries should grant concessions to all developing countries and extend to developing countries all concessions they grant to one another and should not, in granting these or other concessions, require any concessions in return from developing countries. New preferential concessions, both tariff and non-tariff, should be made to developing countries as a whole and such preferences should not be extended to developed countries[21].

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[19] The first act adopted by the General Assembly on the impulse of the newly independent States was res. 1514 (XV) of 14 December 1960, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, which, reiterating the principle of the self-determination of peoples embodied in the UN Charter, condemned colonialism as an impediment to economic development and international peace; this declaration was followed by res. 1710 (XVI) of 19 December 1961, *United Nations Development Decade. A Programme for International Economic Co-operation*, which called on the UN Member States to implement policies aimed at enhancing, among other things, the participation of developing countries in world trade through measures tailored around their specific needs (see Picone and Ligustro, *Diritto dell'Organizzazione mondiale del commercio*, 451-52).

[20] UN General Assembly, Resolution No 1820 (XVII) of 18 December 1962. The UNCTAD was converted into a permanent body of the UN in 1964.

[21] E/CONF.46/141, Vol. I, 10-11.

The quoted UNCTAD principle introduced a new framework for trade relations between developed and developing countries based on two fundamental criteria that would also be adopted by the GATT: non-reciprocity for trade concessions granted to developing countries and non-discrimination among developing countries. A few months later, the GATT Contracting Parties decided to accept, at least in part, the UNCTAD's suggestions, and adopted a Protocol on November 17, 1964 adding to the text of the GATT a Part IV devoted to Trade and Development[22]. Part IV accepts the principle by which developed countries do not expect reciprocity in trade relations with developing countries and assume general commitments to voluntarily adopt measures to contribute to the expansion and diversification of the trade of developing countries. It was again upon impulse by the UNCTAD that the GATT went further, introducing the Generalised System of Preferences as the rule governing trade relations between developed and developing countries[23]. The first decision was adopted by the Contracting Parties of the General Agreement on June 25, 1971, which stated that "without prejudice to any other Article of the General Agreement, the provisions of Article I[24] shall be waived for a period of ten years to the extent necessary to permit developed Contracting Parties (…) to accord preferential tariff treatment to products originating in developing countries". On November 28, 1979, another decision by the Contracting Parties made the so-called *Enabling Clause* permanent, introducing, in addition to preferen-

[22] GATT, Part IV, Articles XXXVI-XXXVIII, identical in the GATT 1994.

[23] The Second UNCTAD, convened in New Delhi in 1968, adopted res. 21 (II), which acknowledged the "unanimous agreement in favor of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences" towards developing countries. In the following years, the movement for an enhanced cooperation for development, involving the economic sphere of international law, evolved in the so-called New International Economic Order, started by UN General Assembly at its Sixth Special Session on 1 May 1974, with Resolution 3201 ("Declaration on the Establishment of a New International Economic Order"): for an overview, see G. Sacerdoti, "The New International Economic Order: Looking Back after 35 Years" (December 5, 2010), Bocconi Legal Studies Research Paper No. 1931628. Available at SSRN: https://ssrn.com/abstract=1931628 or http://dx.doi.org/10.2139/ssrn.1931628

[24] Application of the most-favoured-nation clause.

tial tariff treatment in favour of developing countries, the possibility to adopt special and differentiated treatments for the least developed (LDCs) among the developing countries. The *Enabling Clause* has the sole effect of allowing the GATT Contracting Parties to grant preferential treatment to developing countries, but doing so is in no way mandatory. Preferential treatment remains a unilateral, voluntary decision by the developed countries[25].

4. The GSP in the European Union and the India v. EU case at the WTO

The European Communities were the first to implement a GSP scheme in July 1971, only one month after the adoption of the first enabling clause by the GATT Contracting Parties. It was followed by other developed countries, all of which now have their own GSP in place.

After that first scheme was implemented, the EC regularly amended the GSP to update it according to the evolution of international trade and the changing needs of development[26]. The last one was implemented with Regulation 978/2012[27] and will govern the system of generalised tariff preferences until 2023.

The first schemes did not address the issue of sustainable development and human rights as an essential element of growth and development. The focus was exclusively on trade expansion and, according-

[25] Under a WTO General Council decision adopted on December 16, 2010 concerning the *Transparency Mechanism for Preferential Trade Arrangements (PTA)*, all preferential trade arrangements, including GSP schemes and special treatments for LDCs, must be notified to the WTO Secretariat and examined by the Committee on Trade and Development. In the application of the transparency mechanism, all PTA are available on the website of the WTO.

[26] For an introduction to the first years of the GSP in the European Communities, A. Borrmann, Ch. Borrmann, and M. Stegger, *The EC's Generalized System of Preferences* (The Hague/Boston/London, Martinus Nijhoff, 1981).

[27] Regulation 978/2012 of the European Parliament and the Council of 25 October 2012, applying a scheme of generalised tariff preferences and repealing Council regulation (EC) 732/2008, in *O.J.* L 303 of 31.10.2012, 1.

ly, on tariff reduction. The first elements of conditionality, i.e. a connection between trade concessions and virtuous performance in terms of workers' rights and environmental protection, appeared only in the 90s[28] and were later more fully developed in Regulation 2501/2001. Its scope was limited to core labour standards based on fundamental International Labour Organisation (ILO) Conventions and environmental protection with particular regard to the sustainable management of forests[29]. Conditionality, in terms of the possible temporary withdrawal of the preferences, was possible in cases of slavery or forced labour, violations of core labour standards, exports of goods made by prison labour, ineffective customs controls on drugs, money laundering, fraud in the rules of origin, unfair trading practices, infringement of the objectives of international conventions concerning the conservation and management of fishery resources, and significant detrimental effects on the environment arising from the production of products included in these arrangements[30]. In addition to such special incentives, the 1994 scheme applied another incentive that was already in place in the previous scheme, granting duty free access to the EC market to products originating in countries engaged in campaigns to combat illegal drugs production and trafficking[31]. This provision later led to a dispute within the WTO[32] that shed some light on the relationship be-

[28] Council Regulation (EC) 3281/94 applying a four-year scheme of generalised tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries, in *O.J.E.C.* L 348 of 31.12.1994, 1; Council Regulation (EC) 2501/2001 of 10 December 2001, applying a scheme of Generalised Tariff Preferences for the period from 1 January 2002 to 31 December 2004, in *O.J.E.C.* L 346 of 31.12.2001, 1.

[29] There was a clear influence on this provision of the United Nations Conference on Environment and Development, which had taken place in Rio de Janeiro in 1992, whose final declaration constituted an important step in the evolution of the notion of sustainable development.

[30] Article 26 of Regulation 2501/2001.

[31] Article 3, paragraph 2, of Regulation 3281/94 and Annex V, according to which the beneficiary countries were Colombia, Venezuela, Ecuador, Peru and Bolivia. Duty free access was also granted to LDCs (Article 3, paragraph 1). Also see Article 10 Regulation 2501/2001, where the number of beneficiary States rose to twelve.

[32] See below.

tween the GSP differentiation and conditionality criteria and WTO rules. The 1994 scheme was very narrow in scope, as the tariff reduction was limited, and it affected a relatively small number of products.

The object of the WTO dispute was the scheme adopted with Regulation 2501/2001. The latter was the first act adopted under the common commercial policy that explicitly affirmed the obligation for the Community's trade policy to contribute to sustainable development[33]. It complied by introducing a more comprehensive system of preferences granted according to the performance by the beneficiary States in the domain of sustainable development (environmental policies, particularly the sustainable management of tropical forests and fisheries resources) and labour rights, with reference to some core ILO Conventions. The regulation introduced five different preferential arrangements: a) a general arrangement; b) a special incentive arrangement for the protection of labour rights; c) a special incentive arrangement for the protection of the environment; d) a special arrangement for LDCs; e) a special arrangement to combat drug production and trafficking. Under the last arrangement, the beneficiary countries engaged in actively and effectively combating drug production and trafficking[34] were granted a very favourable treatment (duty free and quota free for a significant number of products). "The result of the Regulation is that the tariff reductions accorded under the Drug Arrangements to the 12 beneficiary countries are greater than the tariff reductions granted under the General Arrangements to other developing countries"[35].

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[33] "The Community's common commercial policy must be consistent with and consolidate the objectives of development policy, in particular, the eradication of poverty and the promotion of sustainable development in the developing countries" (Regulation 2501/2001, Preamble).

[34] The number of beneficiary countries was extended from the previous scheme: Bolivia, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Panama, Peru, Pakistan, El Salvador, and Venezuela.

[35] WT/DS246/R, European Communities – Conditions for the granting of tariff preferences to developing countries, Report of the Panel, 1 December 2003, paragraph 2.8.

This specific clause was challenged by India in a case that was brought to the WTO in 2002[36]. India claimed that it was inconsistent with Article I (1) of the GATT 1994 (Most Favoured Nation Clause) and with the 1979 *Enabling Clause*. Initially, India also intended to challenge the special incentives for workers' rights and for the environment. However, it later restricted its claims to the drug incentive only, as only one State, Moldova, was at that time a beneficiary of the incentive for labour rights, and no States were involved in the incentive for environmental rights, so no nullification or impairment of trade benefits derived to India from such schemes[37].

Beyond the single clauses involved, the central question in the case was the extent to which developed countries were entitled to differentiate among developing countries for non-trade reasons[38].

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[36] On the case, see L. Mola, "I diritti umani nelle relazioni economiche esterne dell'Unione europea: il sistema di preferenze generalizzate", in *La tutela dei diritti umani in Europa*, ed. A. Caligiuri, G. Cataldi, and N. Napoletano (Padova, CEDAM, 2010), 217 *ff.*; A.E. Cassimatis, "Developing States, the Generalized System of Preferences and Trade Measures to Enhance Human Rights", in *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements*, ed. R. Bucley, V.I. Lo, and L. Boulle (Austin-Boston-The Netherlands, Wolters Kluwer, 2008), 201*ff.*; C. Di Turi, "Il Sistema di Preferenze Generalizzate della Comunità europea dopo la controversia con l'India sul regime speciale in tema di droga", in *Rivista di diritto internazionale* (2005), 721 *ff.*; J. Harrison, "Incentives for Development: The EC's Generalized System of Preferences, India's WTO Challenge and Reform", in *Common Market Law Review* (2005): 1663 *ff.*; A. Ligustro, "L'Organizzazione mondiale del commercio condanna lo Schema di preferenze generalizzate della Comunità europea per il carattere discriminatorio del 'regime droga'", in *Diritto pubblico comparato ed europeo* (2005): 432 *ff.*; F. Martines, "I sistemi di preferenze generalizzate, la normative comunitaria e il diritto dell'OMC", in *Diritto dell'Unione europea* (2005), 294 *ff.*; M. McKenzie, "European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries", in *Melbourne Journal of International Law* (2005).

[37] WT/DS246/R, European Communities, paragraph 1.5.

[38] L. Bartels, "The Appellate Body Report in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries WT/DS246/AB/R and its Implications for Conditionality in GSP Programs*", in *Human Rights and International Trade*, ed. T. Cottier, J. Pauwelyn, and E. Bürgi (Oxford, Oxford University Press, 2005), 463 *ff*.

The grounds of India's claims were based on Article I (1) of GATT 1994, while the EC claimed that the drug arrangement was justified on the basis of the *Enabling Clause*. India complained that the special treatment granted by the EC special arrangement for drugs granted to Pakistan was discriminatory, since the list of beneficiary countries was the result of a merely discretionary choice by the EC[39], and that it caused prejudice to its economy.

The Panel found that

> the legal function of the Enabling Clause is to authorize derogation from Article I (1), a positive rule establishing obligations, so as to enable the developed countries, *inter alia*, to provide GSP to developing countries. There is no legal obligation in the Enabling Clause itself requiring the developed country Members to provide GSP to developing countries. The word "may" in paragraph 1 of the Enabling Clause makes the granting of GSP clearly an option rather than an obligation.

The Panel found that this is also a limited authorisation of derogation in that the GSP must be "generalized, non-discriminatory and non-reciprocal"[40]. The derogation, according to the Panel, does not exclude the application of Article I (1) in its entirety; rather, the two provisions must be applied concurrently. As a consequence, because the tariff preferences under the Drug Arrangements were accorded only on the condition that the receiving countries were experiencing a certain level of gravity of drug problems, these tariff preferences were not accorded "unconditionally"[41] to the like products originating in all other WTO

[39] There was no specific procedure to apply for this treatment, and no specific eligibility criteria were indicated in the regulation.

[40] WT/DS246/R, European Communities, paragraph 7.38.

[41] The Panel provides a very interesting reflection on the term "unconditionally" and on the notion of conditionality: "In the Panel's view, moreover, the term 'unconditionally' in Article I:1 has a broader meaning than simply that of not requiring compensation. While the Panel acknowledges the European Communities' argument that conditionality in the context of traditional MFN clauses in bilateral treaties may relate to conditions of trade compensation for receiving MFN treatment, the Panel does not consider this to be the full meaning of 'unconditionally' under Article I:1. Rather, the Panel sees no reason not to give that term its

Members, as required by Article I (1). The Panel therefore found that the tariff advantages under the Drug Arrangements were not consistent with Article I (1) of the GATT 1994[42].

Turning to the text of the *Enabling Clause*, which allows developed Contracting Parties, in derogation of the general rule of the MFN clause of Article I (1) of the GATT, to grant preferential tariff treatment to products originating in developing countries in accordance with the GSP[43], the Panel found that the only allowed differentiation among developing countries in the *Enabling Clause* is the one in paragraph 3(d) in favour of LDCs. In fact, footnote 3 of the *Enabling Clause* specifies that the GSP is to be intended "as described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of 'generalized, non-reciprocal and non-discriminatory preferences beneficial to developing countries'". Paragraph 3 (c) of the *Enabling Clause* further states that the GSP "shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries". The Panel did not find that this provision could be interpreted in the sense that it allows a differentiation among developing countries or the possibility to adopt tailor-made treatments[44], and it concluded that the *Enabling Clause* requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation.

The Panel Report resulted in a complete rejection of the EC's positions and outlawed the whole GSP scheme that the EC had put in place. Thus, the EC appealed the most controversial law issues and legal in-

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ordinary meaning under Article I:1," that is, "not limited by or subject to any conditions". This statement clearly closes the way to any kind of conditionality in trade preferences, including the human rights and sustainable development ones.

[42] WT/DS246/R, European Communities, paragraph 7.60.

[43] Article 2, paragraph *a)* of the *Enabling Clause*, Decision of 28 November 1979 (L/4903).

[44] The EC argued that this provision, together with the non-discrimination requirement, allowed developed States to differentiate the special treatments to accord to developing countries on the basis of the different situations of individual developing countries, considering that non-discrimination prohibits treating equally situations that are different.

terpretations developed in the Panel Report. The Appellate Body Report partially changed the situation[45]. The Appellate Body reversed the part of the Panel Report that excluded the possibility for developed countries to differentiate among developing countries on the basis of paragraph 2 (c) of the *Enabling Clause*. The Appellate Body concluded that

> the term "non-discriminatory" in footnote 3 does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause. In granting such differential tariff treatment, however, preference-granting countries are required, by virtue of the term "non-discriminatory," to ensure that *identical treatment is available to all similarly-situated GSP beneficiaries*, that is, to all GSP beneficiaries that have the "development, financial and trade needs" to which the treatment in question is intended to respond[46].

The Appellate Body accepted the interpretation of the notion of non-discrimination offered by the EC, which is the result of a lengthy work of interpretation in the European legal environment[47]; according to such view, as there is no discrimination in differentiating between unequal situations, it is possible to differentiate, but only on the basis of objectively determined special needs that can be improved by the grant of tariff preferences[48]. This excludes the possibility for developed countries to grant differentiated treatments to developing countries according to political decisions, as has been argued is sometimes the case with the

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[45] Appellate Body Report, WT/DS246/AB/R, 7 April 2004. For a rather critical analysis, see Bartels, "The Appellate Body Report."

[46] WT/DS246/AB/R, paragraph 173 (the emphasis is mine). The differentiation must be based on special needs, objectively determined.

[47] For an overview, see European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Non-Discrimination Law* (Luxembourg, Publications Office of the EU, 2018).

[48] In other words, there must be a causal link between the additional tariff preferences granted in a GSP+ type program and the improvement of a legitimate "development, financial or trade need"; see L. Bartels, "The WTO Legality of the EU's GSP+ Arrangement", in *Journal of International Economic Law* (2007), 869 *ff*.

application of GSP schemes by the United States[49]. At the same time, it has been argued that the result of the case is to allow differentiation on the basis of objective needs, but to limit negative conditionality: differentiation is permitted only when tariff preferences are granted to achieve an objective, not when they are withdrawn to achieve an objective[50].

After the Appellate Body's Report, the EU adopted new GSP programmes in 2005[51] and in 2012[52], which cancelled the previous special incentives and introduced a new arrangement, known as GSP+. The analysis that follows will consider the latest version of the programme, unless otherwise indicated.

5. Human rights and sustainable development conditionality in the European Union's GSP schemes

A few years after the WTO case analysed above, the EU itself went through the significant reform discussed in the first chapter of this study. The Lisbon Treaty, which entered into force in 2009, revised the common commercial policy (CCP) and, more importantly, introduced sustainable development as one of the common objectives of external action in Article 21 TEU. As I argued in the first chapter, pursuing sustainable development in external action, including the CCP, was no longer an option, but a legal constitutional obligation deriving from the Treaties. This new legal framework also affected the GSP, and indeed,

[49] M. Gassebner and A. Gnutzmann-Mkrtchyan, *Politicized Trade: What Drives Withdrawal of Trade Preferences?*, CESifo Working Paper n. 6762 (2017), www.CESifo-group.org/wp. In the U.S. legislation, eligibility criteria are mostly negative: the law excludes States that are communist, that do not comply with some core labour standards, that fail to enforce arbitral awards, that are involved with terrorism, and so on (US Code, Section 2462 (b)).

[50] Bartels, "The Appellate Body Report", clarifies the three conditions required for differentiation in accordance with the Appellate Body's report: when there are legitimate development needs, when the preferences represent an appropriate (and positive) response to these needs, and when the preferences are available to all countries with these same needs.

[51] Council Regulation 980/2005 of 27 June 2005 (*O.J.* L 169 of 30 June 2005,1).

[52] Regulation 978/2012, cited above.

the 2012 arrangement is constructed in a way to give priority to sustainable development considerations. Keeping in mind the findings of the Appellate Body, this paragraph will analyse the new system, taking into account possible elements of inconsistency with GATT/WTO rules.

In January 2012, the Commission published a Communication specifically devoted to the role of trade in connection with the objective of contributing to sustainable development in developing countries, where the EU institution provided a comprehensive assessment of the changes that have occurred in global economic relations in the last years. The Commission acknowledged that tariffs are no longer the enemy to defeat in order to pursue trade liberalisation[53] and to contribute to development but that there are other and more challenging tasks ahead:

> Making trade work for development requires much more than lowering tariffs. Modern and pro-development trade policies need to address a complex range of issues, ranging from trade facilitation at local and regional level to technical, social and environmental regulations, respect of fundamental rights, investment-supporting measures, protection of intellectual property rights, regulation of services, competition policies and transparency and market access in government procurement. Progress on these issues can boost transparency, predictability and accountability, which are essential for inclusive development and poverty alleviation and which tariff cuts alone cannot provide. Finally, active policies are needed to minimize adverse effects of trade opening. The growing diversity of developing countries calls for more differentiation in the design and implementation of EU policies[54].

Clearly, the Commission did not buy the conclusions of the Panel and, although somewhat mitigated, of the Appellate Body that differentia-

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[53] On this topic, A. Mignolli, "*In vino veritas*: Riflessioni sul dibattito americano in merito alla questione delle indicazioni geografiche nel negoziato TTIP," in *Dialoghi con Ugo Villani*, ed. E. Triggiani et al. (Bari, Cacucci, 2017), 891 *ff.*, where it is highlighted how barriers to trade such as geographical indications for wines and cheeses can become much more challenging in negotiations than tariffs.

[54] European Commission, *Trade, Growth and Development*, COM(2012) 22 final, Brussels, 27 January 2012.

tion among developing countries should be avoided as much as possible in the name of non-discrimination. On the contrary, the evolving scene of the global economy shows a growing diversity in levels of development, in production diversification and in vulnerability situations due to economic, natural or political factors, which makes undifferentiated interventions largely ineffective. How can the GSP fit into this scenario? It is clear that the GSP is destined to become a residual arrangement in the relations of the EU with developing countries. Rather, the focus of the Commission's vision of the EU's trade and development strategy was on the Economic Partnership Agreements (EPAs) that the Union is in the process of negotiating and concluding following the expiration of the GATT *waiver* for the differentiated treatment the Union had granted for decades to the ACP (Africa, Caribbean and Pacific) countries at the end of 2007[55]. The EPAs are comprehensive

[55] This is another story, with the same main characters, i.e. non-discrimination and the GATT/WTO. To make a long story short, the Communities, from the first Lomé Convention in 1975 to the Cotonou Agreement in 2000, had granted a growing number of ACP countries – mostly former colonies of the Member States – non-reciprocal, preferential trade treatment for most of the products exported from the ACP countries to the Communities/EU. Such treatment was discriminatory, as the ACP countries enjoyed a more favourable treatment than other developing countries, and for this reason, it was unlawful under GATT/WTO rules. After years of "tolerance" based on the invocation by the Community of the so-called *grandfather clause*, a provision in the Protocol of Provisional Application annexed to the GATT 1947 which permitted the application of pre-existing preferential schemes, the entry into force of the WTO agreements made it necessary for the EU to find a more permanent solution. This was not possible, however, and the EU was forced to request a waiver from the GATT members in 1994. A second waiver was granted in 2000, but the WTO Council made it clear that it would be the last. After the expiry date of the waiver on December 31, 2007, the relations between the EU and the ACP countries had to return to compliance with WTO rules, that is, reciprocal and non-discriminatory. One of the main reasons for such an uncompromising attitude by the WTO bodies certainly was the ongoing bananas dispute, where GATT and WTO dispute settlement procedures had repeatedly ruled in favour of some Latin American banana-producing countries and the U.S., which complained about the discriminatory character of the EU import regime on bananas, as the latter favoured ACP banana-exporting countries. The dispute started in 1993 and was finally concluded only in 2012, with the signing of the Geneva Banana Agreement, agreed by the EU, the Latin American countries

free trade agreements that are characterised as being reciprocal and not preferential, although they provide for a wide range of exceptions and long transition periods[56].

Regulation 978/2012 modifies the Union's GSP in many ways. The Commission's intent was to make the GSP correspond more to the needs of developing countries and to increase its transparency, making it more open to the accession of new countries and simplifying the procedures for proof of origin on the basis of the new, more flexible, rules of origin adopted in 2010[57]. It inaugurates the new approach resulting from the Lisbon Treaty, and it considers the WTO rules as interpreted by the Appellate Body according to which the system must be framed. The Preamble gives expression to these considerations in the second and fourth *recitals*, which state that, on the one hand, the Union's CCP "shall be guided by the principles and pursue the objectives set out in the general provisions on the Union's external action, laid down in Article 21 of the Treaty on the European Union" (*recital* 2), and on the other hand, that the CCP "is to comply with World Trade Organization (WTO) requirements, in particular with the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the "Enabling Clause") adopted under the General Agreement on Tariffs and Trade (GATT) in 1979, under which WTO Members may accord differential and more favourable treatment to developing countries" (*recital* 4). The objective of the scheme is to provide preferential access to the Union's market to products originating in developing countries, which should "assist developing countries in their efforts to reduce poverty and promote good governance and sustainable development" (*recital* 7). The scheme is articulated in three different arrangements: a) a general arrangement; b) a special incentive arrangement for sustainable development and good

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and the U.S. (for details, see S. Griller and E. Vranes, "EC-Banana Case", in *Max Planck Encyclopedia of Public International Law*, at www.mpepil.com).

[56] The Commission notes that developing countries that are not ready to engage in an EPA can opt for the GSP if they are eligible (*Trade, Growth and Development*, paragraph 4.1.4).

[57] Commission Regulation (EC) 1063/2010 of 18 November 2010, on which see *infra*.

governance (GSP+); and c) a special arrangement for the least-developed countries (Everything But Arms, EBA).

The general arrangement is not problematic from the point of view of the eligibility criteria and, consequently, of the possible discrimination between developing countries. It is granted to all developing countries which have not been classified by the World Bank as high-income or upper-middle income countries during the three consecutive years immediately preceding the update of the list of beneficiary countries[58] and do not benefit from a different preferential market access arrangement, such as a trade agreement, which provides an equivalent or more favourable tariff preference (article 4 of Regulation 978/2012). Tariff preferences are granted to products originating from the beneficiary countries according to a graduation established in Article 7 of the Regulation. Products listed in Annex VI as non-sensitive products are granted a full suspension of tariffs, while for sensitive products, the EU applies reduced duty rates[59]. "Product graduation" is applicable when imports in the EU of a product or a category of products from a beneficiary country exceed the thresholds established by Annex VI. In such cases, the preferences are suspended for that product, as it is considered highly competitive and does not need the preferential tariffs to enter the EU market (Article 8 of the Regulation).

[58] The power to adopt delegated acts to, *inter alia*, modify the list of eligible countries has been conferred on the Commission by article 36 of the regulation. The list of eligible countries is in Annex I, while Annex II lists the actual beneficiary countries, according to the criteria established in the regulation. Applying those criteria, the number of beneficiary countries has been drastically reduced compared to the past in order to give priority to countries that really need preferential tariffs to expand their trade.

[59] Most agricultural products are qualified as sensitive, with the exception of those that are not produced in the EU. Interestingly, coffee is a non-sensitive product, while processed coffee (roasted, decaffeinated) is listed as sensitive. Textiles are also mostly sensitive products. Chemicals and minerals include many non-sensitive products, while manufactured goods, such as electronic and mechanical goods, are mostly sensitive but include relevant exceptions. The list of products can also be revised by the Commission with delegated acts on the basis of the import data of the relevant products in the EU.

The special incentive arrangement for sustainable development and good governance, better known as GSP+, is certainly the most interesting for the purposes of this study and also the most problematic from the point of view of WTO consistency, as it introduces a diversification of treatment between developing countries. It is regulated in Chapter III of the Regulation (Articles 9 to 16).

The GSP+ program entails two critical issues, which will be analysed below, namely the eligibility criteria and the conditionality system[60].

The eligibility criteria for the GSP+ arrangement are defined in Article 9, according to which the diversification in treatment must be based on an objective situation of vulnerability of the countries, together with some subjective criteria dependent on commitments by the concerned countries. The GSP+ eligible countries must be GSP beneficiary countries that are vulnerable "due to a lack of diversification and insufficient integration within the international trading system" (Article 9(1)(a) of the regulation). Annex VII expresses the thresholds for vulnerability with reference to the value of exports to the Union by the concerned country[61]; the evaluation is thus based on a unilateral perspective, which could undermine the necessary objectivity of the deci-

[60] An additional issue pointed out by Bartels, *The WTO Legality*, with reference to a previous version of the scheme, has been removed from the new regulation. It was the establishment of a deadline for the developing countries for the submission of their application to be admitted to the GSP+ program. According to Bartels, such a time limitation was contrary to the requirement of openness called for by the WTO for this kind of programs.

[61] There are two thresholds: a) the seven largest GSP sections of its imports into the EU of products listed in Annex IX (the list of products included in the GSP+ arrangement) represent more than the threshold of 75 percent of the value of its total imports of products listed in that Annex, as an average during the last three consecutive years (lack of differentiation of exports, meaning that the State is dependent on a reduced number of exported products); b) the imports of products listed in Annex IX into the Union represent less than the threshold of 2 percent of the value of the total imports into the Union of products listed in that Annex originating in countries listed in Annex II (beneficiary countries of the general arrangement), as an average during the last three consecutive years (minimal integration into the world trading system).

sion[62]. The subjective criteria take into account the fact that the State has ratified and effectively implements several conventions listed in Annex VIII (core human and labour rights UN/ILO conventions)[63] and environmental protection and governance principles[64], and that it has not formulated reservations to such conventions that are not compatible with the objectives and purposes of the conventions. In addition, the State must commit to maintaining the ratification of the conventions, to accepting the reporting requirements imposed by each con-

[62] The same objection, with reference to the previous GSP scheme, was expressed by Bartels, *The WTO Legality*.

[63] Convention on the Prevention and Punishment of the Crime of Genocide (1948); International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Civil and Political Rights (1966); International Covenant on Economic Social and Cultural Rights (1966); Convention on the Elimination of All Forms of Discrimination Against Women (1979); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); Convention on the Rights of the Child (1989); Convention Concerning Forced or Compulsory Labour (ILO Convention n. 29, 1930); Convention Concerning Freedom of Association and Protection of the Right to Organize (ILO Convention n. 87, 1948); Convention Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively (ILO Convention n. 98, 1949); Convention Concerning Equal Remuneration of Men and Women Workers for Work of Equal Value (ILO Convention n. 100, 1951); Convention Concerning the Abolition of Forced Labour (ILO Convention n. 105, 1957); Convention Concerning Discrimination in Respect of Employment and Occupation (ILO Convention n. 111, 1958); Convention Concerning Minimum Age for Admission to Employment (ILO Convention n. 138, 1973); Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO Convention n. 182, 1999).

[64] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, 1973); Montreal Protocol on Substances that Deplete the Ozone Layer (1987); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989); Convention on Biological Diversity (1992); United Nations Framework Convention on Climate Change (1992); Cartagena Protocol on Biosafety (2000); Stockholm Convention on Persistent Organic Pollutants (2001); Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998); United Nations Single Convention on Narcotic Drugs (1961); United Nations Conventions on Psychotropic Substances (1971); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988); United Nations Convention Against Corruption (2004).

vention and regular monitoring by the conventions' monitoring bodies, and to participating in and cooperating with the monitoring procedure envisaged by the regulation and supervised by the Commission. The justification for the GSP+ arrangement is explained in *recital* (11) of the Preamble: it is based on an "integral concept of sustainable development", as elaborated internationally, taking account of the vulnerability as described above. The function of the preferences is to help the beneficiary countries to assume the special burdens and responsibilities resulting from the ratification and implementation of the conventions. In other words, the special economic, financial and trade needs of the beneficiary countries are identified in the "vulnerability" and in the contribution the ratification and implementation of the conventions can make to sustainable development. The causal link is in the help the favourable market access conditions might provide to ease the burden of an integral implementation of the conventions. It cannot be denied, indeed, that high social and environmental standards can prove to be very costly for a developing country. It is also true that disparities can substantially affect trade flows, as the Court of Justice found in the Singapore free trade agreement case discussed in the first chapter of this study.

Unlike the general arrangement, which is applied automatically to the States that fulfil the requirements, an application is needed in order to accede to the GSP+ scheme[65]. The Commission monitors the beneficiary country's situation from the moment of the application: a country can be admitted only if it qualifies according to the requirements mentioned above, and it can be removed if it no longer fulfils the requirements. A temporary withdrawal of benefits is also possible if the State

[65] At the time of writing, the countries that have acceded to the GSP+ arrangement are Cape Verde, Armenia, Kyrgyzstan, Mongolia, Pakistan, Philippines, Sri Lanka, Bolivia, and Paraguay. The procedure for being admitted to the GSP+ scheme has been established by the Commission with the Commission Delegated Regulation (EU) No 155/2013 of 18 December 2013 establishing the rules related to the procedure for granting the special incentive arrangement for sustainable development and good governance under Regulation (EU) No 978/2012 of the European Parliament and the Council applying a scheme for the generalised system of preferences, in *O.J.*, L 48 of 21 February 2013, 5.

does not respect its binding undertakings according to the procedure set up in Article 15 of the Regulation.

The economic advantages are substantive: suspension of duties on the products listed in Annex IX, which is a quite extensive list that includes most of the goods qualified as sensitive in the list for the general GSP. The GSP+ adopts a combination of positive and negative conditionality: the incentive, on one side, through the favourable market access conditions and the leverage consisting in the "threat" of sanctions in the case of lack of respect for the commitments, on the other side.

Forms of negative conditionality are also available in the other arrangements, where, under Article 19, temporary suspension is possible in a determined number of cases, some of which relate to human rights and sustainable development reasons and others to possible prejudice to EU economic interests: a) serious and systematic violation of the principles laid down in the conventions on the core human and labour rights mentioned above; b) export of goods made by prison labour; c) serious shortcomings in custom controls on the export or transit of drugs, or failure to comply with international conventions on anti-terrorism and money laundering; d) serious and systematic unfair trading practices; e) serious and systematic infringements of the objectives adopted by Regional Fisheries Organisations or any international arrangements to which the Union is a party concerning the conservation and management of fishery resources.

The arrangement for Least Developed Countries, better known as the Everything But Arms (EBA) arrangement, is regulated in Chapter IV (Articles 17 and 18). It grants duty free access to the EU market for all products originating in LDCs with the exception of arms and ammunitions. Eligible countries are those that are identified by the UN as least-developed countries[66]. If a country no longer fulfils this condi-

[66] According to the UN, LDCs are low-income (based on World Bank classification) countries confronting severe structural impediments to sustainable development. They are highly vulnerable to economic and environmental shocks and have low levels of human assets. The list of LDCs is reviewed every three years by the Committee for Development, a subsidiary body of the UN Economic and Social Council. The Committee relies on three criteria, each of them considering several indicators: a) human assets. Indicators: secondary school enrolment; under-nourish-

tion, the Commission will remove it from the list of EBA countries after a transition period of three years. Unlike the other arrangements, which will be applicable until December 31, 2023, the ABA has no expiry date and will be applied indefinitely.

The GSP system is completed by safeguard clauses aimed at protecting the Union's interests in cases where the volumes or prices of imported goods cause or threaten to cause serious difficulties to Union producers of like or directly competing products. In such situations, the normal customs tariff may be reintroduced by the Commission upon an investigation[67].

6. The rules of origin

In order to be admitted to the preferential treatments under the GSP – as well as under other preferential arrangements, such as free trade agreements – the products must *originate* in the beneficiary countries. In other words, on the basis of the rules of origin, it must be possible to determine the nationality of the products. The certificate or statement of origin is the equivalent of a passport for exported goods. The notion of the originating product is a very complex one and depends on the legislation of the countries that grant the preferences, and more generally, of the importing country.

Globalisation has conferred on the rules of origin a pivotal position in international trade, with the emergence of global supply and manufacturing processes that use inputs from many different countries. In

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ment; maternal mortality; adult literacy; under five mortality; b) economic vulnerability. Indicators: populations; remoteness; export concentration; victims of natural disaster; share of agriculture, fishing and hunting in GDP; share of population in low coastal zones; instability of exports of goods and services; instability of agricultural production; c) Income per capita. 2018 threshold: USD 1,025 (source: https://www.un.org/development/desa/dpad/least-developed-country-category/ldcs-at-a-glance.html); last access, April 2018.

[67] Chapter VI of the regulation. Specific safeguards and surveillance are provided by articles 29 to 32 for textiles, agriculture and fisheries, sectors that are particularly sensitive for the European market.

addition, the development of a dense network of free trade agreements[68] and other kinds of preferential tariff treatment has relegated MFN treatment to a marginal position[69]. While MFN treatment, being reciprocal, multilateral and non-discriminatory, does not need rules of origin, the situation changes completely when the scene is fragmented in a myriad of different regimes, each of them needing clear rules for the identification of the eligible products.

The EU's rules of origin have evolved over time, and their evolution has taken into account the need for flexible, transparent and simplified rules of origin in order to guarantee the effective implementation of preferential treatments. It must be considered, in fact, that the effectiveness of the whole system depends on the rules of origin. If the implementation procedure of the rules of origin is too complex and demanding for the producers and exporters, it might become less convenient for them to take advantage of the GSP. It is up to the producers and exporters, in fact, to prove that the product they want to export to the EU originates in a country that benefits from one of the arrangements of the GSP. In addition, too complex or unfavourable rules of origin can disguise a protectionist intent and can be a powerful weapon to hinder the effectiveness of a preferential arrangement. The WTO Members have adopted an agreement on the rules of origin[70], but it is only a programmatic agreement establishing a set of general criteria for non-preferential rules of origin from the perspective of a future harmonisation. As for the preferential non-reciprocal treatments, the WTO Members have adopted two ministerial decisions on rules of origin for LDCs in Bali in 2013 and in Nairobi in 2015[71] urging the

[68] The so-called *spaghetti bowl* (see J. Bhagwati, "US Trade Policy: The Infatuation with FTAs", Discussion Paper Series (Columbia University, 1995); H.H. Horaguchi, "Economic Analysis of Free Trade Agreements: Spaghetti Bowl Effects and a Paradox of Hub and Spoke Network", in *Journal of Economic Integration* (2007): 664*ff.*; J. Menon, "From Spaghetti Bowl to Jigsaw Puzzle? Fixing the Mess in Regional and Global Trade", in *Asia and the Pacific Policy Studies* (2014): 470 *ff.*).

[69] S. Lacey, *Multilateral Disciplines on Preferential Rules of Origin: How Far Are We from Squaring the Circle?*, June 1, 2012, available at https://ssrn.com/abstract=2984093.

[70] Annexed to the WTO agreements of 1994.

[71] Bali Ministerial Decision on Rules of Origin for LDCs, of 7 December 2013,

Member States to apply transparent and simple criteria for the determination of the origin of goods in their relations with LDCs. The decisions are not a harmonisation of the rules of origin but are guidelines that the Members can use in drawing their own rules of origin. They require, in particular, a low value addition threshold in processed and manufactured goods, given the limited productive capacity of LDCs, and a high foreign inputs maximum.

The EU rules of origin can be found in Commission Regulation No 2454/93, as amended by Commission Regulation No 1063/2010[72]. With the latter regulation, the Commission introduced a reform of the preferential rules of origin aimed at simplifying the procedure for origin certification by exporters. The rules of origin themselves have not been changed and are largely based on the distinction between products that are wholly obtained in the beneficiary country and products that are not wholly obtained in the beneficiary country. For the latter, the origin can be certified according to the conditions provided in Annex 13a, based on the value of the foreign inputs, the change in tariff classification of the product[73], and the value that is added by the transformation (value added rule). All these conditions are more favourable for LDCs. For example, the maximum value of foreign inputs is fixed at 70 percent for most products, including many processed agricultural products, textiles[74] and

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WT/MIN(13)/42, WT/L/917; Nairobi Ministerial Decision on Rules of Origin for LDCs, of 19 December 2015, WT/MIN(15)/47, WT/L/917.

[72] Commission Regulation No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Custom Code (*O.J.* L 253 of 11 October 1993, 1); Commission Regulation No 1063/2010, in *O.J.* L 307 of 23 November 2010. Further reference will be made using the consolidated version available on the Union's website, www.eur-lex.europa.eu.

[73] Based on the Harmonised Commodity Description and Coding System, generally referred to as the Harmonised System (HS), an international product nomenclature developed and maintained by the World Customs Organisation. It is governed by the International Convention on the Harmonised Commodity Description and Coding System, signed in Brussels on June 14, 1983.

[74] For textiles and clothing, the EU has finally introduced the rule of the single transformation, instead of the double transformation that had previously been in place. This means that LDCs can export textiles and clothing that have undergone only one transformation step in the country (for example, fabric-clothing), using foreign yarn or fibers. A research study has shown that this apparently insignifi-

industrial products originating in LDCs, while it is at 50 percent for products originating in the other beneficiary countries.

Cumulation of origin is possible in different directions: bilateral cumulation with the EU[75], Norway, Switzerland and Turkey[76]; regional cumulation; and extended cumulation between a beneficiary country and a country with which the EU has a free trade agreement in force[77].

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cant difference has in reality had a huge impact on trade from LDCs: J. de Melo and A. Portugal-Perez, "Preferential Market Access Design, Evidence and Lessons from African Apparel Exports to the US and the EU", Policy Research Working Paper 6357 (The World Bank, February 2013) compared data on exports from some African countries to the U.S., which introduced the single transformation rule for clothing in 2001, and the EU, which, at the time of the research, still had the double transformation rule. The results show an increase of about 168 percent in the volume of exports after the application of the single transformation rule.

[75] "Bilateral cumulation shall allow products originating in the European Union to be considered as materials originating in a beneficiary country when incorporated into a product manufactured in that country (…)" (Article 84 of Regulation 2454/93).

[76] "In so far as Norway, Switzerland and Turkey grant generalised tariff preferences to products originating in the beneficiary countries and apply a definition of the concept of origin corresponding to that set out in this section, cumulation with Norway, Switzerland or Turkey shall allow products originating in Norway, Switzerland or Turkey to be considered as materials originating in a beneficiary country (…)" (Article 85 (1) of Regulation 2454/93).

[77] The reciprocal is also possible. Under the rules of origin of the Economic Partnership Agreements (EPAs) that the Union is in the process of concluding with groups of ACP countries, there is a general cumulation for all the ACP countries among themselves, with the Overseas Countries and Territories (OCT), with South Africa on the basis of a special arrangement, and with other countries benefiting from duty-free quota-free access to the market of the EU under the EBA scheme and the GSP scheme (Protocol No 1, concerning the definition of the concept of "originating products" and the methods of administrative cooperation, Annex A to the EPA between the EU and West African States, Brussels, 3 December 2014). Pending the entry into force of the agreements, a special regime for the origin of products, largely reproducing the Protocol, is applied to the ACP countries under Regulation 2016/1076 of the European Parliament and the Council of 8 June 2016, applying the arrangements for products originating in certain States which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing or leading to the establishment of economic partnership agreements (better known as Market Access Regulation, MAR), in *O.J.*, L 185 of 8 July 2016, 1.

Another relevant simplification introduced by Regulation 1063/2010 concerns procedural and administrative matters. The correct implementation of the rules of origin can be a heavy burden for exporters from the administrative point of view. The EU is trying to simplify access to preferential treatment with the introduction of a system based on self-certification of the origin. The exporters must be registered in a European database called REX. Registered exporters can issue an origin statement for the products directly, without passing through national and European authorities for approval and validation. The EU customs authority can only make *ex-post* controls on the proof of origin.

From this necessarily brief analysis, it is possible to draw some considerations on the role of the rules of origin in the GSP system. Beyond the inclusion of a specific State in the scheme, it is the rules of origin that determine the actual beneficiaries of the preferential treatment, i.e. the products, and behind the products, the producers and exporters who are directly involved in trade. For those people, the certification of origin must be as simple as possible; otherwise, the whole structure of preferences risks remaining a dead letter. Unfortunately, despite the undisputable simplification that was recently introduced, compliance with the rules of origin is still very intricate, as is the puzzle of different regimes applicable to different situations, agreements, GSP, and EBA.

It has been suggested that in a situation where even production is globalised, the only way out of the maze of the rules of origin is harmonisation at the multilateral level[78] in the framework of the WTO and the World Customs Organisation. Harmonisation, however, is fairly simple for non-preferential arrangements, and in fact, the negotiation process in this direction is moving forward. Nevertheless, it is much more difficult for preferential arrangements, where the importing countries wish to maintain control of the "nationality" of the products to which they grant preferential market access on their territory. In fact, as the EU practice clearly shows, rules of origin are a useful tool to graduate preferences and sometimes even to circumvent the non-discrimination rules of the WTO, introducing disguised discrimination, such as the general cumulation for all ACP countries, which again discriminates against non-ACP

[78] Lacey, *Multilateral Disciplines*.

developing countries[79]. The Union has started to more effectively coordinate its different origin regimes and to simplify the procedure to prove origin. Nevertheless, the maze is still too intricate to allow developing countries, particularly the poorest among them, to smoothly take advantage of the EU preferential trade regimes.

7. Some cases of implementation of the GSP conditionality clauses

Under Article 14 of the GSP Regulation, the Commission has the task of periodically submitting reports on the implementation of the GSP scheme and on the performance of individual beneficiary countries in terms of both sustainable development/human rights and economic results to the European Parliament and the Council[80]. Such reports, particularly those on the GSP+ scheme, show the improvements but also the persistently problematic situations of the beneficiary countries in implementing the conventions referred to in the Regulation. On the basis of the reports, investigations may be started by the Commission that may lead to the temporary withdrawal of GSP benefits for a country that commits serious and widespread breaches of fundamental rights. The procedure is established in Articles 15 and 19 of Regulation 978/2012 and in a delegated regulation adopted by the Commission in 2013[81]. Under the Regulation and the Delegated Regulation, the procedure and the decision-making power is in the hands of the Commission, which has the duty to acquire all available information from any reliable source, including the monitoring bodies of international human rights agreements. If the information and related evidence justi-

[79] The 2010 regulation has improved this situation by allowing GSP countries to obtain cumulation with countries that have an FTA with the EU, as mentioned above.

[80] The second report was published in January 2018.

[81] Commission Delegated Regulation (EU) No 1083/2013 of 28 August 2013 establishing rules related to the procedure for temporary withdrawal of tariff preferences and adoption of general safeguard measures under Regulation (EU) No 978/2012 of the European Parliament and the Council applying a scheme of generalized system of preferences, in *O.J.*, L 293 of 5 November 2013, 16.

fies an investigation, the Commission may initiate a procedure and establish a "constituted file" containing all the relevant documents. The beneficiary country concerned is under the obligation to cooperate with the Commission, submitting all the necessary information providing proof of compliance with obligations resulting from the international conventions on human rights and sustainable development (Article 3 of the Delegated Regulation). The beneficiary country and the third parties that have submitted evidence[82] have the right to be heard by the Commission or the Hearing Officer[83] and can have access to all the documents in the constituted file except documents that are covered by confidentiality. The procedure takes account of the right of defence of the State and involves the State authorities in all stages of the procedure. The European Parliament, in an important resolution, has drawn attention, *inter alia*, to the lack, both in the Regulation and in the Delegated Regulation, of a definition of "a 'serious failure to effectively implement' an international convention and 'serious and systematic violation of principles' contained in an international convention," urging the Commission to better clarify the grounds for preferences withdrawal in order to render the whole system more effective in contributing to an increase in the level of social and environmental standards in third countries. The Parliament also requested the Commission to enhance the monitoring of commitments undertaken by the beneficiary countries[84]. Between the lines of this resolution, it is possible to read a

[82] The regulation does not specify the identity of the third parties involved. They can be civil society organisations, international human rights bodies or international organisations such as the ILO, with which the EU has a close cooperation, or NGOs.

[83] The Trade Hearing Officer started working in 2007 on the model of the Competition Hearing Officer. He/she is a Commission official appointed by the Commission in charge of ensuring good and transparent administration of policies, such as competition and trade, which have a relevant impact on the activity of individuals. His/her function is to hold hearings for the parties involved in trade proceedings that can affect their rights and interests. The hearing officer was formally established with the Decision of the President of the Commission No 2012/199/EU of 29 February 2012 on the function and terms of reference of the hearing officer in certain trade proceedings, in *O.J.* L 107 of 19 April 2012, 5.

[84] European Parliament, Resolution of 5 July 2016, *Social and environmental standards, human rights and corporate responsibility*, P8_TA(2016)0298.

criticism of the Commission's approach to conditionality in the GSP+, where the withdrawal of preferences is a solution of last resort, even in situations where the respect for human rights is very problematic.

The EU applies conditionality mechanisms in many of its trade arrangements with developing countries, as well as with the neighbouring countries in the framework of the European Neighbourhood Policy. The objective of the conditionality approach is to induce structural reforms of human rights protection and governance in third countries using the leverage provided by trade preferential treatments. The 2000 Cotonou Agreement, for example, has a very sophisticated system of investigation[85], consultation and, if deemed necessary, reaction in the form of suspension of cooperation in case of breaches of the "essential element clause" of respect for human rights, democracy and the rule of law in the ACP countries.

The GSP has put in place the two diversified mechanisms of conditionality described above, one for the general and EBA arrangements, and one for the GSP+, which confer on the Commission the power to temporarily withdraw the benefits of the preferential tariff for countries that have committed the breaches envisaged in Article 19 of Regulation 978/2012. While the general and EBA conditionality clauses apply only *ex-post* negative conditionality – benefits are withdrawn if the State does not comply with some core democratic values – for the GSP+, the system is more complex. It combines *ex-ante* positive conditionality – the preferential treatment is granted on the basis of a selective approach only if the State fulfils certain performance criteria in terms of democracy, governance, human rights and sustainable development – and *ex-post* negative conditionality – the preferences can be temporarily withdrawn if the State fails to comply with the requirements[86]. One difference between the two that needs to be highlighted apart from the mechanism is the substance of the two conditionality schemes. While the GSP+ is more comprehensive and attributes a com-

[85] Article 96 of the Cotonou Agreement. About a dozen procedures have been initiated by the EU since the entry into force of the Agreement.

[86] For further considerations, S. Koch, "A Typology of Political Conditionality Beyond Aid: Conceptual Horizons Based on Lessons from the European Union", in *World Development* (2015): 97 *ff*.

parable weight to sustainable development and governance, on the one hand, and to human rights and labour rights, on the other, the general arrangement and the EBA only consider the latter in determining the grounds for possible conditionality procedures[87]. The only reference to sustainable development concerns is in Article 19 (1)(e), which addresses the conservation and management of fishery resources.

GSP sanctions have been adopted by the EU in a very limited number of cases, Myanmar/Burma in 1997, Belarus in 2007, and Sri Lanka in 2010 (downgraded from GSP+ to the GSP general arrangement)[88]. A very interesting procedure was adopted outside the realm of the GSP regulation in Bangladesh in 2013, together with the adoption of an "enhanced EBA monitoring process". The same special monitoring is in place for Cambodia[89], while an investigation was conducted for El Salvador in 2008-2009. A last interesting case, although it has not yet led to an investigation, concerns Bolivia and its controversial law on child labour.

7.1. *Myanmar/Burma*

A province of British India since 1886, the country at that time known as Burma[90] achieved independence in 1948 under the leadership of Aung San, who was assassinated in July 1947, just a few months after

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[87] Article 19 (1)(a): "Serious and systematic violations of principles laid down in the conventions listed in Part A of Annex VIII". The conventions listed in Part A are "Core human and labour rights UN/ILO Conventions".

[88] Another demotion was decided by the Commission in 2009 with respect to Venezuela. The Latin American country was included in the list of beneficiaries of the GSP+ scheme in 2008, but later, it came to light that it had not ratified the UN Convention against Corruption. Therefore, Venezuela did not fulfil all the necessary requirements of the GSP+ and was removed from the list (Commission Decision No 2009/454/EC of 11 June 2009, in *O.J.* L 149 of 12 June 2009, 78).

[89] The concerns about Cambodia are over land disputes arising from sugarcane concessions and labour rights issues, in particular, the freedom of association (Report from the Commission to the European Parliament and the Council on the Generalised Scheme of Preferences covering the period 2016-2017, Brussels, 19 January 2018, 6).

[90] The official name of the country is now the Republic of the Union of Myanmar. Burma was the English name, officially used until independence, but still used by some English-speaking countries.

the British government had agreed to Burma's independence. The country decided not to join the British Commonwealth of Nations but became a member of the UN. In 1962, a military coup led to the suspension of the Constitution with the objective of establishing a socialist State. The country lived through a long period of unrest and violence, with generalised violations of human rights, particularly during the 1980s, until another military coup in 1988 led to further and even more violent repression of protests, killings of protesters, and the imposition of martial law. In an effort to gradually introduce democracy, in 1990, the first multiparty elections were held, which saw the victory of the National League for Democracy, the most important opposition party, whose leader, Aung San Suu Kuy, Aung San's daughter and winner of the Peace Nobel Prize in 1991, had been under house arrest since the previous year. Despite the elections, the government continued in its policy of repression and did not respect the election's outcome. The international reaction led to sanctions against Myanmar by both the U.S. and the EU, condemning the human rights violations and forced labour practices. After the ratification of a new Constitution by a referendum held in May 2008, general elections were held in 2011 and again in 2012 and 2015. A process of political and social reforms was started by the new government under Aung San Suu Kuy's leadership[91], and efforts were made to end the long period of international isolation of the country[92]. The EU considered positively the democratisation of the country and in 2012 decided to reinstate Myanmar in the GSP, although many human rights problems remain unsolved to date, including serious cases of discrimination against and persecution of ethnic and religious minorities.

The Myanmar case highlights a strong link at the EU level between decisions taken in the framework of the Common Foreign and Security Policy and CCP measures. In November 1996, the Council adopted a CFSP common position introducing measures, including some diplo-

[91] She could not be elected president because under a Constitutional provision, a person who is married to a foreign national is not entitled to be a candidate, and she is married to a British citizen.

[92] The historical information has been taken from *Encyclopaedia Britannica*, s.v. "Myanmar".

matic sanctions, an arms embargo, and visa restrictions against the military government of Myanmar for the "absence of progress towards democratisation and (…) the continuing violation of human rights in Burma/Myanmar"[93]. In June 1995, the Commission decided to open an investigation after receiving a joint complaint from two international organisations of trade union federations, the International Confederation of Free Trade Unions (ICFTU) and the European Trade Union Confederation (ETUC), about the use of forced labour by Myanmar's military authorities. In 1997, the International Labour Conference appointed a Commission of Inquiry with the task of investigating Myanmar's widespread practice of forced labour which, according to the ILO Conference, affected hundreds of thousands of men, women and children in various parts of the country. The military government was also accused of committing physical and sexual abuse of forced labourers including beatings and rapes[94]. After the Commission of Inquiry submitted its report in 1998[95], the ILO Conference was ready, for the first time, to use its most powerful weapon, a resolution under Article 33 of the ILO Constitution[96]. The Resolution of 2000 accepted the results of the Commission of Inquiry, and

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[93] Common Position of 28 October 1996, No 96/635/CFSP, on Burma/Myanmar, in *O.J.* L 287 of 8 November 1996, 1. The Common Position was adopted under Article J.2 of the Maastricht Treaty. Sanctions were later expanded and strengthened, in light of the further deterioration in the political situation in Burma/Myanmar, with Council Common Position No 2003/297/CFSP of 28 April 2003 on Burma/Myanmar, in *O.J.* L 106 of 29 April 2003, 36.

[94] The Commission of Inquiry was appointed under article 26 of the Constitution of the International Labour Organisation to examine the observance by Myanmar of the Forced Labour Convention 1930 (No 29), Geneva, 2 July 1998, www.ilo.org/public/english/standards/ relm/gb/docs/gb273/myanmar.htm.

[95] "This report reveals a saga of untold misery and suffering, oppression and exploitation of large sections of the population inhabiting Myanmar by the Government, military and other public officers. It is a story of gross denial of human rights to which the people of Myanmar have been subjected particularly since 1988 and from which they find no escape except fleeing from the country" (Report of the Commission of Inquiry, Part V, paragraph 543).

[96] "In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be,

> (…) [a]pproves in principle (…) the actions recommended by the Governing Body, namely: (…) (b) to recommend to the Organization's constituents as a whole – governments, employers and workers – that they: (i) review, in the light of the conclusions of the Commission of Inquiry, the relations that they may have with the member State concerned and take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labour referred to by the Commission of Inquiry, and to contribute as far as possible to the implementation of its recommendations; and (ii) report back in due course and at appropriate intervals to the Governing Body[97].

Pending the ILO investigation, in 1997, the EU decided to suspend the GSP benefits towards Myanmar[98] after the adoption of the CFSP sanctions. Sanctions were also adopted at both the political and economic levels by the U.S.

Myanmar thus found itself more and more isolated and under international pressure. Despite such pressures, mitigated by some support from China and the ASEAN countries, who did not join in the sanctions policy, Myanmar continued denying cooperation until the political situation started to change in 2011. On June 13, 2012, the International Labour Conference adopted a resolution that acknowledged that violations of the principles laid down in ILO Convention No 29 of 1930 concerning forced or compulsory labour were no longer considered as serious and systematic. On the basis of such positive conclusion, the EU decided to lift all Common Foreign and Security

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the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith".

[97] Resolution concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Myanmar, 88th session of the International Labour Conference, www.ilo.org/public/english/standards/relm/ilc/ilc88/resolutions.htm

[98] Article 1 of Council Regulation (EC) No 552/97 of 24 March 1997, temporarily withdrawing access to generalised tariff preferences from the Union of Myanmar, in *O.J.* L 85 of 27 March 1997, 8.

Policy sanctions against Myanmar, with the exception of the arms embargo[99], and to reinstate the country in the EBA scheme of the GSP[100].

The Myanmar case is exemplary in many ways, as it is the first time the Union used its conditionality power under the GSP scheme. The previous existence of CFSP sanctions certainly worked as a trigger for the trade measures, and this produced criticism of what looks like the subordination of the trade decision-making process from CFSP decisions and, as a consequence, from geo-strategic, political and economic calculations rather than the desire to realise the trade-development-human rights nexus[101]. I do not agree with this interpretation of the case. On the contrary, I argue that the Myanmar case is a good example of the coherence in the EU's foreign policy, with an effective coordination between the two dimensions of the EU's external actions: the intergovernmental CFSP and the supranational CCP. The interdependence of the two is further reinforced by the overall undemocratic political situation of the country, which paved the way for a resolute intervention by the international community. But at the same time, the role of the ILO in determining the extent and gravity of human rights violations should not be underestimated. It inaugurated a strict connection between the EU institutions and the ILO in monitoring the compliance with core labour standards by countries benefiting from GSP schemes. The Myanmar case also inaugurated a new and more determined approach of the ILO towards violations of labour rights conventions in the era of trade globalisation. The fact that the WTO is focused on trade liberalisation and neglects labour standards probably pushed the

[99] Council Decision 2013/184/CFSP of 22 April 2013, concerning restrictive measures against Myanmar/Burma and repealing Decision 2010/232/CFSP, in *O.J.*, L 111 of 23 April 2013, 75.

[100] Regulation (EU) No 607/2013 of the European Parliament and of the Council of 12 June 2013, repealing Council Regulation (EC) No 552/97 temporarily withdrawing access to generalized tariff preferences from Myanmar/Burma, in *O.J.*, L 181 of 29 June 2013, 13.

[101] L. Beke and N. Hachez, "The EU GSP: A Preference for Human Rights and Good Governance? The Case of Myanmar", Working Paper No 155 (Leuven Centre for Global Governance Studies, March 2015), 20.

ILO to adopt a more alert and uncompromising attitude aimed at balancing the protection of workers' rights and trade liberalisation[102].

7.2. *Belarus*

Belarus is the second example of GSP withdrawal. It follows the same pattern as the Myanmar case. A former member of the Soviet Union[103], Belarus has been an independent State since December 1991, when the Minsk Agreement and the Alma Ata Protocols sanctioned the dissolution of the Soviet Union. The country did not become a member of the Council of Europe. After its independence, it was granted Special Guest status by the Council of Europe, which was withdrawn in 1997 due to concerns about a lack of progress in the field of human rights protection in the country[104]. Belarus was reinstated as a Special Guest by the Parliamentary Assembly of the Council of Europe in 2009 in consideration of the commitments assumed by the government to enhance the protection of human rights and fundamental freedoms.

Belarus is not a member of the WTO, where it has observer status pending the accession process.

Politically, it is a presidential republic. Aleksandr Lukashenko has been the president of Belarus since 1994, repeatedly re-elected through elections carried out with modalities considered by many international observers as not corresponding to international standards for democratic elections.

Such a problematic situation from the point of view of the respect for human rights, democracy and the rule of law led to the adoption of sanctions by the EU. The first measures were passed by the Council in

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[102] See E. Cappuyns, "Linking Labour Standards and Trade Sanctions: An Analysis of Their Current Relationship", *Columbia Journal of Transnational Law* (1998): 659 *ff.*; W. Zhou and L. Cuyvers, "Linking International Trade and Labour Standars: The Effectiveness of Sanctions under the European Union's GSP", *Journal of World Trade* (2011): 63 *ff.*

[103] According to the Yalta Agreements, Belarus was, with Ukraine, a member of the United Nations. Therefore, after the independence, there was no need for a new admission to the UN.

[104] It is the only country in Europe that still has the death penalty in its legal order.

2004[105], following a Council of Europe report on the disappearance of four persons and obstruction of justice by some government officials considered responsible for the cover-up of the crimes. The restrictive measures were extended after the European Council, on March 23, 2006, condemned

> the action of the Belarus authorities this morning in arresting peaceful demonstrators exercising their legitimate right of free assembly to protest at the conduct of the Presidential election. The European Council deplores the failure of the Belarusian authorities to meet OSCE commitments to democratic elections and considers that the Presidential elections in Belarus on 19 March were fundamentally flawed. On a continent of open and democratic societies, Belarus is a sad exception. The European Council has therefore decided to take restrictive measures against those responsible for the violations of international electoral standards, including President Lukashenko[106].

Through multiple amendments, the Council decided to introduce an arm embargo, a prohibition against providing technical and financial assistance for any military-related equipment, and a prohibition against exporting equipment which might be used for internal repression[107].

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[105] Common Position 2004/661/CFSP of 24 September 2004 concerning restrictive measures against certain officials of Belarus, in *O.J.* L 301 of 29 September 2004, 67.

[106] European Council, Presidency Conclusions of 23 March 2006, 7775/1/06 REV 1. The measures were adopted with Common Positions 2006/276/CFSP of 10 April 2006 concerning restrictive measures against certain officials of Belarus and repealing Common Position 2004/661/CFSP, in *O.J.* L 101 of 11 April 2006, 5, and Common Position 2006/362/CFSP, concerning restrictive measures against certain officials of Belarus, of 18 May 2006, in *O.J.*, L 134 of 20 May 2006, 45. See also Council Regulation No 765/2006 of 18 May 2006, concerning restrictive measures against President Lukashenko and certain officials of Belarus, in *O.J.* L 134 of 20 May 2006, 1. The measures provided for a visa ban and the freezing of funds of the persons listed in the annex to the decisions.

[107] See Council Decision 2012/642/CFSP of 15 October 2012, concerning restrictive measures against Belarus, in *O.J.* L 285 of 17 October 2012, 1. This decision was prompted by the consideration that "the most recent elections of 23 September 2012 have also been found to be inconsistent with international standards, in

The sanctions were partially lifted only in 2016 after the government's commitment to cooperate with the Council of Europe on the improvement of human rights protection and acceptance of the release of political prisoners. The presidential elections of 2015 were held in an environment free of violence[108]. The arms embargo remains in place, as well as individual travel restrictions against a limited number of government officials[109].

As in the case of Myanmar, the GSP withdrawal marched on a parallel path to the CFSP measures and followed initiatives taken by the ILO. The input came from information provided by three trade union confederations, the ICFTU, the ETUC, and the World Confederation of Labour (WCL), which submitted reports to the European Commission on the violations of freedom of association in Belarus. They described obstacles to the registration of free trade unions, limitations on trade union activities and the repression of trade union leaders and activists. Such behaviours were clear violations of ILO Conventions No 87 on the Freedom of Association and the Protection of the Right to Organise of 1948 and No 98 on the Right to Organise and Collective Bargaining of 1949. In 2003, the Commission started its own investigation.

During that same year, the International Labour Conference appointed a Commission of Inquiry, which ascertained the existence of serious violations of the mentioned Conventions and addressed to the Government of Belarus twelve Recommendations for reforms to be taken not only to enhance the freedom of trade unions, but also as a necessary preliminary background to guarantee "the recognition and observance in law and practice of basic civil liberties and genuine rule of law"[110].

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particular in preliminary findings of the OSCE/ODIHR election observation mission to Belarus, and that the situation as regards democracy, human rights and rule of law has not improved" (Recital (8) of the Decision).

[108] EU Council for Foreign Affairs and International Relations, Conclusions of 15 February 2016; Council Decision 2016/280/CFSP, of 25 February 2016, concerning restrictive measures against Belarus, in *O.J.* L 52 of 27 February 2016, 30.

[109] Council Implementing Regulation (EU) 2016/276 of 25 February 2016, concerning restrictive measures against Belarus, in *O.J.* L 52 of 27 February 2016, 19.

[110] Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organization to examine the observance

In August 2005, the European Commission concluded its investigation and decided to evaluate and monitor the situation for six months, giving Belarus further time to implement the twelve Recommendations of the ILO Commission of Inquiry. Subsequently, the Commission and the ILO continued monitoring the situation until June 2006, when the International Labour Conference again found the lack of implementation of the twelve recommendations by the Belarus authorities, classifying this situation as a "continued failure"[111]. At this point, the Commission decided to submit a proposal to the Council for the temporary withdrawal of preferential treatment under the GSP for products originating in Belarus[112]. Belarus has not yet been reinstated as a beneficiary of the GSP, despite the positive developments in the political field and the improved cooperation of the country with the ILO and the EU itself.

Belarus is another example of a country that is rather isolated from the European Union[113]: a country which, being European and a neighbour of the Union, is of great importance for the Member States and for the Union itself. It is involved, although partially – there is no partnership agreement in force between the Union and Belarus[114] – in the European Neighbourhood Policy. This explains, on the one hand, the efforts

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by the Government of the Republic of Belarus of ILO Conventions Nos 87 and 98, of 23 July 2004, www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2508289,en:NO.

[111] Council Regulation (EC) No 1933/2006 of 21 December 2006, temporarily withdrawing access to the generalised tariff preferences from the Republic of Belarus, in *O.J.* L 405 of 30 December 2006. The text in force results from a *Corrigendum* published in *O.J.* L 20 of 3 February 2007, 14.

[112] Under Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences, in *O.J.* L 169 of 30 June 2005, 1, which at the time regulated the GSP, the competence for the adoption of measures implementing the GSP, even in the case of withdrawal, was conferred on the Council, acting on a proposal from the Commission.

[113] It is a member of the Eurasian Economic Union established in 2014 between Russia, Belarus and Kazakhstan on the basis of the former Eurasian Customs Union. Armenia and Kyrgyzstan joined the EEU in 2015.

[114] Due to the lack of commitment to democracy and human rights on the part of the Belarus government, the Union has not ratified the Partnership and Cooperation Agreement which was concluded with Belarus in 1995.

made by the CFSP to force Belarus to adopt more democratic electoral procedures and to comply with the rule of law principles, and on the other hand, the caution of the Commission in deciding to ban the country from trade privileges at a moment when Belarus was actively engaged in the implementation of the customs union with Russia and Kazakhstan. The Commission clearly decided to rely on the findings of the ILO Commission of Inquiry and to follow suit, in contrast to what it had done with Myanmar, when it had anticipated the conclusion of the ILO inquiry. It wanted to show that withdrawal was a decision of last resort.

7.3. *Sri Lanka*

Sri Lanka is the last case of suspension of GSP benefits for a country for lack of compliance with human rights standards. Sri Lanka was degraded from GSP+ status to the GSP general arrangement in 2010 but was reinstated in 2017.

Sri Lanka is a multi-ethnic and multi-religious nation. The country had lived through long years of political unrest and civil war due to the insurgency of the Tamil minority against the Sinhala majority, which was building a unitary State neglecting the aspirations for autonomy of minority ethnic groups. The insurgency started to spread violence in the northern and eastern parts of the island at the end of the 70s. The largest and strongest insurgent group was the Liberation Tigers of Tamil Eelam (LTTE or Tamil Tigers[115]). The conflict continued, causing

[115] The Tamil Tigers were declared a terrorist organisation by the EU in 2006, with Council Implementing Decision 2006/379/EC (*O.J.* L 144 of 2001, 21), which placed LTTE on the list of persons and entities affiliated with terrorist organisations, and subjected it to restrictive measures such as the freezing of funds provided for in Article 2(3) of Council Regulation No 2580/2001 of 27 December 2001, on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (*O.J.* 2001 L 344 70); the regulation implemented Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (*O.J.* L 344/2001, 93). Such qualification was subjected to criticism and challenged in the European Court. In the judgments of 16 October 2014, cases T-208/11 and 508/11, *LTTE v. Council*, EU:T:2014:885; 26 July 2017, case C-599/14P, *Council v. Liberation Tigers of Tamil Eelam-LTTE*, EU:C:2017:583, the General Court and the Court of Justice found that the statement of reasons for listing LTTE as a ter-

thousands of victims and displaced persons until 2009, when the government finally regained control of the Tamil-controlled territory. A difficult stabilisation period followed, characterised by disappearances of former Tamil insurgents, human rights abuses and the government's refusal to allow independent investigations of the military's treatment of Tamils after the end of the civil war.

No CFSP measures were adopted towards Sri Lanka during the civil war. The EU had very limited relations with the country until a large *tsunami* struck the island in December 2004, killing thousands of people and severely damaging the coastal areas of the island. The EU was one of the first members of the international community to respond to the disaster in terms of aid and help on the ground. Subsequently, the EU started to be more involved in the Sri Lankan political situation, monitoring elections and sending a diplomatic delegation to Colombo, although it was only marginally involved in the pacification process. The European Parliament repeatedly adopted resolutions on the Sri Lankan conflict, expressing concern and urging the parties to respect international humanitarian law and to stop recruiting child soldiers[116].

The EU had included Sri Lanka in its special incentive GSP scheme in 2008[117] on account of the government's commitment to implement three human rights conventions[118] which it had duly ratified, thus ful-

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rorist organisation were no longer justified after the LTTE's defeat in 2009. Neither the aforementioned cases nor the judgment of 14 March 2017, case C-158/14, *A and others (Tamil Tigers)*, EU:C:2017:202 take a position on the more controversial question, i.e. that of the nature of the Tamil forces under international law.

[116] See, among others, European Parliament, Resolution on Sri Lanka of 8 September 2006 (P6_TA-PROV (2006) 0356), which coincides with the Council measures against the Tamil Tigers, but the concern of the European Parliament about the Sri Lanka conflict dates back to 2000.

[117] Commission Decision No 2008/938/EC of 9 December 2008, *O.J.* L 334 of 12 December 2008, 90.

[118] Under the GSP Regulation then in force (No 732/2008), the special incentive required compliance, among others, with the UN Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child.

filling the eligibility criteria for the special incentive[119]. After reports of human rights violations in Sri Lanka were published by the United Nations, the Commission started an investigation on the implementation of the said conventions by Sri Lanka. The final report of the investigation showed that the legislation of the country incorporating the three conventions in the domestic legal system had not been effectively implemented[120]. This led to the decision to withdraw the special incentive for all products originating in Sri Lanka[121]. This measure heavily affected the garment industry, an economic activity that plays an important role in Sri Lanka and is dependent on exports to the EU, its largest export market[122]. After the elections of 2015, the new government embarked on major institutional reforms, making significant efforts to achieve national reconciliation, respect for human rights and sustainable development. New laws were passed aimed at protecting women's and children's rights[123]. The country showed, according to the EU institutions, significant elements of progress towards the implementation of the GSP+ relevant conventions, and the Sri Lankan authorities started to cooperate with international organisations[124]. The Sri Lankan government applied for GSP+ status on July 12, 2016, and

[119] In 2003, Sri Lanka was granted the special incentive arrangement for the protection of labour rights: Commission Regulation (EC) No 2342/2003 of 29 December 2003 (*O.J.* L 346 of 31 December 2003, 34).

[120] On the role that private businesses can play in engaging the government on its human rights record, see J. Yap, "Beyond 'Don't Be Evil': The European Union GSP+ Trade Preference Scheme and the Incentivisation of the Sri Lankan Garment Industry to Foster Human Rights", *European Law Journal* (2013): 283 *ff*.

[121] Council Implementing Regulation (EU) No 143/2010 of 15 February 2010, temporarily withdrawing the special incentive for sustainable development and good governance provided for under Regulation (EC) No 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka, in *O.J.* L 45 of 20 February 2010, 1.

[122] On the effects of the preference withdrawal in Sri Lanka in terms of poverty and income inequality, see J.S. Bandara and A. Naranpanawa, "Garment Industry in Sri Lanka and the Removal of GSP", *The World Economy* (2015): 1438-40.

[123] Child labour, forced and child marriages, and rapes at the workplace are however still frequent.

[124] See the Joint Staff Document of 19 January 2018, SWD(2018) 31 final, *The EU Special Arrangement for Sustainable Development and Good Governance ('GSP+') assessment of Sri Lanka covering the period 2016-2017*.

the Commission reinstated the country in the GSP program in 2017, granting it GSP+ status[125], notwithstanding the ongoing situation of shortcomings in the implementation of the human rights conventions.

This is a case where the EU has wished to contribute, through the concession of trade benefits, to a difficult process of recovery after too long a period of civil war. The EU is supporting the new government in its efforts to normalise the country and to increase the transparency and respect for human rights in a long-suffering country. The Union has applied negative conditionality, withdrawing the benefits at a moment where, despite the end of the conflict, the country has lived through one of the worst periods in its recent history in terms of the lack of democracy, violence and the failure to respect the most basic human rights. Positive conditionality followed and supported the commitment demonstrated by the government elected in 2015 to improve human rights and democracy in the country. The effectiveness of the trade benefits lever in this, as well as in other cases, is disputed, although the position of the EU as the first trading partner of Sri Lanka makes the leverage more powerful. At the same time, once again the EU's role was important in accompanying the country on its way out of international isolation, supporting its efforts to tighten its relations with international organisations.

Not all the problems related to sustainable development in Sri Lanka are on the way to being positively resolved, as the Commission decided in 2017 to declare it a non-cooperating country pursuant to the EU regulation on the fight against illegal, unreported and unregulated fishing. However, this is another story that we are going to discuss in the chapter on trade in natural resources.

7.4. *Bangladesh*

Myanmar, Belarus and Sri Lanka are the only cases so far of the temporary withdrawal of tariff preferences on account of the failure to comply

[125] Commission Delegated Regulation (EU) 2017/836 of 11 January 2017 amending Annex III to Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalized tariff preferences, in *O.J.* L 125 of 18 May 2017, 1.

with the human rights standards required by the EU GSP arrangements. The case of Bangladesh is different, as it did not lead to the withdrawal of preferences (Bangladesh, as a Least-Developed Country, is enrolled in the EBA scheme). The lever of a possible withdrawal of trade preferences was instead used to put pressure on the government to induce it to improve workers' rights compliance and factory safety.

Bangladesh is a country where poverty affects a huge part of the population, and where workers' rights are often violated, with abuses of all sorts, low pay, child work, and obstacles to the registration of trade unions. Bangladesh's economy largely depends on the ready-made garment (RMG) and knitwear industry, and its most important trading partners are the EU and the U.S. The RGM production is carried out in run-down factories which are absolutely unsafe by underpaid workers, most of whom are women, working day and night in unacceptable conditions of exploitation and risk to their health. This is the price for the rapid economic growth Bangladesh has experienced over the last two decades.

Fire has been the deadliest threat to the life of garment workers in Bangladesh since the fast development of the RGM industry in the 90s. Hundreds of workers have been killed in hundreds of fires over the years, with young women trapped behind locked doors to prevent them from leaving the workplace or stealing items from the line of production[126]. Production must proceed at a fast and steady rhythm to export cheap clothes to the Western markets. The brands that commissioned the production looked the other way, and business proceeded as usual. Then something happened that would change things forever, because those brands and their customers, and the institutions of the so-called developed world could never again look the other way, ignoring the tragedy of the young Bengali workers. On April 24, 2014, the Rana Plaza factory complex near Dhaka collapsed. In the worst industrial disaster of the twenty-first century, 1,136 people died and 2,535 suffered serious injuries. Most were young women working on the production of ready-made garments (RMGs) for export, mainly to

[126] See the chilling description in J. Seabook, *The Song of the Shirt: The High Price of Cheap Garments, from Blackburn to Bangladesh* (London, Hurst Publishers, 2015), 24-25.

the EU. The victims were forced to go to work for fear of loss of wages despite compelling evidence that the building was unsafe[127].

The EU was under a moral obligation to react to such an immense tragedy, at least because of the involvement of many European brands in the production that was carried out in the collapsed building. The first thought in the Commission was to resort to tariff preferences withdrawal for the serious failure to comply with core labour rights and safety standards. However, once again, the Commission joined the International Labour Organisation in its commitment to work together with the Bangladeshi government for the enhancement of work conditions in the country. The input for an innovative approach to the problem that could involve, as much as possible, all the stakeholders, came from the Union with strong support from the ILO[128]. On July 8, 2013, less than three months after the Rana Plaza disaster, representatives from the Bangladeshi government, the European Commission, the ILO and representatives of the garment industry employers and trade unions met at the ILO headquarters in Geneva and agreed on a global Sustainability Compact for continuous improvements in labour rights and factory safety in the ready-made garment and knitwear industry in Bangladesh[129]. The U.S., which had withdrawn tariff preferences immediately after the tragedy[130], and later Canada joined the Compact in the following months.

The first question to be addressed concerns the legal nature of this document. The Compact is not a formal international agreement, as it was not formally approved by the Council following the procedures

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[127] J. Jenner and K. Peake, "The Bangladesh Sustainability Compact: An Effective Exercise of Global Experimentalist EU Governance?", *Cambridge Yearbook of European Legal Studies* (2017): 86-87.

[128] The ILO was already engaged in Bangladesh with programs for the enhancement of work conditions through the reform of the labour laws in line with the international standards.

[129] The text is available on the EU Commission website, at www.trade.ec.europa.eu. On the Compact, see J. Yap, "One Step Forward: The European Union Generalised System of Preferences and Labour Rights in the Garment Industry in Bangladesh", in *Global Governance through Trade. EU Policies and Approaches*, ed. J. Wouters et al. (Cheltenham, Edward Elgar, 2015).

[130] With little impact on the RMG industry, since the U.S. preferences, unlike the EU ones, did not apply to this sector.

established in Article 218 TFEU, nor is it published in the *Official Journal* of the EU. The same is true for the other parties. As a consequence, it cannot be considered as a binding legal instrument, but rather as an instrument of *soft law*, whose force and effectiveness largely depend on the commitment of the parties to engage in the successful implementation of its provisions, and of course, on the threat of the Union to withdraw the EBA treatment, a measure that would be devastating for the economy of Bangladesh[131]. From a substantial point of view, the Compact is based on short- and long-term commitments related to three interlinked pillars: respect for labour rights, in particular the freedom of association and the right to collective bargaining according to the relevant ILO Conventions; the safety and structural integrity of buildings and the health and safety of employees; responsible business conduct by all stakeholders, including the foreign brands on whose behalf most of the Bangladesh factories produce[132]. While the parties to the Compact are of an institutional nature – governments and international institutions like the EU and the ILO – the private stakeholders are involved in the implementation of the deal through voluntary interventions like those they have put in place with the adoption of the Accord on Fire and Building Safety[133] and the Alliance for Bangladeshi worker safety: both these initiatives are private, but have been acknowledged by the Compact and have become part of the comprehensive governance of the situation.

The Compact confers obligations on the government to introduce reforms in the labour law sector, to allow and simplify the registration and activity of trade unions, and to supervise and implement interventions for the safety of the buildings that host garment factories. The EU, the U.S., Canada and the ILO will supervise the reform process and contribute with advice and financial aid. Foreign brands and textile industries are encouraged to coordinate efforts in promoting respect for human rights in Bangladeshi factories. The issue of corporate

[131] Jenner and Peake, "The Bangladesh Sustainability Compact", 88.

[132] M. Ark et al., *The Integration of EU Development, Trade and Human Rights Policies* (Brussels: FRAME Project, 2016).

[133] The Accord provides for inspections in the factories and establishment of a remediation process.

social responsibility is indeed a very sensitive one. The EU adopted a directive in 2014 introducing the obligation for big undertakings to produce non-financial and diversity reports of their activities[134] aimed at starting the process of improving transparency and involving private actors in sustainable development responsibilities. In 2017, the OECD responded to the Rana Plaza tragedy with the adoption of the Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, which urges the garment industry to adopt responsible business conduct and to address and mitigate the risk of harm to workers' health, security and rights and to the environment[135].

The Compact provides for the long-term engagement of the parties in the implementation and monitoring process. The parties meet periodically to review the implementation of the Compact and to discuss further action. Such meetings and the ongoing engagement of the parties are necessary to the success of the Compact, as the government must be kept under pressure. The last reports on the implementation show some shortcomings and the need to take urgent action[136]: the freedom of association does not meet international standards despite significant legal reforms, and the remediation interventions for unsafe buildings are proceeding too slowly.

The Compact is the result of a close cooperation between the EU and the ILO and is an important example of a creative way to tackle a complex problem without resorting to economic sanctions, but to multilateral and multilevel governance in combination with the Damocles sword of trade sanctions. Its effectiveness requires the constant engagement of all the involved actors, private businesses included, both

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[134] Directive 2014/95 of the European Parliament and the Council of 22 October 2014 on non-financial and diversity reporting of undertakings, amending Directive 2013/34 of the European Parliament and the Council, in *O.J.* L 330 of 15 November 2014, 1. Corporate social responsibility and due diligence has become one of the main instruments the Union uses in dealing with supply chain monitoring. See below, in the following chapters of this study.

[135] OECD, *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* (Paris: OECD Publishing, 2018), available at http://dx.doi.org/10.1787/9789264290587-en.

[136] *Implementation of the Bangladesh Compact. Technical Status Report*, October 2017, available at www.trade.ec.europa.eu.

national and foreign, the frequent monitoring of the achieved results and, when necessary, pressure on the government. Even so, it can constitute an important model for future interventions in the framework of the EU's policy of integration of trade and sustainable development.

7.5. *El Salvador*

The case of El Salvador can be considered a success for the GSP+ conditionality system and, again, for the synergy between the Commission and the ILO monitoring bodies. In 2008 the Central American country[137] was a beneficiary of the GSP+ trade arrangement. Issues with labour rights compliance were raised by a ruling of the Supreme Court of El Salvador, which declared certain provisions of the ILO Convention No 87 of 1948 on Freedom of Association and Protection of the Right to Organise, ratified by El Salvador in 2006, to be inconsistent with Article 47 of the Constitution of El Salvador[138]. After this judicial decision, the Commission decided to initiate an investigation to further analyse the legal effects of the judgment in order to determine whether it might justify a temporary withdrawal of the special incentive arrangement[139]. The problem arose because Article 47 of the Constitution of El Salvador excluded employees of the public service from the freedom of association, while Article 2 of the ILO Convention extends the freedom of association to all categories of workers without allowing any exceptions ("without distinction whatsoever"). The ILO Committee of experts on the Ap-

[137] On October 1, 2013, the provisional application to the trade relations between the EU and Costa Rica and El Salvador of the trade pillar of the Association Agreement between the EU and Central America (Costa Rica, El Salvador, Honduras, Nicaragua and Panama; for the last three States, provisional application started in August 2013), which had been signed on June 29, 2012, began, which establishes a free trade area between the EU and Central America. Thus, El Salvador is no longer a beneficiary of the GSP+.

[138] Corte Suprema de Justicia de El Salvador, ruling of October 16, 2007 in cases 63-2007 and 69-2007, in *Diario Oficial*, No 203, Volume No 377, October 31, 2007.

[139] Commission Decision 2008/316/EC of 31 March 2008, *O.J.* L 108 of 18 April 2008; Commission of the European Communities, *Report on the investigation pursuant to Article 18(2) of Council Regulation (EC) No 980/2005 with respect to the protection of the freedom of association and the right to organize in El Salvador*, C(2009) 7934, 3.

plication of Conventions and Recommendations reacted to the declaration of unconstitutionality of ILO Convention No 87 with a statement that expressed regret and urged the State to "guarantee the application of the Convention to public employees including, if necessary, through the reform of the Constitution"[140]. The ILO Committee on Freedom of Association (CFA), on its part, issued recommendations[141] following a complaint submitted by Salvadoran trade unions for the refusal by the Ministry of Labour of El Salvador to grant a legal personality to the Union of Salvadorian Judiciary Employees on the ground that public employees in the judiciary sector were excluded from the right to organise. According to the CFA, the only exclusions allowed by the Convention are for the armed forces and the police. Accordingly, the CFA recommended that the Legislative Assembly of El Salvador "take all the necessary steps to ensure that, in accordance with Convention No 87, the constitutional reform may allow exclusions from the right to organize only in the case of the armed forces and police"[142].

The international reaction and the initiation of an investigation by the Commission, which could lead to the suspension of the GSP+ benefits, prompted the Salvadoran government to immediately cooperate, declaring that it would keep ILO Convention No 87 in force in the country and expressing its commitment to remedy the incoherence between the Constitution and the Convention. Further, the reform process was initiated in the aftermath of the ratification of the Convention by El Salvador. On August 24, 2006, the Legislative Assembly passed a Legislative Decree adopting a new text for Article 47 of the Constitution which recognised the rights of public employees, with some exceptions, to freely associate in defence of their interests. The reform was ratified by the new Legislative Assembly that took office after the elections in 2009[143]. The inconsistencies with Convention No 87 were

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[140] Committee of Experts on the Application of Conventions and Recommendations, CEACR, 2008/79th Session, available at www.ilo.org; Commission of the European Communities, *Report*, 6.

[141] ILO Committee on Freedom of Association (CFA) Report No 353, case No 2629; Commission of the European Communities, *Report*, 6.

[142] CFA Report No 353.

[143] Commission of the European Communities, *Report*, 11.

thus reduced but not eliminated, as the new text of Article 47 keeps in place many exceptions to the right of association in the public sector. Notwithstanding such remaining inconsistencies, the Commission, noting "the significant efforts made by the Government of El Salvador in this respect, as well as considering that the GSP+ scheme has been established as an 'incentive' and an instrument of encouragement and support for developing countries to comply with international standards related to the concept of sustainable development, (…) considers that the action taken by El Salvador should be regarded as sufficient to ensure continuity of benefits under the special incentive arrangement for the time being"[144]. In 2009, the negotiations for the Association Agreement were under way, so it was probably not appropriate to impose trade restrictions on the country at that moment. Nevertheless, the combined pressure from the ILO and the EU was certainly effective in determining the engagement of the government and the parliament of the country in finding a solution to the problem. In this case, the Commission displayed the positive side of conditionality, where the trade benefits are considered as an incentive for the country to engage in raising its human rights standards, which, as the Commission noted, are "related to sustainable development".

7.6. *Bolivia*

Bolivia is not under investigation at the time of writing, although it might be in the future. The country, which is a beneficiary of the GSP+ arrangement, was investigated in 2012 after the Government of the Plurinational State of Bolivia denounced the United Nations Single Convention on Narcotic Drugs in 2011. Immediately afterwards, the Bolivian Government deposited with the Secretary-General of the UN an instrument to re-accede to the Convention, adding a reservation on the traditional use of coca leaves for chewing and medicinal uses. In January 2013, the country was readmitted by the Contracting Parties, and the Commission, having ascertained that the legislation on the

[144] Commission of the European Communities, *Report*, 13.

fight against illegal drugs had been regularly implemented, decided that no preferences withdrawal was needed[145].

The situation worsened after Bolivia, on July 17, 2014, passed a law on children and adolescents which establishes a wide range of measures to protect children and young people, including the prohibition of hazardous work such as mining and construction, but at the same time allows children from age twelve to work as employees and children from age ten to work as self-employed or in the family. This law was approved in a country where, according to statistics cited by the EU Report, in 2008, 22.7 percent of children aged five to thirteen worked. This is contrary to the UN Convention on the Rights of the Child and to ILO Conventions No 138 (Minimum Age for Work) and No 182 (Worst Forms of Child Labour). The ILO reacted in 2014 with a statement by the IPEC (International Programme on the Elimination of Child Labour)[146] and the following year with a report by the CEACR (Committee of Experts on the Application of Conventions and Recommendation)[147]. The

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[145] Commission Implementing Decision 2012/161/EU of 19 March 2012, providing for the initiation of an investigation pursuant to Article 17 (2) of Council Regulation (EC) No 732/2008 with respect to the effective implementation of the United Nations Single Convention on Narcotic Drugs in Bolivia, *O.J.* L 80 of 20 March 2012, 30; Commission Implementing Decision 2013/136/EU of 15 March 2013 terminating the investigation initiated by Implementing Decision 2012/161/EU with respect to the effective implementation of the United Nations Single Convention on Narcotic Drugs in Bolivia, *O.J.* L 75 of 19 March 2013, 35.

[146] IPEC, *ILO's Concerns Regarding New Law in Bolivia Dealing with Child Labour*, Statement, July 28, 2014, available at http://www.ilo.org/ipec/news/WCMS_250366/lang--en/index.htm. I like to cite a reflection from the IPEC report, which I find very interesting in connection with the notion of sustainable development I have adopted so far: "Numerous studies and analyses show the inter-generational cycle of poverty and child labour. Child labour prevents children from acquiring the education and skills they need to access decent work as adults and allow them, in the future, to put their children in school. Child labour cannot be justified as a 'necessary evil' and a means to development". In other words, child labour is not *sustainable*, as it perpetuates a vicious cycle of poverty and lack of education, and in the long run, hinders development.

[147] CEACR, *Application of Labour Standards 2015*, Report III (Part 1A), Geneva, 2015, 192-93; the Committee reiterated its recommendations in CEACR, *Report of the Committee of Experts on the Application of Conventions and Recommendations 2018*

ILO bodies repeatedly urged the Bolivian government to take immediate measures to amend the national law in order to bring its provisions in conformity with the age specified at the time of ratification and with the requirements of the Convention, namely a minimum of fourteen years. In addition, the ILO urged Bolivia to put in place an effective system of inspections in order to enforce the prohibition of hazardous work for children under eighteen years of age, in particular in mines, sugar cane plantations and nuts harvesting. The Commission's Reports on the GSP+ arrangements reiterated the ILO's concerns[148], as in the other cases considered before, thus confirming the close cooperation between the two institutions. The Bolivian Government's response was not entirely satisfactory, but it explained that the measures legalising child labour are meant to be transitional, and that the government aims at eradicating child labour by 2020. Neither the ILO nor the EU have taken any further measures at the time of writing in consideration of the commitment by the government to work for the eradication of child labour in the next few years. But Bolivia remains under special surveillance regarding this crucial topic[149]. Of course, the issue of child labour in Bolivia is far

(Report III, Part A), Geneva, 2018, 242-43; both reports are available on the website of the ILO: http://www.ilo.org.

[148] European Commission, European External Action Service, *The EU Special Incentive Arrangement for Sustainable Development and Good Governance (GSP+) assessment of Bolivia covering the period 2016-2017*, Joint Staff Working Document SWD(2018) 24 final, Brussels, 19 January 2018, available at http://www.trade.ec.europa.eu.

[149] The international institutions also considered the efforts that the government of Bolivian President Evo Morales has been making to improve access to education for boys and girls as a positive development. Another reason for the decision not to adopt restrictions on trade to Bolivia by the EU is probably the conclusion of the Comprehensive Trade Agreement with the countries of the Andean Community, which has provisionally applied since 2013 for Peru and Colombia and since 2017 for Ecuador. Bolivia did not accede to the Agreement, having abandoned the negotiations in 2008, and its exclusion from the tariff preferences would mean the exclusion of the country from the trade flow from the Andean region to the European market. However, such situation would be mitigated by the fact that Bolivia enjoys with other countries of the region a partial cumulation of origin with the signatory countries under the Agreement (Article 3(3) of Annex II, concerning the definition of the concept of "originating products" and

too complex to be addressed here: it involves not only law and sustainable development as we ordinarily conceive such concepts, but a whole system of culture, tradition and society[150].

8. Conclusions

The Generalised System of Preferences confirms its significant role in the promotion of sustainable development by the EU with a multifaceted approach that reflects the evolution of the notion of sustainable development. It addresses the economic pillar through the concession of relevant tariff preferences to developing countries, graduated in accordance with their level of economic development, with more substantive benefits granted to LDCs, but also the social and environmental pillars, through the GSP+ scheme and the general conditionality rules. In the GSP+, the graduation is based not so much on the economic development level of the beneficiary countries, but rather on their willingness to comply with some social, human rights, good governance and environmental standards. Such an approach might raise issues of consistency with WTO rules on non-discrimination, according to which the only acceptable graduation can be based on the levels of economic development. To ensure compliance with WTO rules, the scheme is now based on applications from the interested countries which are included in the list of eligible countries, which are developing countries according to the World Bank criteria (no discrimination).

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methods of administrative cooperation, available at http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147711.pdf).

[150] The philosophy of *vivir bien* or *buen vivir*, or to live well, permeates the Bolivian Constitution and the social and political approach to the development of the country, as a life that goes back to traditions, to an ancestral harmony with the Earth. It includes child labour as part of the culture of those peoples, which is very hard to eradicate. For an approach that considers the complexity of the issues involved, see, among many who have tried to analyse the philosophy that is behind the Bolivian legal reforms, M. Lieber, *En lugar de prohibir el trabajo infantil, se protege los derechos de los niños trabajadores: Bolivia abre nuevos caminos con su nueva legislación*, 2014, available at http://www.europarl.europa.eu/meetdocs/2014_2019/documents/deve/dv/liebel_policy_paper_bolivia_/liebel_policy_paper_bolivia_es.pdf.

Once the interested country applies for GSP+ treatment, it subscribes to written commitments to comply with all the requirements the EU has established for beneficiary countries. In this way, the arrangement becomes very similar to a bilateral agreement where the beneficiary country expressly accepts the conditions in writing. There is no discretion of the Commission in establishing the beneficiary States, as the eligibility criteria are based on the parameters established by the World Bank, and the GSP+ requirements are objectively set in the Regulation (ratification and implementation of the Conventions). The Commission enjoys discretionary power in the implementation of negative conditionality, namely when the European institution decides on the withdrawal of preferences for lack of compliance with the requirements. Here, the practice of application shows that the Commission relies on other international organisations, either the governing bodies of international human rights conventions or, more often, the ILO. The most notable feature of the GSP+ implementation practice is the close relationship that has been established between the Commission and the ILO bodies, which have often followed parallel paths in pursuing the promotion of labour rights in developing countries. The Bangladeshi example is, from this perspective, the most significant as it also represents a model for future action. However, the other cases that have been considered show the same pattern.

The Commission, in its activity of monitoring the implementation of the GSP, tends to stress the positive part of conditionality, where the preferential tariffs are granted as an incentive to countries to progressively improve the sustainability of their development in terms of respect for human and labour rights, good governance and environmental protection. The reports acknowledge the progress made by the countries and highlight the ongoing deficiencies, exercising pressure on governments with the leverage provided for by the possibility of withdrawal. However, actual withdrawal is very rare and has been decided almost always on the grounds of the violation of labour rights and in cooperation with the ILO bodies. The only country where the EU has acted based on widespread violations of human rights was Sri Lanka.

Another important connection of GSP conditionality measures is with CFSP measures. This has happened with Myanmar and Belarus. In these cases, the EU acted both in the field of common foreign and security policy and in the field of trade. I do not see this as a subordination of trade decision-making to the CFSP intergovernmental decision-making, but rather as an example of coherence in the external action of the Union. It would appear incoherent at the very least if the Union conceded trade preferences to a country against which the political branch of the external action has adopted sanctions. After all, trade has been one of the most powerful weapons of foreign policy for centuries, and the situation is not different in the present globalised world. It is evident that when trade decisions are taken, the institutions also consider political issues.

What is crucial for the effectiveness of the GSP conditionality, and in particular for the GSP+ scheme, is for the Commission to start attributing more weight to the general human rights and governance situation of countries and to the environmental policy, which are duly addressed in the reports, but appear to be considered less at times when negative conditionality is used.

There are other instruments, which will be considered in the following chapters, that specifically address the sustainability of trade in certain products or categories of products, including natural resources, and that are probably more effective than the very general provisions of the GSP regulations for the objective of environmental protection and the sustainable use of natural resources.

Chapter III
International Trade as an Instrument of the Fight Against Torture and the Death Penalty

1. Introduction

The GSP schemes are designed in a way that affect all or almost all the goods that are involved in the trade flow between the EU and the beneficiary States, the only distinction being between sensitive and non-sensitive goods. On the other hand, the beneficiary States are selected, and their treatment is differentiated, on the basis of their situation of economic vulnerability and their will to engage in sustainable development commitments through the ratification and implementation of the most important conventions on human and labour rights, good governance and environmental protection. The approach of the GSP is thus based on the relation of the Union with third States selected for their qualities and behaviours. The influence of the Union in the promotion of sustainable development is largely based on positive (incentive) and negative (sanctions) conditionality.

The legal acts that are the object of this and of the following Chapters adopt a different approach to achieve the same objective of promoting human rights and sustainable development in third countries by means of trade measures, as they do not regulate trade with specific countries, but trade in specific goods, in order to either limit or ban entirely trade in certain products or subject such trade to specific requirements aimed at limiting the human rights or environmental impact of the considered goods. The first approach is the object of the present Chapter, which analyses the EU Regulation on trade in goods

that can be used for the death penalty or for torture (hereinafter the Torture Regulation). The latter approach is typical of those regulations that prescribe requirements or certifications of respect for human rights or environmental standards for the import or export of certain products.

In all these cases, what matters is the product, and the regulation is applicable to relations with all third countries, irrespective of their economic situation – developed or developing – and of their individual relation with the EU. Although many agreements the EU has concluded with third countries include clauses on specific controlled goods, such as, for example, drugs and drug precursors, normally, regulations that address specific goods are also applicable if there is an agreement in force.

This Chapter addresses a very important and, at the time it was adopted, innovative method of regulating trade with a view to the protection of human rights and fundamental values: the introduction of a complete ban on the trade of goods that can be used to perform executions or to commit acts of torture and other cruel, inhuman or degrading treatment or punishment. The regulation, first adopted in 2005 and later repeatedly revised, stems from the responsibility of the Union to act against torture, which is prohibited by international law and, as the main trade actor on a continent that historically has been in the lead in the process of the abolition of the death penalty, to make its contribution to the abolition of capital punishment worldwide, and at the same time, to avoid any complicity in executions carried out in third countries[1]. The Union has also taken the lead against torture and the death penalty at the international level, promoting the adoption of a ban on goods used to practice such punishments on a multilateral basis, involving all the States that share the same values through the Alliance for Torture-free Trade. But before analysing the trade regime for these

[1] On this point, B. Malkani, "The Obligation to Refrain from Assisting the Use of the Death Penalty", *International and Comparative Law Quarterly* (2013): 523 *ff*. According to this author, it can be argued that a State that abolishes the death penalty is under a secondary obligation to refrain from facilitating the use of the death penalty elsewhere, for example, by refraining from extraditing or deporting anyone to another State where there is the risk that they will face the death penalty.

very special goods, the following pages will address the legal situation on torture and capital punishment in the European Union, in the constitutional framework of the Union and in the policies where the issue is more relevant, namely refugees and asylum, judicial cooperation in criminal matters, extradition and police cooperation. Since the main focus of this study is on trade, such premise necessarily will not go into much detail. However, it is appropriate to set the legal and values background of the EU's action and to highlight the coherence of the Union's approach to the matter, as well as to point out problematic aspects, inconsistencies and contradictions.

2. Death penalty and torture in European Union Law and in the European Convention on Human Rights

"Parmi un assurdo che le leggi, che sono l'espressione della pubblica volontà, che detestano e puniscono l'omicidio, ne commettono uno esse medesime, e, per allontanare i cittadini dall'assassinio, ordinino un pubblico assassinio"[2]. The movement for the abolition of the death penalty started in Europe during the Enlightenment with the words of the Italian philosopher Cesare Beccaria, who deeply influenced the legal culture of the Continent, both during his own time and subsequently[3].

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[2] "It seems absurd to me that the laws, which are expression of the public will, which loathe and punish murder, commit one themselves and, in order to draw the citizens away from murder, order a public murder" (C. Beccaria, "Dei delitti e delle pene," in *Edizione nazionale delle opere di Cesare Beccaria*, Vol. I, ed. G. Francioni (Milano, Mediobanca, 1984), 94. The first edition of Beccaria's work was published in 1764. The translation is mine).

[3] Beccaria did not contest the death penalty on the basis of a human rights culture, which in his years, was starting its first steps – the French Declaration of the Rights of Man and Citizen was adopted during the French revolution in 1789, and did not mention capital punishment, which was widely accepted and practiced at that time; what he contested was the effectiveness of death as a deterrent for crime, while asserting the central role of the State, which must not lose its moral and legal authority by lowering itself to the same level as criminals. He argued that slavery and forced labour were much stronger deterrents for criminals, as

Contemporary Europe is almost completely free from the death penalty, as all the Member States of the European Union and of the Council of Europe have abolished it in their constitutional order. Only one European State, Belarus, which is neither a member of the Council of Europe nor a Member of the EU, still has the death penalty in its legal system[4].

In international law, there has been an evolution about the death penalty. Most human rights treaties do not expressly prohibit it except in particular circumstances[5], such as the Convention on the Rights of the Child, which prohibits the death penalty for children under 18 years of age. But many regional human rights treaties contain express provisions requiring the abolition of capital punishment: an example is the European Convention on human rights, whose Protocol 13 abolishes the death penalty in all circumstances[6], both in times of peace and in times of war. Nevertheless, as one of the most distinguished experts in international human rights law and the death penalty put it, there is, in international law, a trend towards the abolition of capital punishment, not only through the regional treaties that expressly require abo-

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such punishments entailed more and longer suffering than death. At the same time, what he considered important was the certainty of punishment, the rapidity of judgment and the proportionality of the punishment to the criminal offence.

[4] For data on the application of the death penalty in Belarus, see Cornell Center on the Death Penalty Worldwide, *Death Penalty Database*, at https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Belarus (last access, May 2018).

[5] The Second Optional Protocol to the International Covenant on Civil and Political Rights, adopted by UN General Assembly Resolution No 44/128 of 15 December 1989, requires States Parties to take all necessary measures to abolish the death penalty within their jurisdiction (Article 1). The only admissible reservation is for the application of the death penalty in times of war pursuant to a conviction for a most serious crime of a military nature committed during wartime (Article 2). Despite the adoption and proclamation by the General Assembly, in 2018 the Protocol that resulted was ratified by only eighty-five States, including all the EU Members, while two have signed but not ratified it, and 110 have neither signed nor ratified it.

[6] In the following pages, I will refer to the case-law of the European Court of Human Rights on the evolutive interpretation of Article 2(1) of the Convention, which allow(ed) the death penalty as an exception to the right to life.

lition, but also through a "dynamic and evolutive interpretation of human rights treaties", particularly of the clauses on the right to life and on the right to human dignity[7]. At the multilateral level, the European Union's initiative was instrumental in the adoption of a landmark resolution by the United Nations General Assembly in 2007, calling for a worldwide moratorium on the death penalty[8]. And again, although General Assembly resolutions are not legally binding, they surely provide a moral indication of the stance of the international community on the matter.

In the European legal order, the main instruments for the protection of human rights are the European Convention on Human Rights and Fundamental Freedoms (ECHR)[9] and the Charter of Fundamental Rights of the European Union. The Convention was concluded in 1950 in the framework of the Council of Europe, when the death penalty was still considered a legitimate punishment for the most heinous crimes, and, as such, a legitimate exception to the right to life established by Article 2(1): "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law"[10]. In 1983, the Council of Europe approved Protocol

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[7] See W.A. Schabas, "The Abolition of Capital Punishment from an International Law Perspective" (International Society for the Reform of Criminal Law, 17th International Conference 'Convergence of Criminal Justice Systems – Bridging the Gaps', The Hague, 24-28 August 2003), 7; W.A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd ed. (Cambridge, Cambridge University Press, 2002).

[8] UNGA Resolution 62/149 (2007) adopted on 18 December 2007 at the initiative of the EU, presented through the EU Presidency (Portugal), after a European Parliament resolution of April 26, 2007 on the Initiative for a Universal Moratorium on the Death Penalty, EP Doc. C74 E/775 (2007). See Ch. Behrmann and J. Yorke, "The European Union and Abolition of the Death Penalty", *Pace International Law Review Online Companion* 4, no. 1: 60. The authors argue that "the EU's contribution to the abolition of the death penalty is a recognizable success story of human rights, and it is one aspect of the regions' policies that was rewarded in 2012 with the Nobel Peace Prize" (3).

[9] The ECHR is applicable in the EU system through Article 6(3) TEU, which refers to it as a source of the general principles of EU law.

[10] ETS No 005, Rome, 4 November 1950.

No 6 to the ECHR on the abolition of the death penalty in times of peace, which still allowed the Member States to apply the death penalty in times of war or the immediate threat of war[11]. The final step towards abolition was the adoption, in 2002[12], of Protocol No 13 on the abolition of the death penalty in all circumstances, which allows no derogations and no reservations on the part of the ratifying States. Protocol No 13 has been ratified by all the signatory States of the ECHR except Armenia, Azerbaijan and the Russian Federation[13].

Article 2(1) of the ECHR remains unchanged, but the European Court of Human Rights (ECtHR), in the *Öcalan v. Turkey* case, implicitly admitted the possibility of an evolutive interpretation of the provision in connection with Article 3 of the Convention which prohibits torture and other inhuman and degrading treatment or punishment. The Court said that the Convention must not be interpreted in a vacuum, but it must take into account the developments of international practice and of the law of the Member States: "The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions and that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies" and

> [t]he *de facto* abolition (…) in respect of twenty-two Contracting States in 1989 has developed into a *de iure* abolition in forty-three of the forty-four Contracting States and a moratorium in the remaining State that has not yet abolished the penalty, namely Russia. This almost complete abandonment of the death penalty in times of peace in Europe is reflected in the fact that all the Contracting States have signed Protocol No 6 and forty-one

[11] ETS No 114, Strasbourg, 28 April 1983.

[12] ETS No 187, Vilnius, 3 May 2002.

[13] Armenia and Azerbaijan are still involved in a conflict over the region of Nagorno-Karabakh, which was occupied by Armenian forces in 1992 and self-proclaimed its independence, but was revendicated by Azerbaijan, as it is inside its internationally recognised borders. Russia suspended the death penalty with a moratorium in 1996, but hypothetically, it could be reintroduced by the government.

> States have ratified it, that is to say, all except Turkey, Armenia and Russia. It is further reflected in the policy of the Council of Europe, which requires that new member States undertake to abolish capital punishment as a condition of their admission into the organisation. As a result of these developments the territories encompassed by the member States of the Council of Europe have become a zone free of capital punishment.

It concluded: "Against such a consistent background, it can be said that capital punishment in peacetime has come to be regarded as an unacceptable (…) form of punishment that is no longer permissible under Article 2". Notwithstanding such premises, the Court acknowledged that the contracting States have followed the usual method of amending the Convention, adopting Protocol No 13, which apparently prevails on a tacit agreement on the modification of Article 2(1). However, for the case at hand, it was not necessary to decide on the point, since Articles 2 and 3 in any case prevent States from inflicting the death penalty without a fair trial[14], and the Court left the issue unresolved.

As for the Charter of Fundamental Rights, which was approved by the EU institutions in 2000 and has become legally binding, with the same legal value as the Treaties, through the reference in Article 6(1) TEU, the relevant provision is Article 2(2): "[n]o one shall be condemned to the death penalty, or executed." The scope of this provision is quite interesting, as the Charter only applies to the EU institutions and the Member States while applying or implementing EU law. As such, it is not addressed to the legal order of the Member States, where the abolition of capital punishment is regulated by other sources, namely the ECHR and the national constitutions, but to the EU legal order in those cases where the EU can be affected by problems in the application of the death penalty. Since it is apparent that the EU itself cannot inflict capital punishment on anyone, as it does not have the

[14] See *Öcalan v. Turkey*, Grand Chamber, Judgment of 12 May 2005, 46221/99, in *Case Reports* 2005-IV, 47*ff.*, paragraphs 162*ff.*; *Öcalan v. Turkey*, First Section, 12 March 2003; in Shabas' opinion, the judgment, though carefully worded, expresses the view of the Court that capital punishment is now contrary to Article 3 of the Convention, as an inhuman and degrading punishment (Schabas, "The Abolition of the Capital Punishment", 10).

competence to do so, those situations necessarily involve either the Member States or third countries and the relations of the Union with those countries. As for the Member States, in the unlikely case that one of them reintroduces the death penalty, the EU institutions could start the procedure under Article 7 TEU for serious violations of the values of the Union by one of the Member States, a procedure that could lead to sanctions such as the loss of voting rights in the Council[15]. Undoubtedly, the introduction of the death penalty in a Member State of the Union would amount to a serious breach of the fundamental values of the Union enshrined in Article 2 TEU that could trigger Article 7 procedure.

More likely is the possibility that an issue related to capital punishment will arise in the relations with third countries, as many States in the international community still retain the death penalty in their criminal law. The Union's approach to this problem is twofold: on the one hand, it tries to protect persons that happen to be under its jurisdiction from being sentenced to death and executed. This protection can be achieved through the attribution of refugee status and through the prohibition on extradition in the absence of sufficient guarantees that capital punishment will not be inflicted. The second approach is political, and it entails pressure on third countries for the abolition of the death penalty, torture and other cruel and inhuman treatment or punishment. Such pressure can be made at the political level, using the instruments of political dialogue, as well as at the trade level, using the instruments of conditionality, or restrictions on the trade of specific goods, which is the object of the Torture Regulation; finally, the Union

[15] On Article 7 TEU, see L.F.M. Besselink, "The Bite, the Bark, and the Howl: Article 7 TEU and the Rule of Law Initiatives", in *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, ed. A. Jakab and D. Kochenov (Oxford, Oxford University Press, 2017), 128 *ff.*; E. Cimiotta, "La prima volta per la procedura di controllo sul rispetto dei valori dell'Unione prevista dall'art. 7 TUE? Alcune implicazioni per l'integrazione europea", *European Papers* (2016): 1253 *ff.*; R.D. Kelemen and M. Blauberger, "European Union Safeguards against Member States Democratic Backsliding", *Journal of European Public Policy* (2017): 317 *ff.*; U. Villani, "Osservazioni sulla tutela dei principi di libertà, democrazia, rispetto dei diritti dell'uomo e stato di diritto nell'Unione europea", *Studi sull'integrazione europea* (2007): 27 *ff.*

also acts at the judicial level by means of *amicus curiae* briefs, as it has done many times in U.S. courts dealing with capital cases.

Torture, unlike the death penalty, is very clearly and strictly prohibited by international law. All international human rights treaties prohibit torture without exceptions, limitations or derogations. Suffice it here to recall Article 5 of the Universal Declaration on Human Rights of 1948, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984[16] to which all the EU Member States are contracting parties, and the UN General Assembly Resolution No 3452(XXX)[17]. It is widely believed that the prohibition of torture has become a rule of international customary law with peremptory character[18]. At the European level, the ECHR prohibits torture in Article 3: "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment". The same provision can be found in Article 4 of the EU Charter of Fundamental Rights[19]. In the following pages, torture and capital punishment will be

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[16] The Convention was adopted and opened for signature, ratification and accession by General Assembly Resolution No 39/46 of 10 December 1984 and entered into force on 26 June 1987. As will be shown later, EU legal instruments, including the Torture Regulation, adopt the definition of torture contained in the Convention.

[17] UNGA Resolution No 3452(XXX) of 9 December 1975, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/30/3452.

[18] On the *jus cogens* character of the prohibition of torture, see International Law Commission, *Report of the Sixty-Sixth Session* of 2014, Annex, A/69/10, paragraph 11 and the literature and case-law cited there. Recently, see UNGA Resolution 72/163 of 6 November 2017, on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, whose Preamble affirms "(…) the prohibition of torture is a peremptory norm of international law without territorial limitation and (…) international, regional and domestic courts have recognized the prohibition of cruel, inhuman or degrading treatment or punishment as customary international law".

[19] For the implementation of these provisions at the internal and external levels and the action and weaknesses of the Union, see M. Picchi, "Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment: Some Remarks on the Operative Solutions at the European Level and their Effects on the Member States. The Case of Italy", *Criminal Law Forum* (2017): 749 *ff.*; E. Pistoia,

considered jointly, pointing out specific features of the one or of the other when needed.

2.1. *The Guidelines on EU policy towards third countries on torture and on the death penalty*

Since 1998, eleven sets of Guidelines for the EU's promotion of human rights in its foreign policy have been adopted by the Foreign Affairs Council of the European Union[20]. The Guidelines are addressed to the institutions and the Member States and have the main objective of providing all the actors of the external relations of the Union with a

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"La tortura nella 'Fortezza Europa'. Possibilità e carenze nell'Unione europea", in *La tortura nel nuovo millennio. La reazione del diritto*, ed. L. Zagato and S. Pinton (Padova, 2010), 243 *ff.*

[20] Council of the European Union, *Guidelines to EU policy towards third countries on the death penalty*, 29 June 1998; Council of the European Union, *Guidelines to EU Policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment*, 9 April 2001, 7369/01; Council of the European Union, *EU Guidelines on Human Rights Dialogues with Third Countries*, 13 December 2001, 14469/01; Council of the European Union, *EU Guidelines on Children and Armed Conflict*, 4 December 2003, 15634/03; Council of the European Union, *Ensuring Protection – European Union Guidelines on Human Rights Defenders*, 2 June 2004, 10056/04; Council of the European Union, *European Union Guidelines on promoting compliance with international humanitarian law (IHL)*, 5 December 2005, updated in 2009, *O.J.* C 303 of 15 December 2009, 12; Council of the European Union, *EU Guidelines on the Promotion and Protection of the Rights of the Child*, 10 December 2007, 16031/07; Council of the European Union, *EU Guidelines on violence against women and girls and combating all forms of discrimination against them*, 8 December 2008, 16173/08; Council of the European Union, *EU Guidelines on the promotion and protection of freedom of religion or belief*, 24 June 2013, 11491/13; Council of the European Union, *Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons*, 24 June 2013, 11492/13; Council of the European Union, *EU Human Rights Guidelines on Freedom of Expression Online and Offline*, 12 May 2014, 9647/14. For an assessment of the legal value and of the function of the Guidelines in the foreign policy of the Union, as well as the procedure for their adoption, see J. Wouters and M. Hermez, "EU Guidelines on Human Rights as a Foreign Policy Instrument: An Assessment", Working Paper No 170 (Leuven Centre for Global Governance Studies, February 2016).

tool and guidance for the implementation of the values of the Union in its relations with third countries. The Guidelines aim at enhancing the coherence of the external action of the Union at the horizontal (between the different areas of EU external action) as well as the vertical (Union/Member States) level. The Guidelines also provide the officials of the EU missions abroad with the necessary legal references to contribute to preventing violations or for interventions or statements in cases of violations or other situations that require immediate action; simply put, the Guidelines can be considered as a comprehensive "policy toolbox"[21]. The Guidelines are a CFSP instrument and are not legally binding. However, they can be considered as the expression of the EU's political priorities on human rights[22]. As has been pointed out, the crucial problem with the Guidelines is their implementation. Because of the lack of specific training on human rights of the officials on the ground or, more often, because diplomats tend to focus on different political priorities in bilateral relations with third countries, the Guidelines do not receive a systematic implementation[23]. Despite these weaknesses and the lack of legally binding force, the Guidelines still are important practical tools and a source of legal information for the officials who work in the EU missions and in the Member States' embassies in third countries and are an expression of the EU's position on the promotion of human rights.

Two Guidelines address, respectively, the EU's policy concerning the death penalty, adopted in 1998, and torture and other cruel, inhuman and degrading treatment or punishment, adopted in 2001 and later revised.

The Guidelines for EU policy towards third countries on the death penalty was the first document of this type to be adopted by the Council. It is based on the commitment of the Union to the abolition of the death penalty for itself and for third countries. Accordingly, the objectives of the European Union are to work towards the universal abolition of the death penalty as a strongly held policy view agreed by all

[21] Wouters and Hermez, "EU Guidelines on Human Rights," 6 and 13.

[22] Wouters and Hermez, 14.

[23] Wouters and Hermez, 16.

EU Member States; and, where the death penalty still exists, to call for its use to be progressively restricted and to insist that it be carried out according to the minimum standards described in the international instruments and in the Guidelines[24]. The EU missions in third countries shall act by means of diplomatic *démarches* aimed at encouraging the third country to abolish the death penalty or at least to adopt a moratorium, to ratify all relevant international instruments, and to cooperate with international organisations, including the UN Treaty Bodies which are competent for monitoring the implementation of human rights conventions. The Guidelines also request the EU missions abroad to act in individual cases, when appropriate, for example, by the means of *amicus curiae* briefs[25] or public statements or attending trials in order to exert influence on the policies of the third States.

The Guidelines on torture and other cruel, inhuman or degrading treatment or punishment follow the same pattern of the death penalty Guidelines. The objective is the complete eradication of torture in the world. The action the EU and its Member States shall take is based on political dialogue with third countries, diplomatic *démarches* when appropriate, bilateral and multilateral cooperation, including the use of financial instruments such as the European Instrument for Democracy

[24] Part III of the Guidelines: "Minimum standards paper". The text of the guidelines, in the version revised in 2013, is available at https://eeas.europa.eu/sites/eeas/files/guidelines_death_penalty_st08416_en.pdf.

[25] A significant example is provided by the Brief for European Union et al. as *amici curiae* to the Supreme Court of the United States in the landmark case *Roper v. Simmons*, 543 U.S. __ (2005), where the issue at stake was the capital punishment of a person under 18 years of age. The Court held that, under the VIII Amendment to the U.S. Constitution, according to which "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted", and considering the widespread consensus in the international community against the juvenile death penalty, as testified by the EU's brief, it was time also for the U.S. to abandon this practice: "[i]n sum, it is fair to say that the U.S. now stands alone in a world that has turned its face against the juvenile death penalty" (Supreme Court Opinion, 23, delivered by Justice Kennedy). See also the EU's *amicus curiae* brief in *Atkins v. Virginia*, 536 U.S. 304 (2002), on the execution of a mentally disabled person.

and Human Rights[26], conditionality clauses in agreements, the withdrawal of GSP+ benefits, and trial observation. The EU will also urge third countries to adopt measures aimed at, *inter alia*, ratifying and implementing international conventions against torture and participating in multilateral human rights mechanisms such as the UN Treaty Bodies, modifying their legal systems in order to criminalise all acts of torture, making their judicial systems more effective in prosecuting all acts of torture, adopting and implementing safeguards and procedures relating to places of detention, and providing rehabilitation for victims[27]. In the name of coherence and the international credibility of the Union, the torture Guidelines stress the importance of the EU Member States' internal compliance with the prohibition of torture in order to "maximize its influence by having Member States' laws and practices meet or exceed international standards against torture and other ill-treatment in all respects"[28]. Despite all the weaknesses described above in terms of the implementation problems, the Guidelines retain their importance as an instrument of foreign policy coherence and as a framework for action in the field of human rights. They are useful not only for diplomats and officials in their daily activity in third countries, but also because they provide a comprehensive description of the EU position on human rights.

2.2. *Death penalty and torture as grounds for the right to international protection and for the refusal of extradition*

The death penalty and torture are relevant in the EU system as grounds for the recognition to foreign nationals of the right to refugee status or to other forms of international protection. In this respect, reference should

[26] Regulation (EU) No 235/2014 of the European Parliament and the Council, of 11 March 2014, establishing a financing instrument for democracy and human rights worldwide, in *O.J.* L 77 of 15 March 2014, 85, whose particularity is that the financial support is not directed at governments, but at civil society actors.

[27] Rehabilitation and assistance to victims of torture is another area of action of the EU under the Guidelines. The text of the *Torture Guidelines* is available at http://data.consilium.europa.eu/doc/document/ST-6129-2012-REV-1/en/pdf.

[28] *Torture Guidelines*, 15.

be made to the so-called Qualification Directive[29], according to which a person eligible for international protection is a person who, if returned to his or her country of origin or of habitual residence, would face a real risk of suffering "*serious harm*" (Article 2(f)[30]. Serious harm is defined in Article 15 of the Directive as (a) the death penalty or execution; (b) torture or inhuman or degrading treatment or punishment; (c) a serious and individual threat to a civilian life or person by reason of indiscriminate violence in situations of international or internal armed conflict. The Member States are under the obligation to grant those persons the protection that is provided for in the Directive, and in particular they are under the obligation of *non-refoulement*, i.e. they cannot expel from their territory persons who are eligible for protection. In no circumstances can the Member States deliver a person to a third State where he or she could be subjected to the death penalty or to torture or other ill-treatment.

The same principle applies to extradition and mutual legal assistance in criminal matters, as well as to police cooperation in criminal investigations. Extradition and judicial cooperation lie within the competence of the Member States, but EU law has established common rights for European citizens that are aimed at enhancing their protection in the framework of the Area of Freedom, Security and Justice. Article 19(2) of the Charter of Fundamental Rights provides that "[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment". The Court of Justice has applied this provision to asylum seekers in conjunction with the Qualification Directive and to cases concerning ex-

[29] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (*O.J.* L 304/2004, 12), substantially modified by Directive 2011/95/EU of the European Parliament and of the Council on standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), of 13 December 2011 (*O.J.* L 337 of 20 December 2011, 9).

[30] The emphasis is mine.

tradition requests from third countries of European citizens who resided or travelled in a Member State different from the Member State of origin[31]. According to the Court, Article 19(2) of the Charter must be interpreted as meaning that a Member State must reject a request for extradition originating from a third country concerning a Union citizen who has exercised his right to free movement if that citizen faces a serious risk of being subjected to the death penalty in the event of extradition[32]; in another case, the Court held that, even if there is no risk of the death penalty, the Member State is bound to assess the existence of a real risk of torture or inhuman or degrading treatment in the requesting third State when it is called upon to decide on the extradition of a European citizen to that State[33].

In the framework of judicial cooperation in criminal matters, the EU has adopted agreements that concur with the definition of the common principles and procedures for extradition and mutual legal assistance in criminal matters towards third States. In addition, the European Police Office (EUROPOL) has adopted agreements with third countries that establish cooperation procedures for transboundary criminal investigations. The problem with such forms of cooperation is that the EU and its Member States could face the risk of cooperating in an investigation or in judicial proceedings that might lead to a death sen-

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[31] This requirement is necessary because otherwise the person falls exclusively within the jurisdiction of the State of residence or nationality. The fact that he or she has exercised his or her right to free movement inside the European Union places the person under the jurisdiction of EU law, including the Charter of Fundamental Rights.

[32] Order of the Court of 6 September 2017, case C-473/15, *Adelsmayr*, EU:C:2017:633, paragraph 27. Mr. Adelsmayr was an Austrian citizen who faced the risk of being sentenced to death in the United Arab Emirates for murder and manslaughter. He was sued because he had canceled a professional trip to Germany because of the fear of being extradited by German authorities.

[33] Judgment of 6 September 2016, case C-182/15, *Petruhhin*, EU:C:2016:630. This case was about a request for extradition from Russia of an Estonian citizen residing in Latvia and arrested there under charges of attempted large-scale, organised drug trafficking. For a comment on the case, see S. Saluzzo, "EU Law and Extradition Agreements of Member States: The Petruhhin Case", *European Papers* (2017): 435 *ff*.

tence, thus becoming "accomplices" of the infliction of the capital punishment[34]. The agreements the EU has adopted so far are not entirely satisfactory from this standpoint. The problems are apparent if we consider the Agreements on extradition and on mutual legal assistance with the United States[35], the Agreement on mutual legal assistance with Japan and two agreements between Europol and the United States. Article 13 of the Agreement on extradition between the EU and the U.S. provides as follows:

> [w]here the offence for which extradition is sought is punishable by death under the laws in the requesting State and not punishable by death under the laws in the requested State, the requested State may grant extradition on the condition that the death penalty shall not be imposed on the person sought, or if for procedural reasons such condition cannot be complied with by the requesting State, on condition that the death penalty if imposed shall not be carried out. If the requesting State accepts extradition subject to conditions pursuant to this Article, it shall comply with the conditions. If the requesting State does not accept the conditions, the request for extradition may be denied.

Considering the commitment of the EU against the death penalty and the constitutional requirements of many Member States, it would be preferable to provide a clearer possibility of the rejection of the request in the case of capital offences[36], as is the case of the Agreement with

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[34] Malkani, "The Obligation to Refrain," 524-25.

[35] Agreement on extradition between the European Union and the United States of America, in *O.J.* L 181 of 19 July 2003, 27; Agreement on mutual legal assistance between the European Union and the United States of America, in *O.J.* L 181 of 19 July 2003, 34. Both Agreements were concluded with Council Decision No 2009/829/CFSP of 23 October 2009, in *O.J.* L 291 of 7 November 2009, 40.

[36] It must be considered that negotiations for the Agreements with the U.S. started in 2002 after the shock of 9/11. It was deemed necessary to engage in closer cooperation in criminal matters in order to enhance the fight against international terrorism. See A. Mignolli, *L'azione esterna dell'Unione europea e il principio della coerenza* (Napoli, Jovene, 2009), 160-61; A. Georgopoulos, "What Kind of Treaty Making Power for the EU? Constitutional Problems Related to the Conclusion of the EU/US Agreements on Extradition and Mutual Legal Assistance", *European Law Review* (2005): 190 *ff*.

Japan, whose Article 11(1)(b) includes, among the grounds for refusal of assistance, "a request concerning an offence punishable by death under the law of the requesting State (…) unless the requested State and the requesting State agree on the conditions under which the request can be executed"[37]. The formulation here is inverted: the rule is that assistance is denied unless the parties find an agreement on the conditions. What is even more troubling is that nowhere in the Agreement with the U.S. on mutual legal assistance[38] is it possible to find a reference to the possibility to refuse assistance for cases that might lead to death sentences. The only provision that concerns the refusal of cooperation is Article 13: "(…) [t]his Agreement is without prejudice to the invocation by the requested State of grounds for the refusal of assistance (…), including where execution of the request would prejudice its sovereignty, security, ordre public or other essential interests". No mention of the death penalty as a possible ground for refusal has been included in the provision, and it only refers to very general interests of the Member States. It is very sad that the EU did not expressly and strongly affirm a principle that is considered one of the fundamental values of the Union itself and of the Member States. The only reason I can imagine for this solution is that the Union did not want to hinder the investigation and prosecution of terrorist acts after 9/11, even well knowing that terrorism is a capital offence in federal U.S. criminal law and in the criminal law of many states of the U.S. The same problems arise from the two agreements that EUROPOL concluded in 2001 with the United States on police cooperation and on the exchange of personal data and related information[39]. Nothing is said in either Agreement about the prohibition on using the exchanged information in capital investigations. As a consequence, it is possible that EUROPOL must agree to the transmission to U.S. authorities of the

[37] Agreement between the European Union and Japan on mutual legal assistance in criminal matters, in *O.J.* L 39 of 12 February 2010, 20.

[38] Agreement on mutual legal assistance between the European Union and the United States of America, of 25 June 2003, in *O.J.* L 181 of 19 July 2003, 34.

[39] The texts of the Agreements are available at https://www.europol.europa.eu/partners-agreements/operational-agreements.

personal data of subjects who could be prosecuted for offences that are punishable with the death penalty[40].

3. The EU Regulation against trade in goods that can be used for the death penalty and torture

The Union has been the first subject of the international community to enact legislation aimed at banning the trade of goods that can be used for the death penalty and torture. The so-called Torture Regulation was adopted in 2005 and repeatedly revised in the following years[41]. The revision approved in 2016 with Regulation No 2016/2134 substantially revised the regime put in place by the Regulation. It was triggered by a resolution of the European Parliament adopted in June 2010[42], where the Parliament urged the Commission to submit a proposal for the revision of the Torture Regulation in light of the many implementation problems that had arisen over the years.

The choice to introduce a special regime for death penalty and torture tools is rooted in repeated stances on the part of the United Nations

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[40] And here we cannot go into the discussion about the sensitive topic of the treatment and protection of personal data, for which a delicate balance is needed with security and the effectiveness of the fight against terrorism.

[41] Council Regulation (EC) No 1236/2005, of 27 June 2005, concerning trade in certain goods that could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, in *O.J.* L 200 of 30 July 2005, 1. The last substantial revision, which filled many holes present in the previous discipline, was adopted with Regulation (EU) No 2016/2134 of the European Parliament and the Council of 23 November 2016, amending Council Regulation (EC) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, in *O.J.* L 338 of 13 December 2016, 1. The text currently in force is a consolidated version that includes all the revisions, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02005R1236-20180214.

[42] European Parliament, Resolution on the implementation of Council Regulation (EC) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment (B7-0360/2010).

Commission on Human Rights, starting with Resolution No 2001/62, whose paragraph 8 "*[c]alls upon* all Governments to take appropriate effective legislative, administrative, judicial or other measures to prevent and prohibit the production, trade, export and use of equipment which is specifically designed to inflict torture or other cruel, inhuman or degrading treatment"[43], which was reiterated in the following years. It is also rooted in the international and European legal background on torture and the death penalty[44] as described above.

In the following pages, I will analyse the main aspects of the Torture Regulation: the justification for the derogation from the GATT and the GATS rules; the definition of torture and other cruel, inhuman and degrading treatment or punishment; the trade regimes for goods that are used only for the death penalty and torture, for goods that can be used for the death penalty and torture but also have legitimate utilisations, and for medicinal goods that can be used for executions; the regime for transit and brokering services added by the last revision of the Regulation; and finally, a case study will analyse the impact the Regulation has had on executions in the United States.

3.1. *Public morals as a derogation from the GATT and the GATS rules*

Both the GATT and the GATS allow the Contracting Parties to adopt trade restrictions in order to safeguard the fundamental interests of the State. These are the so-called general exceptions of Articles XX[45] of the GATT and XVI of the GATS, which provide a large number of objectives of public policy that can be achieved by introducing derogations to the GATT or the GATS rules. The States may introduce measures of this type whenever the liberalisation of trade threatens one of the protected

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[43] UN Commission on Human Rights Resolution No 2001/62, Torture and other cruel, inhuman or degrading treatment or punishment, of 25 April 2001, Doc. E/CN.4/RES/2001/62. See the reference in *recital* (5) of Regulation 1236/2005.

[44] Regulation No 1236/2005, *recitals* (2) and (3).

[45] See T. Eres, "The Limits of GATT Article XX: A Back Door for Human Rights?", *Georgetown Journal of International Law* (2003-2004), 597 *ff.*; J. Klabbers, "Jurisprudence in International Trade Law. Article XX GATT", *Journal of World Trade* (1992), 63 *ff.;* S. Charnovitz, "Exploring the Environmental Exceptions in GATT Article XX", *Journal of World Trade* (1991), 37 *ff.*

interests indicated in the cited provisions, which include public morals, environmental and public health interests, the protection of natural resources, and the protection of works of art. The restrictive measures adopted under the general exception clauses must respect the conditions established in the so-called *Chapeau* of Article XX, namely that "(…) such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade"[46]. There are no procedural requirements, and there is no need for the approval of the measures by the WTO bodies. The only review of the legality of such measures is *ex post* in the case of complaints by other Contracting Parties that lead to a dispute settlement procedure[47].

The Torture Regulation undoubtedly introduces restrictions on trade for certain specific categories of goods for which the import to and export from the EU's customs territory is either prohibited or strictly regulated. In addition, the Regulation also restricts trade in services associated with the restricted goods, such as training, technical assistance and maintenance services, and brokering services. In the Regulation, there are no express references to WTO rules, but *recital* (7) of the Preamble contains a justification for the adoption of trade restriction measures that recalls the Article XX exception for public morals: "[t]hese rules are instrumental in promoting respect for human life and for fundamental human rights and thus serve the purpose of protecting public morals". In its proposal, the Commission was more explicit: "[t]he prohibition of torture and other cruel, inhuman or degrading treatment or punishment is part of the public morals of the international community. The proposed regime restricts trade with a view to preventing violations of that prohibition in cases where such violations are likely to occur, and is therefore necessary to protect public morals"[48]. In the subsequent amended proposal, the Commission specified that the proposal "confirms (…) the

[46] On the *Chapeau* of Article XX, see L. Bartels, "The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction", *American Journal of International Law* (2015):95 *ff.*

[47] Picone and Ligustro, *Diritto dell'Organizzazione mondiale del commercio*, 321-22.

[48] European Commission, doc. COM(2002) 770 final of 30 December 2002, Explanatory Memorandum.

justification for the restrictions under WTO rules"[49]. If the Regulation is interpreted in conjunction with the Commission's explanatory notes, it is apparent that the Commission intended to refer to Article XX GATT on the general exception of public morals as a justification for the trade restrictions that are introduced by the Regulation. In addition, it is interesting to note that the Commission clearly had in mind a very innovative notion of public morals, which is not the public morals of the Member States individually considered or of the Union itself, but "the public morals of the international community". The restrictive measures aim at protecting the fundamental values of the international community, not the specific national interests of a determined State, as is normally the case with measures justified under the general exception clauses. The choice of the EU institutions not to refer expressly to the public morals of the international community in the text of the Regulation is worthy of criticism, since the EU lost an opportunity to make an important contribution to an evolutive interpretation of the notion of public morals[50]. The fact that the motivation that is in the background of the Regulation protects international public morals or the fundamental values of the international community has nevertheless been confirmed by the EU's initiative for the institution of the Alliance for a Torture-Free Trade, analysed in more detail below, by which the EU tries to involve the international community as a whole in the project of banning trade in all death penalty and torture equipment worldwide.

3.2. *Definitions: torture and other cruel, inhuman and degrading treatment or punishment*

The Regulation includes definitions of the notions of torture and other cruel, inhuman and degrading treatment or punishment in Article 2 (a)

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[49] European Commission, doc. COM(2004) 731 final of 29 October 2004, Explanatory Memorandum.

[50] This choice has been explained with the consideration that while the prohibition of torture is considered a peremptory norm of customary international law, the same is not true for the abolition of the death penalty: see L. Magi, "Il commercio di beni utilizzabili per praticare la pena di morte, la tortura e altri trattamenti disumani e recenti misure comunitarie di contrasto," *Rivista di Diritto Internazionale* (2007): 402 *ff*.

and (b). According to the previous version of Article 2 (a) of the Regulation,

> 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from that person or from a third person information or a confession, punishing that person for an act that either that person or a third person has committed or is suspected of having committed, or intimidating or coercing that person or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted either by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity. It does not, however, include pain or suffering arising only from, inherent in or incidental to, lawful penalties.

This definition was taken from the 1984 UN Convention Against Torture (CAT). However, *recital* (8) specifies that the notions of torture and other ill-treatment adopted in the Regulation consider not only the CAT, but also the UN General Assembly Resolution No 3452(XXX), and must take into account the case-law on the interpretation of the corresponding terms in the European Convention on Human Rights and in other international instruments to which the EU or the Member States are parties. For other types of ill-treatment different from torture, the CAT provides no definition. The one adopted by the old version of the Regulation reads as follows: "'[o]ther cruel, inhuman or degrading treatment or punishment' means any act by which significant pain or suffering, whether physical or mental, is inflicted on a person, when such pain or suffering is inflicted either by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity. It does not, however, include pain or suffering arising only from, inherent in or incidental to, lawful penalties". The 2016 revision amended both definitions, adding to Article 2 (a) and (b) the clarification that "[c]apital punishment is not deemed a lawful penalty under any circumstances". Such clarification is necessary to highlight the stance of the EU on the issue of capital punishment. Even if, as has been stressed before, no customary norm of in-

ternational law exists on the prohibition of the death penalty, it cannot be considered "lawful" under European Union law: in other words, the EU does not recognise the legality of the norms of third countries' legal orders that provide for the possibility to inflict the death penalty.

In addition, the amending Regulation also modifies the definition of "other cruel, inhuman and degrading treatment or punishment", which, under the revised version of Article 2 (b), means "any act by which pain or suffering attaining *a minimum level*[51] of severity" is inflicted on a person. The new formulation was adopted to take into account the case-law of the European Court of Human Rights on the subject[52].

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[51] The emphasis is added.

[52] See the consolidated opinion of the Court on the notion of ill-treatment, as well as on the difference between torture and other types of ill-treatment, effectively summarised in *Gäfgen v. Germany* (GC), case No 22978/05, paragraphs 88-90: "88. In order for ill-treatment to fall within the scope of Article 3 it must attain a minimum level of severity. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (…). Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it (…), as well as its context, such as an atmosphere of heightened tension and emotions (…). 89. The Court has considered treatment to be 'inhuman' because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering (…). Treatment has been held to be 'degrading' when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it was such as to drive the victim to act against his will or conscience (…). 90. In determining whether a particular form of ill-treatment should be classified as torture, consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As noted in previous cases, it appears that it was the intention that the Convention should, by means of such a distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (…). In addition to the severity of the treatment, there is a purposive element to torture, as recognised in the United Nations Convention against Torture, which in Article 1 defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating" (CE:ECHR:2010:0601JUD002297805).

Another question is whether acts of torture or other ill-treatment necessarily have to be committed by public officials, or whether on the contrary, acts committed by private parties could also fall within the scope of the notion of torture and other ill-treatment. Under the definition provided by the CAT, the only relevant acts of torture are those committed by public officials or persons who act under the instigation or control of an organ of the State (*de jure* or *de facto* State organ). On the other hand, the ECtHR has admitted the possibility of acts of torture being committed by private persons or groups of persons (in this case, the possible violation by the State would consist in the failure to provide adequate protection to the persons under its jurisdiction[53]). It has been suggested[54] that the reference to the case-law of the ECtHR is instrumental to the inclusion in the trade regime of the possibility that the end-user of a good might be a natural or legal person. Under Article 6(2) of the Torture Regulation, "[t]he competent authority shall not grant any authorisation when there are reasonable grounds to believe that goods listed in Annex III might be used for torture or other cruel, inhuman or degrading treatment or punishment, including judicial corporal punishment, by a law enforcement authority *or any natural or legal person in a third country*"[55].

3.3. *Trade regime for products used solely for the death penalty, torture and other ill-treatment*

The trade regime established by the Torture Regulation is differentiated according to the nature of the goods. For those goods whose only and

[53] This is the case of the judgment in *HLR v. France*, No 24573/94, of 29 April 1997, where the applicant expressed the fear that being deported from France to Colombia would expose him to retaliation from local drug traffickers on account of his cooperation with the French police. The Court held that "[o]wing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection" (paragraph 40).

[54] Magi, "Il commercio di beni utilizzabili," 391-92.

[55] The emphasis is mine.

exclusive use is the execution of the death penalty or the infliction of torture or other cruel, inhuman or degrading treatment or punishment which are listed in Annex II, Chapter II of the Torture Regulation provides a prohibition on the export of such goods, irrespective of their origin, and a prohibition on supplying technical assistance related to such goods[56]. The only derogation, in Article 3 (2), concerns the exports of goods that, in the country where they will be exported, will be used for the exclusive purpose of public display in a museum in view of their historic significance[57]. The same prohibition applies under Article 4 to all imports of such goods and to the acceptance of technical assistance related to them. The 2016 revision added prohibitions on the transit (Article 4a), brokering services[58] (Article 4b), training (Article 4c), displaying or offering for sale of such goods in trade fairs (Article 4d) and advertising (Article 4e)[59], which were not considered in the original Regulation but whose inclusion was deemed necessary to enhance the effectiveness of the regime[60]. After the revision, the restriction of trade in death penalty and torture tools was significantly strengthened. Particularly important is the inclusion of the prohibition on the transit of the goods in the customs territory of the Union, which was previously allowed. In fact, transit means, according to Article 2 (s) of the Regulation, "a transport within the customs territory of the Union of non-Union goods which pass through the customs territory of the Union with a destination outside the customs territory of the Union". In this operation, no goods originating in the Union are involved, and it is possible that Union citizens also are not, but the operation itself, if allowed, would compromise the effectiveness of the trade restrictions.

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[56] Article 3 (1).

[57] In this case, the competent authority of the Member State will grant an individual authorisation according to Article 8 (4).

[58] Brokering services are defined in Article 2 (k) as "the negotiation or arrangement of transactions for the purchase, sale or supply of relevant goods from a third country to any other third country, or the selling or buying of relevant goods that are located in a third country for their transfer to another third country".

[59] It is prohibited to sell or purchase from any person, entity or body in a third country advertising space in print media or on the Internet or advertising time on television or radio in relation to goods listed in Annex II.

[60] See the European Parliament 2010 Resolution cited above.

The extension of the prohibition to brokering services prevents European operators from eluding the prohibition by negotiating and concluding transactions between third country nationals, not directly involving the European market. In this case, unlike transit, the entire operation takes place outside the Union's territory. The Union's rules can target brokering only if the operator who provides this kind of services is a Union citizen acting within the territory of the Union. This is why Article 2(l) of the Regulation clarifies that broker means any natural or legal person, entity or body, including a partnership, resident or established in a Member State, that supplies brokering services from within the Union; any natural person having the nationality of a Member State, wherever resident, who supplies such services from within the Union; and any legal person, entity or body incorporated or constituted under the law of a Member State, wherever established, that supplies such services from within the Union.

The regime that results from the revised Regulation is a comprehensive ban on all possible trade flows connected to torture and death penalty tools whose implementation is mandated for the designated authorities of the Member States, which are listed in Annex I.

As stated above, the goods to which such ban is applied are listed in Annex II to the Regulation, which includes items such as gallows, guillotines, and blades for guillotines, electric chairs, electric shock devices, and other disquieting objects. Two main issues arise from the system for listing the goods that are shared by all three lists annexed to the Regulation (besides Annex II, there is Annex III, which lists goods that can be used for torture and other ill-treatment, and Annex IIIa, which lists medicinal goods that can be used for executions). First, new torture devices are developed daily, so there is the need to frequently and rapidly update the lists, and second, unfortunately, the death penalty and torture can be inflicted even without specific devices. This of course limits the effectiveness of the trade restrictions in the attainment of its primary objective, which is the abolition of the death penalty and the eradication of torture worldwide. Despite such limits, as will be shown later, the EU restrictions have undoubtedly produced significant practical effects and have the undisputable merit of contributing to the diffusion of a widespread awareness about the persist-

ing problem of torture in many parts of the world, as is shown by the wide participation in the EU's initiative for the Alliance for a Torture-Free Trade. As for the first problem, the Regulation confers on the Commission the competence to adopt delegated regulations to amend the Annexes in order to update the lists, following an urgency procedure where imperative grounds of urgency so require (Articles 12, 12a, 15a and 15b). The proposal put forward by the European Parliament for a catch-all clause, allowing the national authorities to decide that an authorisation is necessary in order to respond swiftly to new circumstances was not accepted by the Commission, as it would jeopardise the uniformity of EU trade policy.

3.4. *Trade regime for goods that can be used for the death penalty and torture, but also for legitimate purposes*

Annex III lists items that can be used either for the purpose of torture or other ill-treatment, or for legitimate purposes, and Annex IIIa lists medicinal goods that can be used for the purpose of capital punishment, but also have a medical utilisation. We are talking here about items that can be used for legitimate law enforcement purposes or medical purposes, but whose use could be abused, such as shackles and chains, handcuffs, weapons and devices designed for riot control, equipment disseminating incapacitating or irritating chemical substances, and medicinal substances that can be used in lethal injections, including amobarbital, pentobarbital, and thiopental, but also as legitimate anaesthetics. It must be considered that the EU has enacted special regimes for firearms and the so-called dual-use items, the latter being goods that can have both a military and a non-military utilisation. Since military goods are mostly under the exclusive competence of the Member States or of the CFSP, the Union can regulate trade only in goods that have a civilian use and in borderline goods such as dual-use items and light weapons[61].

[61] See Regulation (EU) No 258/2012 of the European Parliament and the Council of 14 March 2012 implementing Article 10 of the United Nations Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, supplementing the United Nations Convention

The export regime for goods that can be used for the death penalty and other ill-treatment is regulated in Chapters III and IIIa of the Torture Regulation and consists in a system of national authorisations.

Under Articles 6 and 7c, the competent authorities in the Member States shall deny the authorisation to export where there are reasonable grounds to believe that the relevant goods might be used respectively for torture or other ill-treatment or for capital punishment in a third country. In taking such decision, the national authorities must take into account all available information, including national and international case-law, reports by international human rights bodies, and reports by civil society organisations. If it is known that goods listed in Annex III might be used for torture or other ill-treatment in a third country, all operators, whether resident or established in a Member State or not, shall also be prohibited from executing the transit of such goods.

Under Article 8, exporters may request a Union General Authorisation for exports of the medicinal substances listed in Annex IIIa and directed to the countries listed in Annex IIIb, which are third countries that have abolished the death penalty. The Union General Authorisation is automatically issued. However, it must be used in compliance with the conditions and requirements established in Annex IIIb, which prohibits its use in all cases where there is the possibility that the goods may be re-exported to a third country that applies the death penalty, or if there are no binding guarantees that the distributor or the end-user will not transfer, supply or re-export the medicinal goods to law enforcement authorities in a third country that has not abolished the death penalty. If the exporter does not comply with such require-

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against Transnational Organised Crime (UN Firearms Protocol), and establishing export authorisation, and import and transit measures for firearms, their parts and components and ammunition, in *O.J.* L 94 of 30 March 2012, 1; Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, in *O.J.*, L 134 of 29 May 2009, 1; Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, in *O.J.* L 335, 13.12.2008, 99, whose regimes are treated as *lex specialis* by the Torture Regulation (Articles 5 and 7b).

ments, the competent authorities of the Member States can prohibit the exporter from using the authorisation, and at the same time, must inform the authorities of the other Member States, since the authorisation's validity covers the whole territory of the Union.

For all other exports, the national authorities can grant exporters either global or individual authorisations. A global authorisation is granted to one specific exporter or broker in respect of a type of goods listed in Annex III or IIIa and is valid for exports or the supply of brokering services to one or more specified end-users or distributors located in one or more third countries. An individual authorisation, on the contrary, is granted to one specific exporter or broker for exports or the supply of brokering services to one specific end-user in a third country, and covering one or more goods, or to a natural or legal person, entity or body transporting goods within the customs territory of the Union for transit[62]. The exchange of information between the Member States' authorities and the Commission on granted and refused authorisations, as well as on the grounds for the refusal, is crucial for the effectiveness of the whole system. The Commission has the duty to provide a public report every year on the implementation of the Regulation[63].

3.5. *The impact of the trade regime for medicinal products on executions in the U.S.*[64]

In the United States, the separate states largely have exclusive jurisdiction over criminal law and justice (the federal government holds the authority to prosecute a narrow range of federal crimes in each state, provided the federal offense features an interstate nexus or quality). The states can independently decide whether to allow the death penalty in their courts or not, on the assumption that in the U.S. constitutional system, capital punishment is legal under the Fifth Amendment to the Constitution: "[n]o person shall be held to answer for a capital,

[62] See Article 2 (p) and (q).

[63] Article 13.

[64] I am grateful to John T. Carlson, defence lawyer at the U.S. Court of Appeals, Tenth Circuit, for his insightful comments on a first draft of this chapter.

or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury (…), nor be deprived of life, liberty, or property, without due process of law". The same requirement of due process is affirmed for the jurisdiction of the states in the Fourteenth Amendment: "(…) nor shall any State deprive any person of life, liberty or property without due process of law". On the other hand, the prohibition by the Eight Amendment of the imposition of "cruel and unusual punishment" is the basis for the judicial review of the constitutionality of executions, which must take into account either the particular characteristics of the defendant (minor, mentally ill, pregnant woman) or the modalities of the execution, which must not be excessively cruel or inhuman[65].

Out of 50 states that form the USA, 31 have the death penalty, 19 have abolished it, and 4 have a moratorium adopted by an order issued by the Governor. The federal death penalty was reinstated in 1988 for federal crimes, but it is rarely used. Since 1988, seventy-six defendants have been sentenced to death in federal courts, and only three have been executed. No federal executions have taken place since 2003[66]. There is also a special regime for American Indian tribes, which, under U.S. constitutional law, are sovereign within the boundaries of the reservations. For major crimes, Indian land is under exclusive federal jurisdiction, but with respect to the death penalty, the tribes have the possibility to opt-in[67]: nearly all the tribes have rejected the death penalty (only two have opted in) on the grounds of tradi-

[65] For an analysis of the case-law of the Supreme Court on capital cases, see J. Bessler, "Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence", *American Criminal Law Review* (2012): 1913 *ff*.

[66] Source: Death Penalty Information Center, at https://www.deathpenaltyinfo.org (last access June 2018).

[67] "(…) no person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence under this chapter for any offence the federal jurisdiction for which is predicated solely on Indian country (…) and which has occurred within the boundaries of Indian country, unless the governing body of the tribe has elected that this chapter have effect over land and persons subject to its criminal jurisdiction" (18 U.S.C. § 3598). See K. Murray and J.M. Sands, "Race and Reservations: The Federal Death Penalty and Indian Jurisdiction", *Federal Sentencing Reporter* (2001): 28.

tional beliefs, culture and religion[68], but also based on distrust in the fairness of the federal judicial system.

What is relevant for assessing the impact of the EU ban on the trade in death penalty tools, including medicinal drugs, is the case-law on the modalities to carry out executions and the consequences of the lack of such drugs. Normally, the states use a three-drug protocol to carry out executions by means of lethal injection: (1) sodium thiopental or pentobarbital, a sedative that induces a deep, coma-like, unconsciousness; (2) a paralytic agent; and (3) potassium chloride, which causes cardiac arrest[69]. In this protocol, the first drug is crucial in order to qualify the execution as "humane", because only in a state of deep unconsciousness can the person be deemed not to suffer the pain caused by the second and third drugs. The ban on medicinal drugs introduced by the Commission in 2011 and operative since January 2012[70] includes both sodium thiopental and pentobarbital. Before the adoption of the Commission's regulation, some Member States, including Italy, Germany and Denmark, anticipated the application of the ban following the June 2010 Resolution by the European Parliament cited above, which urged the Commission and the Member States to more effectively implement the ban on death penalty and torture goods. In 2011, these States began denying authorisation to supply U.S. correctional facilities with the sodium thiopental and pentobarbital used for executions. The biggest producer of sodium thiopental, a U.S. company, Hospira, which produced the drug in a plant located in Italy, was forced to stop the production of the drug in January 2011 under intense pressure from the Italian

[68] "Navajos see life as precious, good or bad, and so we don't pick and choose. All life is precious", said the Navajo Tribe Council Speaker after the Tribe decided not to request the death penalty for the murderer of a little girl on Navajo land in 2016. Another member of the Tribe added that "our beliefs, that I was raised with, say that no one has a right to take away a life except the Creator. Period. End of story" (*Most American Indian Tribes Opt Out of Federal Death Penalty*, Associated Press, 21 August 2017).

[69] In *Baze v. Rees*, 553 U.S. 35 (2008), the Supreme Court held that this protocol did not violate the Eight Amendment to the Constitution.

[70] Commission Implementing Regulation No 1352/2011 of 20 December 2011 amending Council Regulation (EC) No 1236/2005, in *O.J.* L 338 of 21 December 2011, 31.

government[71]. It did not take long for U.S. correctional facilities to run out of supplies, because such drugs have a short validity time and cannot be used after their expiration date. To continue carrying out executions, it was thus necessary to modify the lethal injection protocol. Sodium thiopental and pentobarbital were substituted with midazolam at a high dosage. Midazolam is a sedative normally used in small doses to induce sleep or unconsciousness before minor surgical procedures, but it is unknown whether it is effective in inducing and maintaining the deep unconsciousness necessary to render the person unable to feel pain associated with the administration of the paralytic agent and potassium chloride. On the contrary, its use is normally not recommended for major or painful surgeries. Not surprisingly, a number of executions featuring midazolam ended with disastrous results. In January 2014, the execution of convicted rapist and murderer Dennis McGuire lasted twenty-six minutes, during which time the prisoner appeared to suffer atrocious pain[72]. The same happened during the 2014 executions of Kenneth Williams in Arkansas, Joseph Wood in Arizona, Clayton Lockett in Oklahoma and of Ronald Smith in Alabama in December 2016.

After the first episodes of botched executions, some inmates sentenced to death in the state of Oklahoma filed an action in federal court under the Eight Amendment claiming that the use of midazolam in lethal injection is unconstitutional as the drug does not prevent the person from feeling pain. The case, *Glossip v. Gross*, was decided by the

[71] See Hospira Statement Regarding Sodium Thiopental Market Exit of 21 January 2011, available at https://www.evaluategroup.com/Universal/View.aspx?type=Story&id=235611.

[72] "I was aghast. Over those 11 minutes or more he was fighting for breath, and I could see both of his fists were clenched the entire time. His gasps could be heard through the glass wall that separated us. Towards the end, the gasping faded into small puffs of his mouth. It was much like a fish lying along the shore puffing for that one gasp of air that would allow it to breathe. Time dragged on and I was helpless to do anything, sitting helplessly by as he struggled for breath", quote from the testimony of Father Lawrence Hummer, *I Witnessed Ohio's Execution of Dennis McGuire. What I Saw Was Inhumane*, available at https://www.theguardian.com/commentisfree/2014/jan/22/ohio-mcguire-execution-untestedlethal-injection-inhumane.

U.S. Supreme Court on 29 June 2015[73]. According to controlling precedents, reaffirmed by the Court, the petitioners must show that the challenged means of execution creates a serious risk of severe pain, failing which they cannot succeed under the Eight Amendment. In addition, the Court controversially held that these petitioners must themselves identify an alternative and less painful method of execution[74]. A divided Court (5-4) upheld the constitutionality of midazolam in the execution protocol, relying on the testimony of expert witnesses who affirmed that midazolam is "highly likely" to render a person unable to feel pain during an execution. To reach such conclusion, the Court first acknowledged that the death penalty is constitutional, so there must be a constitutional means to carry out executions[75]. It then explained the reasons for the shortage of the necessary drugs without mentioning the European ban. The Court referred instead to unspecified, generic "pressures" from "anti-death-penalty advocates"[76]. Before examining the testimony of the experts, the Court paused to describe

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[73] *Glossip et al. V. Gross et al.*, 576 U.S.__ (2015), opinion delivered by Justice Alito for the majority.

[74] Justice Sotomayor, in her beautifully written and passionate dissenting opinion in *Glossip*, argues that the relevant precedent, *Baze*, held no such thing: "[t]he Court today, however, would convert this categorical prohibition [of cruel and unusual punishment] into a conditional one. A method of execution that is intolerably painful – even to the point of being the chemical equivalent of burning alive – will, the Court holds, be unconstitutional *if*, and only if, there is a 'known and available alternative' method of execution".

[75] "Our decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out' (*Baze*, at 47). And because some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risks of pain. After all, while most humans wish to die a painless death, many do not have that good fortune. Holding that the Eight Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether" (*Glossip*, at 4).

[76] "A practical obstacle soon emerged, as anti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences. The sole American manufacturer of sodium thiopental, the first drug used in the standard three-drug protocol, was persuaded to cease production of the drug" (*Glossip*, at 4).

the heinous and horrible crimes for which the petitioners were convicted. Finally, it concluded that the petitioners had failed to meet the requirements outlined above: they did not succeed in proving that midazolam creates a demonstrated risk of severe pain during the execution, and they failed to identify a "known and available" alternative. The decision appears to be based on weak, if not non-existent, scientific evidence and on a quite aggressive defence of capital punishment. The impression the reader receives from *Glossip* is that the Court feels itself to be under siege from public opinion and international community pressures against the death penalty[77]. It is no accident that the Court never mentioned the international community, international law or the European Union, as it had done in some previous cases[78] such as *Roper v. Simmons*, mentioned before, a case prohibiting the death penalty for juvenile offenders.

In 2017, another case came to the attention of the Supreme Court. Petitioner Thomas Arthur, a prisoner on Alabama's death row, showed significant evidence that Alabama's current lethal injection protocol, which includes midazolam, will result in intolerable and needless agony, and he even proposed an alternative: death by firing squad. The Court of Appeals denied his request because Alabama law does not permit executions by firing squad, so it could not be considered a "known and available" alternative under *Glossip*. The Supreme Court, for its part, denied the petition for a writ of certiorari, and thus, there is no Supreme Court opinion, as it is normal for the majority of the Court not to give reasons for declining to hear cases. There is only the dissent by Justice Sotomayor, who pointed out the danger of subordinating the constitutionality of an execution method to state law. The fact that state law does not provide any alternative methods of execution, as a matter of fact, rendered the *Glossip* requirement meaningless and unvi-

[77] See Justice Breyer's *Dissenting opinion*, where he argues that capital punishment is becoming more and more cruel and unusual and should be considered unconstitutional.

[78] On the role of international law in the Supreme Court's case-law, see C. Bradley, "The Federal Judicial Power and the International Legal Order," *Supreme Court Review* (2006): 59 *ff.*; J. Koven Levit, "*Sanchez-Llamas v. Oregon:* The Glass is Half Full," *Lewis & Clark Law Review* (2007): 29 *ff.*

able, as death row inmates will never be able to propose any "known and available" alternative methods of execution. She stressed, on the contrary, that state law must be consistent with the Constitution, and cruel and unusual punishment cannot be permitted under state law[79]. She showed the importance of an evolutive interpretation of the notion of cruel and unusual punishment in the definition of what is constitutional and what is not when it comes to discussing the lawfulness of execution methods[80], and the hypocrisy that lies behind the so-called "humanity" of lethal injection[81]. She concluded her argument by reminding the Court of its duties under the Constitution, which, in her opinion, the Court had abdicated in the last cases[82].

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[79] *Arthur v. Dunn*, 580 U.S. __ (2017), Sotomayor, J. Dissenting opinion.

[80] "The decision below is all the more troubling because it would put an end to an ongoing national conversation— between the legislatures and the courts— around the methods of execution the Constitution tolerates. The meaning of the Eighth Amendment's prohibition on cruel and unusual punishments 'is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791' but instead derives from 'the evolving standards of decency that mark the progress of a maturing society,' *Kennedy v. Louisiana*, 554 U. S. 407, 419 (2008) (quoting *Trop v. Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion). Evolving standards have yielded a familiar cycle: States develop a method of execution, which is generally accepted for a time. Science then reveals that—unknown to the previous generation—the States' chosen method of execution causes unconstitutional levels of suffering. A new method of execution is devised, and the dialogue continues. The Eighth Amendment requires this conversation. States should not be permitted to silence it by statute" (Justice Sotomayor Dissenting Opinion in *Arthur*, at 13).

[81] "Chief Justice Warren famously wrote that '[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man,' *Trop*, 356 U. S., at 100 (plurality opinion). States have designed lethal-injection protocols with a view toward protecting their own dignity, but they should not be permitted to shield the true horror of executions from official and public view. Condemned prisoners, like Arthur, might find more dignity in an instantaneous death rather than prolonged torture on a medical gurney" (Justice Sotomayor Dissenting Opinion in *Arthur*, at 13).

[82] "Twice in recent years, this Court has observed that it 'has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment" (*Baze*, 553 U. S., at 48 (plurality opinion); *Glossip*, 576 U. S.). In *Glossip*, the majority opinion remarked that the Court 'did not re-

The botched executions I recalled above inflamed public opinion, and one hopes that in the long run, this deep sense of indignation and concern will lead to a complete abandonment of capital punishment in the U.S. For the time being, nevertheless, some positive effects of the EU ban can be seen in the following figures: after a peak of 98 in 1999, executions in the United States started to decrease, but the number always remained between 45 and 80. In 2009, there were 52, 46 in 2010, and 43 in 2011 and 2012, and then the effect of the ban started to kick in: 39 executions in 2013, 35 in 2014, 28 in 2015, 20 in 2016, 23 in 2017, and 13 so far in 2018[83]. Many executions have been rescheduled due to the impossibility of obtaining the drugs required to conduct executions[84].

It is possible to say that the European Union's ban had multiple, devastating effects on the U.S. death penalty system: first, it contributed to changing the mentality and the attitude of pharmaceutical companies, which started to consider their involvement in execution incompatible with their mission to work toward saving lives. Second, which is appalling, it was the cause of intense suffering for those inmates who were executed with new untested drugs. That horrendous suffering was instrumental in putting under the spotlight the issue of the death penalty, showing the barbarity of executions. Third, it raised many important legal and constitutional questions that the Court will be forced to address again in the near future, and, as in *Glossip*, the Court is divided on such a delicate and sensitive issue.

On March 14, 2018, Oklahoma, with an unprecedented response to the inability to obtain lethal injection drugs, decided to start using nitro-

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treat' from this nonintervention strategy even after Louisiana strapped a 17-year-old boy to its electric chair and, having failed to kill him the first time, argued for a second try – which this Court permitted. We should not be proud of this history. Nor should we rely on it to excuse our current inaction" (Justice Sotomayor Dissenting Opinion in *Arthur*, at 18).

[83] Source: Death Penalty Information Center, at www.deathpenaltyinfo.org. Last access, July 2018.

[84] An additional problem emerged as states started stockpiling drugs that could be used by hospitals for life-saving surgical procedures in order to be able to carry out executions: see E. Pilkington, "States are stockpiling lethal injection drugs that could be used to save lives", *The Guardian*, 20 April 2017.

gen gas asphyxiation for future executions[85]. This decision raises a moral and legal issue for the EU, which must face the tough accusation that, by making "humane" drugs unavailable, it bears some responsibility for Oklahoma's decision to turn to what is arguably a less humane method of execution. What should be the EU's response to this? The Supreme Court demonstrated that it did not like international pressure on the sovereign determination of the country about the death penalty issue and will probably uphold the state's decision. On the other hand, the EU is acting to preserve its fundamental values and the moral and legal obligation not to become an accomplice to executions. It is a clash between the sovereign right of a State to determine, within the limits of its own Constitution, the boundaries of the notion of "cruel and unusual punishment" and the sovereign right of a group of States gathered in the EU to regulate trade in a way that prevents them and their citizens from being involved in what they consider *per se* cruel and inhuman. It is difficult to predict the outcome of this conflict, but it will certainly involve more battles in court and more suffering.

4. The Alliance for Torture-Free Trade

"Death penalty and torture are a global problem, and we need to act globally". These are the words that the EU Commissioner for Trade pronounced at the launching event of the Alliance for Torture-Free Trade on September 18, 2017 at the United Nations Headquarters in New York. The Alliance is the result of a joint initiative of the European Union, Argentina and Mongolia aimed at banning trade in death penalty and torture instruments worldwide. The EU drew inspiration from its own experience with the Torture Regulation to persuade other countries to join the effort aimed at eradicating the death penalty and torture around the world. As the EU Commissioner said, trade is a very good thing, but it must be based on values, and it must make a

[85] M. Berman, "Oklahoma Says It Will Begin Using Nitrogen for All Executions in an Unprecedented Move," *The Washington Post* (March 14, 2018). Needless to say, defense lawyers are ready to give battle in court.

contribution to the eradication of practices such as capital punishment and torture. Legally speaking, the Alliance is founded on a political declaration, which, so far, has been signed by fifty-eight countries, including all twenty-eight Member States of the Union, plus the EU itself. The political declaration is not an international treaty; it is rather a non-binding document, but the signatory States take a political and moral commitment to act jointly in pursuing the restriction of trade in death penalty and torture goods. As an instrument of *soft law*, its effectiveness depends on the political will of the signatory countries to implement it and put in place the measures necessary to enforce its provisions. The declaration is based on four points: (1) take measures to control and restrict exports of torture goods; (2) equip customs authorities with appropriate tools, including a platform put in place by the Alliance to monitor trade flows, exchange information, and identify new products that can be used for torture or the death penalty; (3) make technical assistance available to help countries with setting up and implementing laws to ban this trade; and (4) exchange practices for efficient control and enforcement systems[86].

[86] EU Trade Commissioner Press Release, September 7, 2017, available at http://europa.eu/rapid/press-release_IP-17-3088_en.htm; 18 September 2017 Political Declaration, available on the website of the Alliance: http://www.torturefreetrade.org/.

Chapter IV
Conflict Diamonds and Minerals

1. Diamonds and valuable minerals: from blessing to curse

It is impossible to describe in a few pages how the blessing of a territory rich in such valuable resources as diamonds and valuable minerals can turn into a curse, but some suggestions can be useful for understanding the impact diamonds have had on the lives of people and on the history of countries.

It is a story of wars, power, exploitation, corruption, and widespread violations of human rights, which has caused endless bloodshed on the African continent for the last forty years, often with the complicity of Western powers and multinational corporations, whose only interest often is to put their hands on diamonds, even if those diamonds are dripping with blood. And it is the story of a conflict between development and war, where the losers are the people: men, women and children who are deprived of their right to sustainable development in the name of economic interests and of the fight for power. A very powerful tool for development, the abundance of valuable natural resources has been turned into a horrible nightmare[1], with the international community unable to effectively change the situation.

[1] There are exceptions, for instance it is worth mentioning the case of Botswana, which has the world's richest diamond deposits and is, since its independence in 1966, a stable and functioning democracy (T. Hughes, "Conflict Diamonds and the Kimberley Process: Mission Accomplished – Or Mission Impossible?," *South African Journal of International Affairs* (2006): 115 *ff*.).

This is also the story of an undisputedly serious commitment by the EU and other international actors, including private corporations and NGOs, to break the link between diamonds and bloody conflicts, a commitment that has registered many successful accomplishments but also presents some weaknesses that will be pointed out in the following pages.

The international community focused on conflict diamonds, or "blood diamonds," in the 90s, during the Angolan civil war, when it became apparent that the armed groups fighting for control of the country were trafficking diamonds to finance their military activity, often with the complicity of the largest diamond companies and of some Western governments[2]. The same happened in Sierra Leone, Ivory Coast, and Liberia, and during the long and bloody war in the Democratic Republic of Congo, a conflict which today has not yet been resolved and where diamond trafficking also involves the neighbouring countries[3]. Diamond trafficking is a very lucrative activity, as it permits military and paramilitary groups, as well as terrorist organisations, to fuel their activities, while at the same time providing high profits to traders, often Western multinational corporations or ruthless traffickers. As a matter of fact, diamonds are the ideal good for trafficking: they are small, highly valuable, easy to hide, difficult to trace, and not detectable by metal detectors or by anti-drug dogs[4].

The international community started to address this phenomenon in 1998, when the United Nations Security Council adopted its first resolution on the matter, introducing a trade embargo on diamonds exported from Angola that lacked the official Certificate of Origin issued by the GURN (Government of Unity and National Reconcilia-

[2] Like Belgium, which wants to protect the economic interests of its Antwerp diamond market.

[3] For the history of conflicts in African countries, see G. Prunier, *From Genocide to Continental War: The Congolese Conflict and the Crisis of Contemporary Africa* (London, Hurst Publishers, 2009); F. Reyntjens, *The Great African War: Congo and Regional Geopolitics 1996-2006* (Cambridge, Cambridge University Press, 2011); G. Fernández Arribas, "The European Union and the Kimberley Process", CLEER Working Papers (2014/3), 1 *ff*.

[4] Fernández Arribas, "The European Union and the Kimberley Process", 8.

tion)[5]. Similar provisions were later adopted for Sierra Leone[6] in order to tackle the illicit trade in diamonds that was fuelling the conflict in the country while at the same time prejudicing the legitimate diamond industry and trade, which can constitute an important factor for development and prosperity[7]. On March 10, 2000, the so-called *Fowler Report* was published[8]. The Report contained an accurate analysis of diamond trafficking in Angola during the civil war and demonstrated that diamonds were the primary source of financial resources for the UNITA (União Nacional para la Indipêndencia Total de Angola, the principal rebel group during the war, against which the UN had already placed sanctions since 1993). According to the Fowler Report, there were many ways through which rough diamonds extracted from Angolan mines under UNITA's control ended up in Antwerp and other Western markets, thus providing the rebels with the weapons and other commodities needed for their military action. An earlier report, published by the NGO Global Witness in 1998, provided details on the role of multinational corporations in the diamond trade and pointed out the difficulties in the implementation of the trade embargo on rough diamonds, which were especially due to the economic interests at stake, particularly in countries such as Belgium, as Antwerp is the strongest marketplace in the world for diamonds[9]. The problem was not limited to the Angolan situation, as many other countries in the area were also involved on account of the porosity of the borders and of

[5] UNSC Resolution 1173 (1998) of 12 June 1998, S/RES/1173 (1998), paragraph 12 (b) and (c).

[6] UNSC Resolution 1306 (2000), of 5 July 2000, S/RES/1306 (2000).

[7] "Emphasizing that the legitimate diamond trade is of great economic importance for many States, and can make a positive contribution to prosperity and stability and to the reconstruction of countries emerging from conflict, and emphasizing further that nothing in this resolution is intended to undermine the legitimate diamond trade or to diminish confidence in the integrity of the legitimate diamond industry" (Preamble of UNSC Resolution 1306 (2000).

[8] Final Report of the UN Panel of experts on the situation in Angola, established under UNSC Res 864 (1993).

[9] Global Witness, *A Rough Trade: The Role of Companies and Governments in the Angolan Conflict* (London, 1998), available at https://www.globalwitness.org/en/archive/rough-trade/.

the endemic situation of conflict in the region of Sub-Saharan Africa. Addressing the issue of the illegal diamond trade thus became a priority for the international community.

2. The Kimberley Process

In May 2000, a meeting of the representatives of States involved in the diamond trade took place in Kimberley, South Africa, with the participation of representatives of the diamond industry, such as the World Diamond Council (WDC), an organisation gathering diamond traders from different countries in the world[10] and NGOs active in the area, such as Global Witness. It was an innovative formula for an international conference, and it actually was not an international conference in the sense that this term is normally understood in international law[11]. The advantage of the tripartite participation was the possibility to directly involve the stakeholders; the disadvantage was the impossibility of concluding a formal and legally binding international agreement between all the participants. The outcome of the meeting was a declaration that expressed the commitment of the participants to take action in order to break the link between conflict diamonds and armed conflict, starting what became known as the Kimberley Process. The governments of the countries involved in diamond production, import and export met in Pretoria, South Africa on September 21, 2000, and again in London on October 25 and 26 of the same year. In the statements issued at the conclusion of the meetings of the intergovernmen-

[10] The World Diamond Council was established in July 2000 by a resolution passed at the World Diamond Congress in Antwerp, Belgium by the World Federation of Diamond Bourses and the International Diamond Manufacturers Association to respond to the growing problems posed to the diamond industry by human rights activists and legislators in different countries questioning the impact of diamond sales on conflicts worldwide.

[11] An international conference is a meeting of State representatives (State organs). The presence of private subjects such as the NGOs and the trading companies made the Kimberley meeting something different and more informal than a traditional international conference.

tal pillar of the Kimberley Process, the participants expressed their resolve to "maintain the momentum of the Kimberley Process by moving ahead into an intergovernmental process to design a workable international certification scheme for rough diamonds. We favour a simple and effective scheme that does not place undue burden on governments and industry, particularly smaller producers"[12]; the Ministers acknowledged that conflict diamonds make up only a small fraction of the overall market for rough diamonds and that this market contributes to economic development worldwide. The London meeting is important because in the final statement, the ministers recognised the need to involve private actors in the diamond industry and civil society in the Kimberley Process (the WDC was invited to this meeting). The participant States sponsored an important resolution, which was adopted by the United Nations General Assembly in December of that same year. The resolution welcomed and supported the efforts of the Kimberley Process promoters towards the solution of the problem of the illegal trade in conflict diamonds, encouraging the States parties to the Process to proceed rapidly with the "creation and implementation of a simple and workable international certification scheme for rough diamonds"[13].

The actual proposal for the Kimberley Process Certification Scheme (KPCS) was launched at a meeting which took place in Interlaken, Switzerland on November 5, 2002, with the participation of thirty-seven States[14]. The certification scheme discipline (the so-called "core

[12] Ministerial Statement, conclusions of the Ministerial Meeting Pretoria, September 21, 2000, available at https://www.kimberleyprocess.com/en/2000-ministerial-statment-conclusions-ministerial-meeting-pretoriacompendium.

[13] UNGA Resolution 55/56 of 1 December 2000, A/RES/55/56, on the role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to the prevention and settlement of conflicts, paragraph 3(a). In 2002, the General Assembly adopted Resolution 56/263 of 13 March 2002, which urged the States participating in the Kimberley Process to come up with proposals for an international system of certification for rough diamonds.

[14] Angola, Australia, Botswana, Brazil, Burkina Faso, Canada, Ivory Coast, the People's Republic of China, Cyprus, the Czech Republic, the Democratic Republic of Congo, the European Community, Gabon, Ghana, Guinea, India, Israel, Japan,

document") was annexed to the final declaration of the meeting. From the legal point of view, it is a recommendation to the States parties to adopt domestic legislation consistent with the provisions of the document ("Participants, (…) recommend the following provisions"). The scheme establishes a system of international certification for rough diamonds. The definition of "conflict diamonds" can be read in Section I of the Interlaken "core document"[15]:

> CONFLICT DIAMONDS means rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council (UNSC) resolutions insofar as they remain in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognised in United Nations General Assembly (UNGA) Resolution 55/56, or in other similar UNGA resolutions which may be adopted in future.

It is a very specific definition that focuses only on the role of the diamond trade in fuelling conflicts and is limited to rough diamonds, excluding polished diamonds and diamonds that are part of jewellery.

According to the core document, each shipment of rough diamonds must be accompanied by the Kimberley Process Certificate, issued by the exporting countries' competent authorities, which should provide an indication of origin for all the parcels of diamonds, together with their value, the carat weight of the gems, the name of the exporter and importer, and other information.

The core document also contains recommendations for the control by governments of mine sites, especially of small and artisanal mines, which should be subject in any case to a licensing procedure, as well as for the licensing of exporters and importers, for the traceability of payments and

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the Republic of Korea, Lesotho, Malta, Mauritius, Mexico, Namibia, Norway, Philippines, the Russian Federation, Sierra Leone, South Africa, Swaziland, Switzerland, Tanzania, Thailand, Ukraine, the United Arab Emirates, the United States of America and Zimbabwe.

[15] The text can be read on the website of the KP (https://www.kimberleyprocess.com) in a version that includes the modifications adopted by the Participants in 2015.

for other practical issues aimed at enhancing the effectiveness and transparency of the whole process (Annex II, on the so-called minimum requirements). The participants also must disclose annual reports and statistics on the production, exports and imports of rough diamonds. There is a provision about compliance that establishes a peer review mechanism which functions by means of missions in the participants' territory, with the consent of the State. However, nothing is said in the KPCS document about sanctions against a participant that does not comply (Section VI of the core document). Nevertheless, in practice, States have been sanctioned for failing to comply with the KPCS requirements. Until 2006, the non-compliant State was expelled from the KP, as happened with the Republic of Congo (Congo Brazzaville) and Lebanon in 2004[16]. In 2006, the Plenary Meeting in Gaborone, Botswana opted for the suspension, rather than expulsion, of non-compliant members[17]. The last case of measures adopted against a non-compliant member was the temporary suspension of the Central African Republic in 2013[18]. As a matter of fact, the measures adopted against the Central African Republic can be qualified as an embargo on diamonds due to breaches of voluntary political commitments in a very critical situation where the government had no

[16] Hughes, "Conflict Diamonds", 115-16.

[17] Plenary Final Communique, 6-9 November, Gaborone, Botswana: "[t]he plenary agreed to: publish the names of participants which habitually fail to submit statistics; highlight requirements related to illegal shipments; develop proposals related to interim measures including possible suspension in cases of significant non-compliance". The text is available at https://www.kimberleyprocess.com/en/2006-final-communique-plenary-gaborone-botswanacompendium.

[18] The Central African Republic (CAR) was temporarily suspended in 2013 with an administrative decision taken by the Plenary: "[t]he Plenary notes that pockets of rebel groups are operating in the Eastern part of the country, including in a number of diamond-producing areas around Sam Ouandja, Bria and Bamingui and decides that the information reviewed could constitute non-compliance with the minimum requirements of the certification scheme, in particular Section IV of the KPCS document, according to which each Participant should 'establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipments of rough diamonds imported into and exported from its territory' (…). Participants decide to temporarily refrain from sending or receiving rough diamond shipments from the CAR as a preventive measure" (all the KP documents are available on the KP website: https://www.kimberleyprocess.com).

effective control over the territory because of the presence of rebel forces. In many other cases, there have been vigilance missions and assessments of the situation, but there have been no other cases of suspension. For example, in 2006, the Participants adopted a decision regarding Venezuela where they recognised the existence of significant non-compliance. No sanctions were adopted, and there was only a decision to send a review mission to the country. The same happened with Brazil and Guyana, where the Governments proved unable to guarantee respect for the KP requirements but were nevertheless not sanctioned[19]. In December 2005, the Security Council adopted an embargo on trade in rough diamonds originating in the Ivory Coast[20]. In November of that same year, the Plenary of the KP, meeting in Moscow, decided to take all necessary steps to prevent Ivorian diamonds from entering the legitimate diamond trade but did not expel or suspend the country. They chose, in that case, to work in close cooperation with United Nations bodies. In 2011, a decision by the Plenary of the KP addressed the situation in the Marange region in Zimbabwe, where there was a very complex situation of non-compliance, lack of control by the State's authorities and violations of human rights. Nevertheless, the Participants decided to endorse exports of diamonds produced in those Marange mines that could be considered compliant[21]. In fact, the main focus of the certification regime is on conflict prevention and settlement, rather than on human rights protection.

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[19] Brazil decided autonomously to suspend all its diamond exports, acknowledging its inability to control diamond production and trafficking in the country. See Hughes, "Conflict Diamonds", 126.

[20] UNSC Resolution No 1643 (2005) of 15 December 2005, S/RES/1643(2005).

[21] These cases triggered the decision by the NGO Global Witness to withdraw from the KP. The NGO stated that the KP was unwilling to take serious action in the face of blatant breaches by Venezuela and has proven unwilling to stop diamonds fuelling corruption and violence in Zimbabwe. They even accused the KP of having become an accomplice to diamond laundering – whereby dirty diamonds are mixed in with clean gems. See the statements at www.globalwitness.org; see also Fernández Arribas, "The European Union and the Kimberley Process", 19; this author also points out that in some countries, corrupted governments facilitate the issue of certificates for conflict diamonds, which, in this way, are mixed in with gems of legitimate origin. According to Hughes, "Conflict Diamonds", 123, the question is whether the KP has sufficient "teeth."

Of course, conflicts cause gross and widespread human rights violations, and all measures which address conflicts also address disastrous human rights situations. But, at the same time, the regime that was put in place with the Kimberley Process is limited to considering and regulating only those diamonds that are used to fuel conflicts. Thus, there is the contradictory consequence that mines for the extraction of diamonds recognised as employing (the right word here would be exploiting) people, even children, in conditions of slavery, but that do not supply armed rebel groups, are considered clean. This happens, above all, in artisanal and alluvial mines run by small groups or families in very poor conditions and in remote areas, where it is very hard to monitor production and to trace the diamonds that are extracted.

Civil society and representatives of the industry are invited to take part in the KP as observers. This system preserves the intergovernmental character of the KPCS, which had been contaminated by the Kimberley meeting that started the whole process. Now, it can be said that the Kimberley Process is formally an intergovernmental entity where civil society and diamond industry representatives take part as registered observers and are involved in the Committees and Working Groups (for example, the World Diamond Council, for its technical expertise, holds the Chair of the Working Group of Diamonds Experts) but do not take part in Plenary meetings. Most decisions, although formally taken by the Participants, i.e. the States, are however taken by means of a so-called "tripartite consensus", which also considers the opinions of NGOs and of the diamond industry[22].

The KPCS received appreciation and support from the Security Council and the General Assembly[23]; in particular, the General Assembly called for the widest possible participation in the KPCS[24] and appreciated the inclusion of civil society and the diamond industry in the process.

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[22] Fernández Arribas, "The European Union and the Kimberley Process", 15-16.

[23] UNSC Resolution 1459 (2003) of 28 January 2003, in which the Security Council expressed strong support for the KPCS, and UNGA Resolution 57/302 of 15 April 2003.

[24] In 2017, the number of participant countries had increased to fifty-four, including the EU, which means that in terms of States, the system covers eighty-two countries.

As mentioned before, the KPCS is non-binding for the participant States. Thus, it can be considered an example of international *soft law*, calling for voluntary compliance. It has also been defined as a voluntary political agreement[25] or as an example of informal international lawmaking, meaning an international instrument that is not a formal agreement, but establishes rules that are normally followed by the parties through the adoption of domestic norms and the establishment of internal systems of control and sanctions for breaches[26]. There are clues, however, that the core document can be considered an international agreement or at least that it has acquired a binding character in the practice of the implementation of the system. First, it is perfectly normal that an international agreement is not directly applicable and that it needs domestic implementation measures in order to be applied inside the domestic legal order. Second, the possibility to suspend a Participant in the case of a breach of the minimum requirements seems to contradict the voluntary and non-binding character of the system. At the very least, compliance with the recommendations of the core document can be qualified as a condition for the participation in the "club" of the KP, and the other members are allowed to expel or suspend the members that do not comply. Expulsion and suspension are guarantees of the correct operation of the mechanism, but at the same time, such procedures allow an argument in favour of the shift of the system towards a more binding character. The KP, despite some degree of institutionalisation – a rotating Chairmanship, periodic meetings of the parties, and a number of committees and working groups – is not an international organisation. It has a very loose administrative structure, mostly based on confidential diplomatic contacts and administrative services provided by the Chairman, and there is no headquarters but a virtual one provided by the website[27].

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[25] Fernández Arribas, "The European Union and the Kimberley Process", 16.

[26] J. Pauwelyn, "Informal International Lawmaking: Framing the Concept and Research Questions", in *Informal International Lawmaking*, eds J. Pauwelyn, R.A. Wessel, and J. Wouters (Oxford, Oxford University Press, 2012), 22; J. Klabbers, *International Courts and Informal International Law*, *ivi*, 220.

[27] The 2017 Plenary decided to create an Ad Hoc Committee on Review and Reform to address the definition of a reform of the KP's structure towards increased institutionalisation, including the creation of a permanent secretariat.

3. The Kimberley Process and the WTO

The KPCS entails restrictions on trade in rough diamonds, as it prohibits its trade in diamonds between participating and non-participating States. Specifically, the Participants are under a prohibition against importing diamonds originating from non-participating countries as they lack the required certification. In addition, the scheme precludes trade in rough diamonds originating from those participating States which have been suspended from the scheme for non-compliance with the requirements. It thus results in a contradiction with the WTO non-discrimination and equal treatment rules in Article I (General Most-Favoured-Nation Clause), as well as with the elimination of quantitative restrictions pursuant to Articles XI (general elimination of quantitative restrictions) and XIII (non-discriminatory administration of quantitative restrictions) of the GATT.

At the moment of defining the scheme, some of the Participants, including the EU, opted for the solution the EU had already adopted in the Torture Regulation, namely to rely on the general exceptions in Article XX of the GATT. In fact, the KP could very well fit into the Article XX (a), protection of public morals, or Article XX (b), protection of human life and health, exceptions. It has been suggested that the KP could also be exempted from GATT rules under Article XXI, which provides an exception based on national security reasons, as a link certainly exists between conflict diamonds and terrorist groups; Article XXI also provides an exception for actions taken in accordance with the UN Charter and, as stated above, the KP received multiple endorsements from UN bodies, including the General Assembly and the Security Council[28]. In the case of the KP, where there is strong evidence

[28] K.E. Woody, "Diamonds on the Souls of Her Shoes: The Kimberley Process and the Morality Exception to WTO Restrictions", *Connecticut Journal of International Law* (2007): 351 *ff*. The author argues that the KP, unlikely other measures that have been challenged in the GATT/WTO system, is a voluntary agreement involving numerous countries, open to other countries willing to meet the requirements, rather that the result of one country imposing its own standards on the others (such as, for example, in the *Tuna-Dolphin* case or in the *Shrimp-Turtle* case: see *infra*, the following chapter).

that conflict diamonds are related to serious and widespread human rights abuses, both in the process of production of the diamonds and for the use that rebels and other irregular armed forces make of the profits they gain from trade in diamonds, a challenge in the WTO against the trade restrictions would be very unlikely[29]. Notwithstanding such considerations, other Participants[30] decided it was safer to request a waiver from the WTO bodies. The adoption of the waiver was decided by consensus by the WTO General Council on May 15, 2003 and was applicable from January 1, 2003 to December 31, 2006. It was later extended from January 1, 2007 to December 31, 2012 and again from January 1, 2013 to December 31, 2018[31]. The waiver allows the Participant States to derogate from the obligations of Articles I (1), XI (1) and XIII (1) of the GATT for the period concerned in consideration of the "extraordinary humanitarian nature of this issue and the devastating impact of conflicts fuelled by the trade in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts"[32] and of the involvement of the United Nations in the issue.

The request and adoption of a WTO waiver raised many contrasting reactions from commentators, as the issue involves the wider controversial topic of the relationship between trade rules and other potentially conflicting interests such as human rights protection[33]. Some authors believe that the fact that WTO Members felt the necessity to be granted a waiver from WTO obligations in order to be able to implement measures aimed at pursuing non-commercial interests and values such as human rights protection implies a superiority, a kind of hierarchy in

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[29] Woody, "Diamonds on the Souls of Her Shoes", 354; K. Nadakavukaren Schefer, "Chilling the Protection of Human Rights: What the Kimberley Process Waiver Can Tell Us About the WTO's Effect on International Law", NCCR Trade Working Paper No 2007/03.

[30] Canada, Japan, and Sierra Leone, joined by other Participants.

[31] Decisions WT/L/518 of 15 May 2003; WT/L/676 of 15 December 2006; WT/L/876 of 14 December 2012.

[32] Decision of 14 December 2012.

[33] See Reid, *Balancing Human Rights*.

international law, where international trade prevails over all other interests of the international community[34]. On the contrary, other commentators argue that the very fact that a waiver is requested kicks off a discussion: in this sense, the waiver process can be considered as a forum for a wide political debate in the WTO on the need to reconcile conflicting norms and interests without implying any superiority of trade rules over other international law norms[35]. The origin of a waiver request is, as a matter of fact, the existence of a conflict between legal regimes in an international law system that is characterised by fragmentation and where conflicts frequently arise[36]. In the effort to reconcile conflicting legal regimes, it is crucial to rely on existing legal procedures within international institutions, such as the United Nations and the WTO. In this sense, the waiver process can become an instrument to restrict WTO jurisdiction in favour of other international legal regimes that can better deal with certain issues[37]. At the same time, waivers are more transparent and open to public debate than unilateral derogations such as the general exceptions. The latter, in fact, are largely based on the individual interests of the parties involved (those that implement the restrictive measures and those that might react on the basis of the nullification and impairment of their commercial interests, both often disregarding international law norms and values). It is true that, as mentioned above, the KP could probably be successfully covered by the general exception clause without the need to request a waiver. However, in my opinion, the complexity of the interactions between international law regimes re-

[34] Woody, "Diamonds on the Souls of Her Shoes"; Nadakavukaren Schefer, "Chilling the Protection of Human Rights"; J. Pauwelyn, "WTO Compassion or Superiority Complex? What to Make of the WTO Waiver for 'Conflict Diamonds'", *Michigan Journal of International Law* (2003): 1177 *ff.*: The latter author fears that the precedent of the conflict diamonds waiver might undermine future trade restrictions imposed for humanitarian purposes if this is done in the absence of a waiver.

[35] I. Feichtner, "The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests", *European Journal of International Law* (2009): 615 *ff.*

[36] See M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, A/CN.4/L.682 of 13 April 2006.

[37] Feichtner, "The Waiver Power of the WTO", 615 *ff.*

quires, whenever it is possible, such interactions to be regulated by clear and transparent rules and procedures. This can be effectively achieved by means of discussions in international fora such as the WTO, making use of established procedures such as the waiver process. Moreover, the KP is a legal regime characterised by a broad participation of countries, and it is based on an (informal) agreement, which makes it different from unilateral State measures. Given its scope and its objectives, it is appropriate to establish clear rules for the definition of its relations with the wider multilateral trade regime. This does not diminish the role and the legal force of non-commercial values such as human rights protection and conflict prevention that are at the core of the KP. From this perspective, the waiver process can be considered as a valuable instrument to coordinate potentially conflicting regimes without undermining the possibility to resort to the general exception clause in different situations, as is confirmed by the EU's Torture Regulation of 2005, which relies on the public morals exception and has so far never been challenged by other WTO Members.

4. The EU Regulation on the rough diamonds certification scheme

The European Community (later the European Union) was a participant in the KP from day one, as it is one of the biggest actors in the diamond trade, especially through the diamond district of Antwerp in Belgium[38]. The EU is represented in the KP by the Commission, in the person of the director of the Service for Foreign Policy Instruments (FPI), a Commission department that is responsible, alongside the European External Action Service, for the management of the financial and operational components of the EU's foreign policy, including the KP and the Torture

[38] It is estimated that around 84 percent of all rough diamonds from around the world are traded through Antwerp (https://www.awdc.be/en/diamond-trade-and-industry: last access June 2018).

Regulation, as well as for implementing international economic sanctions and deploying elections observation missions[39].

After the first KP meetings of 2000, the Council of the EU adopted the *EU Programme for the Prevention of Violent Conflicts*[40], whose paragraph (13), indent (8) reads as follows: "Member States and the Commission will tackle the illicit trade in high-value commodities, including by taking forward work to identify ways of breaking the link between rough diamonds and violent conflicts and through support for the Kimberley Process". Such statement has been interpreted as the application of the treaty-making procedure in an informal way[41].

Regulation 2368/2002[42] implementing the Kimberley Process for the international trade in rough diamonds was adopted by the Council on December 20, 2002 and was later repeatedly integrated by Commission implementing regulations. The main modification was introduced in 2014 to include the territory of Greenland in the implementation of the KPCS[43]. In Europe, there is no diamond production, so all the diamonds that circulate on the continent are imported. Those that are exported

[39] The FPI is the *alter ego* of the European External Action Service on the Commission's side. It implements all the foreign policy measures that fall within the external competences of the Commission, primarily those that require the management of the financial instruments for the EU's external action.

[40] Council of the European Union, Doc. 9537/1/01 of 7 June 2001. The document was endorsed by the Goteborg European Council of 15-16 June 2001.

[41] Given the voluntary character of the KP core document, there was no need at the EU level to trigger the treaty-making procedure of Article 218 TFUE (at that time, it was Article 228 TEC). However, it appeared appropriate for the Commission to receive some kind of endorsement or authorisation, even if informal, from the Council as the decision-making body in the field of external action: see Fernández Arribas, "The European Union and the Kimberley Process", 21, who speaks of an "indirect application of the procedure for the conclusion of international agreements".

[42] Council Regulation (EC) No 2368/2002 of 20 December 2002, implementing the Kimberley Process certification scheme for the international trade in rough diamonds, in *O.J.* L 358 of 31 December 2002, 28.

[43] Regulation (EU) No 257/2014 of the European Parliament and the Council of 26 February 2014, amending Council Regulation (EC) No 2368/2002 as regards the inclusion of Greenland in implementing the Kimberley Process certification scheme, in *O.J.* L 84 of 20 March 2014, 69.

from Europe have previously been imported. In the last years, however, because of the melting of the ice due to global warming, diamonds and other gems have been discovered under the ice that covers the territory of Greenland, and this Danish island was converted into a diamond producing territory. Following a referendum held in 1982, which decided the withdrawal of Greenland from the EU, the island has been associated with the EU, but its territory is not a part of the customs territory of the Union for the purpose of trade regulations. In such a situation, the diamonds extracted in Greenland would be originating in a territory that is not a participant in the KP, and consequently, they would be excluded from international trade. It was thus necessary to include Greenland in the KPCS under the representation of the Commission in the same position as the other EU Member States.

The Regulation establishes a system of implementation for the KPCS based on an administrative structure centred on the Commission and on a number of "Community authorities" designated by the Member States. The Community authorities are national authorities, but act on behalf of the Union and are, in effect, Union administrative organs. Not all the Member States have designated a Community authority. There are only five of them listed in Annex III to the Regulation, located in Belgium, the Czech Republic, Germany, Portugal, Romania and the United Kingdom. Trade operators that are nationals of Member States where there is no Community authority must refer to one of them. The Community authorities must report back to the Commission on all their activities. The import and export of rough diamonds into or from the Union are prohibited unless they fulfil the conditions that are established in the Regulation. All shipments of rough diamonds must be contained in tamper-resistant containers and accompanied by a certificate. In the case of imports, the certificate must be issued by the competent authority of a KP Participant, and it is the task of the Community authority to verify and validate it before allowing the diamonds into Union territory. If the requirements are not fulfilled, the Community authority will detain the package and inform the Commission and the competent authority of the exporter. In the case of exports, the accompanying certificate (EU certificate) will be issued by one of the Community authorities when it has established that

the rough diamonds were lawfully imported or were mined or extracted in Greenland (Article 12 of Regulation 2368/2002).

The procedures are significantly simplified if diamond traders commit to the "industry self-regulation" of Chapter IV of the Regulation. Under the provisions of Article 17, organisations representing traders in rough diamonds which have established a system of warranties and industry self-regulation for the purpose of implementing the KPCS may apply to the Commission for a listing in Annex V[44]. The traders' organisations must fulfil all the requirements and make all the commitments that are indicated in Article 17(2) of the Regulation[45]. In the

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[44] Five organisations have been listed so far, of which four are located in Antwerp and one in London.

[45] "(i) sell only diamonds purchased from legitimate sources in compliance with the provisions of relevant United Nations Security Council Resolutions and of the Kimberley Process Certification Scheme and guarantee in writing on the invoice accompanying each sale of rough diamonds that, on the basis of their personal knowledge and/or written warranties provided by the supplier of such rough diamonds, the rough diamonds sold are therefore not conflict diamonds; (ii) see that each sale of rough diamonds is accompanied by an invoice containing the said signed guarantee unequivocally identifying the seller and buyer and their registered offices, containing the VAT identification number of the seller, where applicable, the quantity/weight and qualification of the goods sold, the value of the transaction and the date of delivery; (iii) not buy rough diamonds from suspect or unknown sources of supply and/or rough diamonds originating in non-participants in the KP certification scheme; (iv) not buy rough diamonds from any source found, after legally binding due process, to have violated government laws and regulations concerning the trade in conflict diamonds; (v) not buy rough diamonds in, or from, any region that is the subject of an advisory notice from a governmental or KP certification scheme authority to the effect that conflict diamonds are emanating from, or are available for sale in, that region; (vi) not knowingly buy, sell or assist others in buying or selling conflict diamonds; (vii) ensure that all employees buying or selling rough diamonds within the diamond trade are fully informed of trade resolutions and government regulations restricting the trade in conflict diamonds; (viii) create and maintain for at least three years records of invoices received from suppliers and issued to customers; (ix) instruct an independent auditor to certify that these records have been created and maintained accurately and either that it has identified no transactions which failed to comply with the undertakings referred to in (i) to (viii) or that any transaction which failed to comply with such undertakings has been duly reported to the ap-

case of infringement, the Commission can remove the organisation from the list. Being included in the list provides many advantages, as the import procedures are much simpler: it is sufficient for the importer to submit a signed declaration stating the lawfulness of the import to the Community authority (Article 13).

The Regulation requirements do not apply to diamonds that enter the Union's territory for the sole purpose of transit, provided that the containers are sealed, and the accompanying certificate has not been tampered with (Article 18).

It is up to the Member States to determine the sanctions to be imposed in the case of infringement of the Regulation. Such sanctions shall be effective, proportionate and dissuasive and shall be capable of preventing those responsible for the infringement from obtaining any economic benefit from their action (Article 27).

The system put in place by the Regulation is an effective coordination of public administration and private self-regulation in the name of corporate social responsibility that later would be the centre of the regulation on conflict minerals, and it reflects the structure of the KP, whose effectiveness largely depends on the involvement and engagement of the diamond industry.

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propriate Community authority; and (b) provide conclusive evidence that it has adopted rules and regulations which oblige the organisation: (i) to expel any member found, after a due process inquiry by the organisation itself, to have seriously violated the abovementioned undertakings; and (ii) to publicise that member's expulsion and notify the Commission thereof; (iii) to make known to all its members all governmental and KP certification scheme laws, regulations and guidelines regarding conflict diamonds and the names of any natural or legal person found guilty, after legally binding due process, of violating these laws and regulations; and (c) provide the Commission and the appropriate Community authority with a complete list of all its members dealing in rough diamonds, including full names, addresses, location and other information which will contribute to avoiding mistaken identities".

5. Corporate social responsibility and conflict minerals. The EU Regulation on due diligence

On May 17, 2017, the EU legislators passed an important and innovative piece of legislation, Regulation (EU) No 2017/821[46]. This Regulation disciplines the behaviour of Union importers with regard to the import of some minerals from conflict-affected and high-risk areas of the world. Unlike the KPCS Regulation or the Torture Regulation, the 2017 Regulation does not introduce a ban on trade in minerals originating from conflict areas but adopts a different approach. The objective of the Regulation, based on Article 207 TFEU (Common Commercial Policy), is to guide the action of private Union importers towards a responsible conduct of their business, applying the principles of corporate social responsibility to the supply chain of selected minerals.

5.1. *Background*

Some preliminary background information is necessary to better understand the problems the Regulation aims to address. The conflict minerals (and metals) problem derives again from the ongoing conflict in the Democratic Republic of Congo (DRC), where armed groups and rebels continue to fuel their violent actions with the revenues from illegal mining activities and the illegal trade of minerals across the border with neighbouring countries, accompanied by widespread violations of human rights, violence against children and rape of women. In Resolution No 1952 (2010)[47] on the situation in the DRC, the United Nations Security Council acknowledged the linkage between the illegal exploitation of natural resources, the illicit trade in such resources and the proliferation and trafficking of arms as one of the major factors fuelling and exacerbating conflicts in the Great Lakes Region of Africa. The Resolution expressed support for the conclusions reached by the

[46] Regulation (EU) No 2017/821 of the European Parliament and the Council of 17 May 2017, laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, in *O.J.* L 130 of 19 May 2017, 1.

[47] S/RES/1952 (2010) of 29 November 2010.

Group of Experts established pursuant Resolution 1533 (2004)[48] which, among other things, recommended the adoption of guidelines for due diligence for importers, processing industries and consumers of Congolese mineral products, to mitigate the risk of further exacerbating the conflict in the eastern part of the DRC by providing direct or indirect support to illegal armed groups, individuals found to violate the assets freeze and travel bans, criminal networks and perpetrators of serious violations of international humanitarian law and human rights abuses[49]. In light of such considerations, the Security Council called "upon all States to take appropriate steps to raise awareness to the due diligence guidelines referred to above" and to urge importers, processing industries and consumers to exercise due diligence that includes the steps described by the Group of Experts in its final report: (1) strengthening company management systems; (2) identifying and assessing supply chain risks; (3) designing and implementing strategies to respond to identified risks; (4) conducting independent audits; and (5) publicly disclosing supply chain due diligence and findings[50].

The Security Council's exhortation to the States to urge private corporations to exercise due diligence can be framed in the context of the debate on the responsibility of private businesses with regard to human rights protection. In 2008, the Special Representative of the UN Secretary-General John Ruggie published a Report with a significant title: "Protect, Respect and Remedy. A Framework for Business and Human Rights"[51] in which the same Special Representative drafted the

[48] S/RES/1533 (2004) of 12 March 2004.

[49] Group of Experts final report, S/2010/596, and S/RES/1952 (2010), paragraph 7. The document adopted by the Group of Experts and endorsed by the Security Council was called "Due diligence guidelines for the responsible supply chain of minerals from red flag locations to mitigate the risk of providing direct or indirect support for conflict in the eastern part of the Democratic Republic of the Congo".

[50] S/RES/1952 (2010), paragraph 8.

[51] J. Ruggie, *Protect, Respect and Remedy. A Framework for Business and Human Rights*, Report of the Special Representative of the United Nation Secretary-General on the issue of human rights and transnational corporations and other business enterprises, endorsed by the UN Human Rights Council with Resolution A/HRC/8/5 of 7 April 2008. In 2014, the Human Rights Council adopted a resolution (A/HRC/26/9), which established an open-ended intergovernmental working

"Guiding Principles on Business and Human Rights", endorsed by the UN Human Rights Council in June 2011[52]. Both documents acknowledge a well-known feature of the international community, which became even more apparent with the development of globalisation, namely the active role of private companies, particularly multinational corporations, in international relations[53], and the need to actively involve them in the protection of human rights, even independently of the action of the States: according to the Guiding Principles, in fact, States, under international law, have the duty to protect human rights, while corporate responsibility to respect human rights is a "global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and willingness to fulfil their own human rights obligations"[54]. In other words, multinational corporations which operate in areas where the territorial State is not able or willing to enforce human rights are nevertheless under the responsibility to guarantee the respect for fundamental human rights. The OECD (Organisation for Economic Cooperation and Development) has been working on similar issues since the 70s, when the first edition of the "Guidelines for Multinational Enterprises" was adopted in order to spread the criteria for ethical business in areas such as environmental protection, human rights and labour rights, the fight against child labour, and the fight against corruption and bribery. The Guidelines have been revised and updated several times since their first adoption,

group on transnational corporations and other business enterprises with respect to human rights (OEIGWG). Mandate of the OEIGWG is to elaborate an internationally binding legal instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. In July 2018, the OEIWGW released the first official draft of the legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises ("Zero Draft"). The text of the "Zero Draft" can be read at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf.

[52] *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, endorsed by the UN Human Rights Council in Resolution of 6 July 2011 (A/HRC/RES/17/4).

[53] See R.-J. Dupuy, "Le dédoublement du monde", *Revue Générale de droit international public* (1996): 313 *ff*.

[54] *Guiding Principles on Business and Human Rights*, commentary to Principle 11.

and the OECD has also integrated the main document with sector-specific documents. In 2010, the OECD approved the "Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas"[55], which follows the path opened by the final report of the UN Group of Experts on conflict minerals from the DRC and neighbouring countries[56].

In December 2010, the Heads of State and Government of the African Great Lakes Region meeting in Lusaka took a political commitment to fight the illegal exploitation of natural resources in the region[57], approving "the six tools developed to curb illegal exploitation of natural resources, namely (1) Regional Certification Mechanism; (2) Harmonisation of National Legislation; (3) Regional Database on Mineral Flows, (4) Formalisation of the Artisanal Mining Sector; and (5) Promotion of the Extractive Industry Transparency Initiative (EITI) and (6) Whistle Blowing Mechanism".

The international legal background of the EU legislation is thus largely based on non-binding documents having the character of recommendations or political statements, with the exception of the Security Council Resolution, which established the obligation for the States to "raise awareness" of the due diligence guidelines. Nevertheless, no obligations arise for private enterprises directly from a Security Council Resolution.

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[55] The OECD Ministerial Council Recommendation that accompanies the Guidance recommends that adhering States "actively promote the observance of the Guidance by companies operating in or from their territories and sourcing minerals from conflict-affected or high-risk areas with the aim of ensuring that they respect human rights, avoid contributing to conflict and successfully contribute to sustainable, equitable and effective development" (OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 3rd ed. (Paris, 2016), 9.

[56] On the UN Guidelines and OECD Guidance, see V. Grado, "Diversità e unità d'approcci sulla responsabilità sociale d'impresa: il caso dei c.d. 'conflict minerals'," in *Diritto internazionale e pluralità delle culture*, ed. G. Cataldi and V. Grado (Napoli, Editoriale Scientifica, 2014), 291*ff.*

[57] Lusaka Declaration of the ICGLR Special Summit to Fight Illegal Exploitation of Natural Resources in the Great Lakes Region, Lusaka, Zambia, 15 December 2010.

At the national level, it is worth recalling the legislation passed by the Obama administration in 2010, the so-called Dodd-Frank Act, whose Section 1502 requires

> persons to disclose annually whether any conflict minerals that are necessary to the functionality or production of a product of the person, as defined in the provision, originated in the Democratic Republic of the Congo or an adjoining country and, if so, to provide a report describing, among other matters, the measures taken to exercise due diligence on the source and chain of custody of those minerals, which must include an independent private sector audit of the report that is certified by the person filing the report[58].

The U.S. legislation does not ban trade in minerals originating from the conflict-affected areas of the DRC and neighbouring countries, but places on companies the burden to report on the due diligence measures they have adopted. This burden has proven to be so heavy for companies that in 2017, the SEC's President issued a statement where he expressed his concerns over the effectiveness of the disclosure system:

> The disclosure requirements have caused a *de facto* boycott of minerals from portions of Africa, with effects far beyond the Congo-adjacent region. Legitimate mining operators are facing such onerous costs to comply with the rule that they are being put out of business. It is also unclear that the rule has in fact resulted in any reduction in the power and control of armed gangs or eased the human suffering of many innocent men, women, and children in the Congo and surrounding areas[59].

The reactions to this statement were not surprising: NGOs, human rights activists and religious groups all urged the SEC to continue the full implementation of Section 1502, while companies and businesses

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[58] SEC (U.S. Securities and Exchange Commission), *Spotlight* on Specialized Corporate Disclosure, Title XV of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, https://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml.

[59] M.S. Piwowar, *Reconsideration of Conflict Minerals Rule Implementation*, Public Statement of 31 January 2017, available at https://www.sec.gov/news/statement/reconsideration-of-conflict-minerals-rule-implementation.html.

insisted on the costs and waste of time of compliance with the disclosure requirements[60].

The third level of intervention is the private one. A large number of initiatives have been developed by companies and industry associations to help companies implement due diligence, particularly to help them establish traceability or chain of custody systems, and to identify, assess and manage risk[61]. Such private programs remain non-binding for companies, which adhere to them on a voluntary basis.

The minerals that are mainly involved in illegal trade and in the fuelling of conflicts are tin, tungsten, tantalum and gold (the so-called 3TG). Alone or in alloy, they are used in the electronics, automotive and telecommunications industries: tantalum and tin are used in cars, and tantalum can be found in trains for automated functions. Cell phones and tablets contain tungsten and tantalum, while telecommunications wiring contains tin, tantalum and gold[62]. As the International Telecommunications Union put it, to produce a glittering array of high-tech devices — from smartphones to laptops — the information and communication technology (ICT) industry needs minerals. Tin, tantalum, tungsten and gold are among those used in many ICT products, with the ICT industry consuming 50 to 60 percent of the world's tantalum, close to 26 percent of its tin, and 9 percent of the gold mined each year[63].

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[60] See Comments on the Statement on the Commission's Conflict Minerals Rule, available at https://www.sec.gov/comments/statement-013117/statement013117.htm. The fate of the Dodd-Frank Act is uncertain: On June 8, 2017, the House of Representatives passed the Financial Choice Act, repealing the Dodd-Frank, including Section 1502. At the time of writing, the Act is under discussion in the U.S. Senate, but in the meantime, the SEC has suspended the enforcement of Section 1502.

[61] See http://mneguidelines.oecd.org/implementingtheguidance.htm: I last accessed the website in June 2018.

[62] J.R. Linik, "What Are Conflict Minerals and Why Does Conflict-Free Matter?", *Tech Innovation* (12 September 2014), available at https://iq.intel.com/why-conflict-free-matters-in-your-everyday-life/.

[63] "Conflict Minerals in the ICT Supply Chain," *ITU News*, No 7/2012, available at https://itunews.itu.int/en/2854-Conflict-minerals-in-the-ICT-supply-chain.note. aspx.

5.2. *The EU Regulation on due diligence supply chain*

Against this very complex background, the EU started debating on the need to adopt legislation addressing the problem of conflict minerals, both in the framework of the OECD and at the institutional level[64]. Regulation No 2017/821 was finally adopted on May 17, 2017, but its application for companies has been delayed until January 1, 2021 to give them time to adjust to the new obligations that arise from the Regulation[65].

The objective of the Regulation is to enhance transparency in the supply chain of minerals (3TG) in order to make sure that products which are placed on the European market do not contain minerals originating from conflict areas or areas that are at high risk of serious violence and human rights abuses[66]. To achieve this objective, the EU legislators, acting on the legal basis of Article 207 TFEU on the Common Commercial Policy, put in place a system of supply chain due diligence largely based on the OECD Guidance, to which it makes repeated references, involving the supply chain of 3TG minerals from the mines to the smelters and refiners. The latter, in fact, are typically the

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[64] See European Commission, *The Raw Materials Initiative. Meeting our Critical Needs for Growth and Jobs in Europe*, of 4 November 2008, COM/2008/0699 final. In the following years, the European Parliament called upon EU institutions to adopt legislation following the example of U.S. Dodd-Frank Section 1502 (Resolutions of 7 October 2010, 8 March 2011, 5 August 2011, 26 February 2014).

[65] On the Regulation see Th. Voland and Sh. Daly, "The EU Regulation on Conflict Minerals: The Way Out of a Vicious Cycle?", *Journal of World Trade* (2018): 37 *ff.*

[66] See *Recital* (10) of the Preamble of the Regulation: "Union citizens and civil society actors have raised awareness with respect to Union economic operators not being held accountable for their potential connection to the illicit extraction of and trade in minerals from conflict areas. Such minerals, potentially present in consumer products, link consumers to conflicts outside the Union. As such, consumers are indirectly linked to conflicts that have severe impacts on human rights, in particular the rights of women, as armed groups often use mass rape as a deliberate strategy to intimidate and control local populations in order to preserve their interests. For this reason, Union citizens have requested, in particular through petitions, that the Commission make a legislative proposal to the European Parliament and to the Council to hold economic operators accountable under the relevant Guidelines as established by the UN and OECD".

last stage in which the origin of the minerals can effectively be traced. After this stage of transformation, it is often considered to be unfeasible to trace back the origin of minerals[67].

The structure of the Regulation is based on the due diligence supply chain according to the criteria established in the OECD Guidance, accompanied by the commitment by the EU institutions to adopt measures and provide financial assistance to support conflict-affected and high-risk areas where 3TG are mined[68], particularly in the African Great Lakes Region, and to incentivise and strengthen the respect for good governance, the rule of law and ethical mining[69].

The EU Regulation implements the OECD Guidance, translating it into binding obligations for EU importers of minerals and ores containing 3TG and 3TG metals[70]. The supply chain is considered from the smelters and refiners upstream (up to the mines), while the downstream (from the smelter or refiner to the final product) and recycled products supply chains are excluded. The Regulation applies a *de minimis* rule according to which the due diligence requirements are applicable only to importers whose volume of imported minerals exceeds a certain threshold established by the Commission.

According to Article 1, "[t]his Regulation establishes a Union system for supply chain due diligence ('Union system') in order to curtail opportunities for armed groups and security forces to trade in tin, tan-

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[67] *Recital* (16) of the Preamble of the Regulation.

[68] NGOs point out a serious lack of financial support for measures that help to address persistent governance problems in Congo's artisanal mining sector, such as poorly functioning public mining services, military involvement in mining activities and mineral smuggling to neighbouring countries (J. Cuvelier, *Leaving the Beaten Track? The EU Regulation on Conflict Minerals*, Africa Policy Brief No 20, April 2017, 6).

[69] On this parallel approach to sustainable mining, see the Joint Communication by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy "Responsible Sourcing of Minerals Originating in Conflict-Affected and High-Risk Areas: Towards an Integrated EU Approach", of 5 March 2014, JOIN (2014) 8 final.

[70] According to the definitions in Article 2 (a) and (b), "minerals" means ores and concentrates containing tin, tantalum or tungsten, and gold; "metals" means metals containing or consisting of tin, tantalum, tungsten or gold.

talum and tungsten, their ores, and gold. This Regulation is designed to provide transparency and certainty as regards the supply practices of Union importers, and of smelters and refiners sourcing from conflict-affected and high-risk areas". The system works following the five OECD due diligence steps (similar to those indicated by the UN Group of Experts): (1) management system obligations; (2) risk assessment obligations (3) risk management obligations; (4) third-party audit obligations; and (5) disclosure obligations. The Regulation allows the recognition of private associations' supply chain due diligence schemes, which can simplify procedures for companies (Article 8) and provides for the definition of an EU list of global responsible smelters and refiners not limited to those located on EU territory (Article 9). The importers must trace the minerals supply chain and chain of custody in order to make it possible to identify and assess the risk of an adverse impact against the standards of their supply policy. This means that the importer must put in place the so-called grievance mechanism, an early-warning system that allows, on the basis of all available information about the circumstances of the extraction and the handling and trade of minerals from conflict areas (Articles 4 and 5), to identify possible situations of risk. Relevant information can be obtained from all available sources, including third-party audits and whistle-blowers. The importer must also establish mechanisms to respond to identified risks, including a range of measures from recommendations to comply with due diligence standards to temporary suspension of trade with the supplier, to disengagement with the supplier that fails to adopt risk mitigation measures. The third-party audit is mandatory unless the importer demonstrates that all smelters and refiners in his or her supply chain are comprised in the Commission's list of compliant smelters and refiners or have otherwise demonstrated their compliance with the Regulation. In all other cases, the third-party audit shall certify compliance of the supply chain with due diligence standards (Article 6). All information deriving from the importer's due diligence implementation and third-party audit reports must be disclosed to the Member States' authorities and to the public (Article 7).

For the operation of this system, the identification of conflict-affected and high-risk (CAHR) areas is of critical importance. Accord-

ing to the definition in Article 2(f), "'conflict-affected and high-risk areas' means areas in a state of armed conflict or fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed States, and widespread and systematic violations of international law, including human rights abuses". The OECD Guidance includes a more detailed, but narrower, definition:

> *[c]onflict-affected and high-risk areas* are identified by the presence of armed conflict, widespread violence or other risks of harm to people. Armed conflict may take a variety of forms, such as a conflict of international or non-international character, which may involve two or more States, or may consist of wars of liberation, or insurgencies, civil wars, etc. *High-risk areas* may include areas of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence. Such areas are often characterised by widespread human rights abuses and violations of national and international law[71].

The EU Regulation's scope is not limited to situations of violent conflict of whatever nature but also includes situations where the main feature is weak or non-existent governance and widespread human rights abuses, apparently even in the absence of a conflict. This makes sense in light of the objectives of the EU's external action under Article 21 TEU, where one of the crucial points is precisely the EU's obligation to contribute to the protection of human rights worldwide. But at the same time, such a generic and wide definition of CAHR areas can raise implementation problems and also problems of consistency with WTO rules, as will be discussed later. The identification of CAHR areas is left to the importers, but the Commission, under Article 14, will adopt guidelines to direct importers in their assessment, which requires political as well as legal considerations often beyond the expertise of economic operators:

> 1. In order to create clarity and certainty for and consistency among the practices of economic operators, in particular SMEs

[71] OECD Guidance, 13.

> [Small and Medium Enterprises], the Commission, in consultation with the European External Action Service and the OECD, shall prepare non-binding guidelines in the form of a handbook for economic operators, explaining how best to apply the criteria for the identification of conflict-affected and high-risk areas. That handbook shall be based on the definition of conflict-affected and high-risk areas set out in Article 2(f) of this Regulation and shall take into account the OECD Due Diligence Guidance in this field, including other supply chain risks triggering red flags as defined in the relevant supplements to that Guidance. 2. The Commission shall call upon external expertise that will provide an indicative, non-exhaustive, regularly updated list of conflict-affected and high-risk areas. That list shall be based on the external experts' analysis of the handbook referred to in paragraph 1 and existing information from, *inter alia*, academics and supply chain due diligence schemes. Union importers sourcing from areas which are not mentioned on that list shall also maintain their responsibility to comply with the due diligence obligations under this Regulation.

Article 14 does not solve all possible problems of the identification of CAHR areas, since the Commission's list is non-exhaustive, and the due diligence obligations are not limited to the areas mentioned on the list, but will provide useful indications on how to apply the wide definition of CAHR areas adopted by the Regulation.

The system of due diligence put in place by the EU Regulation is, as mentioned above, a conversion into a binding, directly applicable law of a system, i.e. the OECD due diligence Guidance, which had been conceived as voluntary, where compliance is based on the ethical behaviour of companies, on the pressure put on producers by consumers who are more and more aware of human rights abuses and violence in conflict areas, and on the consequent need for corporations to preserve their good reputation. Converting all this into a mandatory system presents the same risks as the U.S. regulatory scheme, which, as mentioned, is failing because of the attitude of companies that, in order to bypass the burdensome procedures for certifying minerals originating from conflict areas, prefer to completely avoid importing from the DRC and neighbouring countries, thus inflicting damage on the already weak economy of the region. On the other hand, from the point

of view of NGOs and other activists for human rights, the U.S. legislation maintains an important role in raising awareness and responsibility in the public and in corporations. The EU Regulation has a wider scope than the U.S. legislation, as it is not limited to the African Great Lakes Region but can be extended to other conflict-affected and high-risk areas worldwide[72] and is a part of a wider policy of the Union to regulate corporate social responsibility and corporate sustainability in the much-needed effort to spread a culture of a more responsible and ethical way of doing business. The wider scope of the comprehensive EU policy on corporate social responsibility makes it less likely that companies will try to bypass the Regulation, as they must comply at the same time with other rules, such as those contained in Directive 2014/95 on the disclosure of non-financial and diversity information[73].

5.3. *Possible inconsistencies of the due diligence supply chain Regulation with WTO rules*

As for all trade regulatory frameworks, it is also necessary to consider possible inconsistencies of the due diligence supply chain Regulation with the multilateral trade rules of the WTO. The due diligence Regulation, as specified above, does not impose a ban or a restriction on trade in 3TG minerals and metals from specified countries, but it can, in different ways, impact market access opportunities for miners, smel-

[72] In this sense, it is not a targeted measure but part of a general policy affecting trade in raw materials.

[73] Directive No 2014/95/EU of the European Parliament and the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, in *O.J.* L 330 of 15 November 2014, 1. The Directive requests the disclosure, by large corporations, of information on sustainability such as environmental protection, social responsibility and treatment of employees, respect for human rights, measures against corruption and bribery, and diversity on company boards in terms of age, gender, educational and professional background. On the Directive, J. Quinn and B. Connolly, "The Non-Financial Information Directive: An Assessment of its Impact on Corporate Social Responsibility", *European Company Law* (2017): 15 *ff.*; S. Doyle, "Non-Financial Reporting and Duties of Corporate Social Responsibility and Human Rights", *The Comparative Law Yearbook on International Business* (2016): 231 *ff.*

ters and refiners that produce 3TG from conflict areas[74]. First, discrimination is inherent to the responsible smelters and refiners list the Commission has the power to draw up. The fact that the list includes both EU and non-EU plants entails that the latter are *de facto* obliged to comply with the due diligence standards if they want to stay in the market[75]. In addition, a detrimental impact on trade can be produced in the case that an EU importer, in performing his or her duties of risk management, decides to disengage with a miner or a smelter or refiner or to adopt other restrictive measures that can result in a restriction on trade from a WTO Member State or a part of its territory. In this respect, it is correct to argue that the EU Regulation, although based on and referring to the OECD Guidance, has converted the latter into an EU binding measure, with the consequence that, from the international law standpoint, the discipline is referred only to the EU. What is more controversial is the international law (and WTO law) relevance of restrictive measures adopted by private entities in the application of the Regulation requirements[76]. The general rule is that only State measures are relevant under the GATT/WTO system. Private behaviour is normally not relevant, in so far as it is driven by economic factors. But, in a case such as the EU Regulation, private behaviour is driven by the obligation to comply with binding due diligence requirements. Even if the importers have a choice in deciding which measure to adopt in the framework of risk mitigation, their choice is limited and oriented by the EU measure. This leads to the conclusion that such a situation

[74] The Regulation, in defining conflict-affected and high-risk areas, does not talk about States, thus trying to avoid the possibility of trade restrictions extending to specific States but limiting the possible restrictions to "areas" within the territory of a State or extending over the boundary between two or more States, such as the case of the Great Lakes Region.

[75] See E. Partiti and S. Van Der Velde, "Curbing Supply-Chain Human Rights Violations Through Trade and Due Diligence. Possible WTO Concerns Raised by the EU Conflict Minerals Regulation" (ASSER Research Paper 2017-02), 3.

[76] S.M. Villapando, "Attribution of Conduct to the State. How the Rules on State Responsibility May Be Applied Within the WTO Dispute Settlement System", *Journal of International Economic Law* (2002): 418 *ff.*, considers a number of WTO cases where the problem of private behaviour *vis-à-vis* State responsibility has been raised in WTO dispute settlement proceedings.

could fall within the WTO dispute settlement bodies' stance on the matter, according to which whenever a measure of a WTO Member establishes incentives for private actors to take certain decisions, such decisions cannot be considered independently from that measure[77].

Possible justifications of the EU regime with respect to violations of Article I (1) of the GATT (non-discrimination and Most Favoured Nation Clause) can be found in the exception clauses of Article XX and XXI of the GATT. In particular, Article XXI (c) covers actions taken by WTO Members in compliance with obligations under the UN Charter, which include Security Council resolutions. Such justification could cover measures adopted in the implementation of Resolution 1952 (2010) on the DRC[78]. But, given the global scope of the EU Regulation, Article XXI (c) is not sufficient. A further justification can be provided by Article XXI (b) (ii): "relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment". It has been argued that even such justification cannot cover measures taken outside areas of armed conflict with the only aim of preventing human rights abuses[79]. The only remaining option is to rely on the general exception clause of Article XX, in particular paragraphs (a) and (b) thereof, which allow the adoption of measures in order to safeguard public morals and to protect human life and health. The Regulation does not mention any of these possible justifications under WTO rules, but problems may arise once the Regulation starts to be applied.

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[77] Partiti and Van Der Velde, "Curbing Supply-Chain Human Rights Violations", 16, with reference to the relevant WTO case-law.

[78] Which is the case of the U.S. Dodd-Frank Act, whose geographical scope is limited to the Great Lakes Region.

[79] Partiti and Van Der Velde, "Curbing Supply-Chain Human Rights Violations", 20, consider the adoption by the Chinese Government of the Chinese Guidelines for Responsible Mineral Supply Chain, based on the UN Guiding Principles on Business and Human Rights and on the OECD Guidance, even if China is not a member of the OECD, as evidence of widespread acceptance of due diligence principles in the international community. According to the authors, it is crucial that due diligence requirements based on the mentioned documents be considered as relevant international standards in the WTO framework as well (26).

6. Conclusions

The protection of human rights and the prevention of conflicts has become one of the critical issues in the EU's external relations, particularly in the field of trade policy. The Union has been working on this issue for decades, looking for innovative solutions to the problem of the extraterritorial effect of its actions. In fact, the task of spreading human rights protection values in third States entails some kind of extraterritorial application of the EU's values. The solutions adopted with the diamond trade regime and with the minerals due diligence Regulation go beyond the logic of conditionality that is at the root of systems such as the Generalised System of Preferences, where the economic advantages granted by the EU are conditioned by the respect, on the part of the beneficiary States, of some core internationally recognised principles in the field of human rights and sustainability. The Regulations on diamonds and minerals target some specific products and regulate trade in those products in a way that should, on the one hand, sanction with a trade ban those producers (in third countries) and traders (in the EU) who do not comply with the requirements of respect for human rights, while on the other hand, they should raise awareness in the public and in economic operators about their responsibility in international trade. The movement in favour of responsible business goes precisely in this direction. It is indisputable that the disclosure of information is crucial in this new philosophy of business, as it allows consumers to be more informed on the origin, means of production, and environmental and social impact of the product they are buying.

In order to achieve this objective, the EU is exploring innovative legal mechanisms that emphasise the role of economic operators within the EU legal environment. Both regimes are very interesting in this respect, as they put in place administrative structures that consist in networks of national and EU authorities based on the model of the administrative network that the EU has many times successfully implemented in other areas, such as competition policy or monetary policy, while also conferring implementing and administrative responsibilities on private associations and the economic operators themselves. An interesting feature of the minerals due diligence Regulation, which

was pointed out above, is the transformation of a voluntary regime such as the OECD Guidance into a legally binding one under the Regulation. Here, the EU does not simply reproduce the substantive principles and criteria of due diligence contained in the Guidance in a binding regulation. Rather, it refers to the Guidance itself and to possible modifications which might be adopted in the future within the OECD as mandatory norms for the behaviour of EU importers. At the same time, however, the Regulation leaves the importers a wide margin of discretionary power in the choice of the policy to adopt in the presence of identified risks: power that is balanced by the obligation to disclose to the State and EU authorities and to the public all the information about the risks and the trade policy choices made by the economic operators. In this way, the choices made by EU importers in the field of risk management and risk mitigation will be subjected to an *ex-post* evaluation that may affect, positively or negatively, their reputation and their future business.

What is necessary for these trade regimes to be successful in achieving the objectives they pursue is to implement the accompanying measures that are needed to address the development weaknesses of the countries and the regions to which the trade measures are applied and that are required by the due diligence Regulation. In other words, the Union must enhance coherence in its external action, putting together trade measures and development cooperation measures, particularly in the form of financial assistance for projects aimed at improving the working conditions of miners, with particular attention to artisanal mines, increasing the sustainability of diamonds and minerals production, and fighting child labour by providing assistance for the education of boys and girls.

Chapter V
Natural Resources Between the Internal Market and International Trade: Seal Products Regime, Illegal Timber, Illegal, Unreported and Unregulated Fishing, and Sustainability Criteria for Biofuels

1. Introduction. Sustainable management and trade of natural resources

This chapter puts together EU measures which have been adopted mainly under legal bases different from the Common Commercial Policy with the objective of regulating the production, movement and marketing of certain specific products or categories of products in the internal market of the EU. However, as those regulations also affect trade with non-EU countries and aim at a more sustainable trade, particularly in sensitive natural resources, it is worth considering them as well in the present study. This is confirmed by the fact that some of them have also triggered complaints from third countries in the framework of the WTO, precisely because of the alleged adverse and discriminatory effects on international trade. This is the case of the Seal Regime and of the sustainability criteria for biofuels and bioliquids. In the case of timber, the regime for the product is the result of a combination of trade regulations, environmental regulations and international agreements.

In the following pages, the EU measures will be considered from the exclusive standpoint of their impact on international trade, placing the internal regime in the background, as this is not the place for a comprehensive analysis of regimes whose complexity, as is the case with the

biofuels regulation, is beyond the subject matter of this study. My objective is to analyse the effort on the part of EU institutions to promote the sustainable production and management of natural resources through the regulation of international trade. The EU policy in this regard takes many different forms, which include participation in international conventions, such as CITES[1], the Rio Convention on Biodiversity[2], and the Protocol on Biosafety[3] but also many regional regimes, such as those

[1] CITES is the Convention on International Trade in Endangered Species of Wild Fauna and Flora signed in Washington D.C. on March 3, 1975. It entered into force on January 1, 1975. All the EU Member States are parties to the Convention. The EU acceded to the CITES on July 8, 2015, after an amendment to the Convention (which was adopted in Gaborone, Botswana in 1983, and entered into force in November 2013), allowing regional economic integration organisations to join the Convention. The basis for the EU accession is Council Decision (EU) 2015/451 of 6 March 2015, in *O.J.* L 75 of 19 March 2015, adopted under the legal basis of Article 192 (1) TFEU (environmental policy). Due to the need to give the Convention a uniform application within the EU, it was implemented through EU regulations even before the EU's accession. The Basic Regulation is Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein, accompanied by a number of Commission implementing regulations. On the EU's participation in the CITES after accession, see L. Krämer, "EU Negotiating and Voting Under the Amended CITES Convention", *Journal for European Environmental & Planning Law* (2015): 3 *ff.*

[2] The United Nations Convention on Biological Diversity was adopted on May 22, 1992 in Nairobi and was opened for signature during the Rio "Earth Summit". It entered into force on December 29, 1993. The aim of the Convention is the conservation of biological diversity, together with the sustainable use of its components and the fair and equitable sharing of benefits from the use of genetic resources. The EU acceded to the Biodiversity Convention with Council Decision No 93/626/EC of 25 October 1993, in *O.J.* L 309 of 13 December 1993, 1.

[3] The Protocol on Biosafety to the Convention on Biological Diversity, first negotiated in Cartagena, Colombia, during an extraordinary meeting of the Conference of the Parties to the Biodiversity Convention in February 1999, was later concluded in Montreal, Canada on January 29, 2000. It was concluded by the EU with Council Decision No 2002/628/EC of 25 June 2002, in *O.J.* L 201 of 31 July 2002, 48. The Protocol provides a framework, based on the precautionary principle, for the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, also taking into account risks to human health and specifically focusing on transboundary movements (Recital (5) of the cited Decision). The Council's choice to adopt the Decision under the legal basis of Article

regulating the sustainable management of marine biological resources[4]. In other cases, the EU has directly regulated trade in certain products with the aim of promoting the sustainable use of natural resources.

From the institutional point of view, it is always difficult to draw a clear distinction between environmental protection policy and trade policy, as measures often affect both internal and international movements of goods with the main aim of protecting the environment through the responsible and sustainable use and management of natural resources. In some cases, the choice of the legal basis of the acts has also created controversies[5] because of the different character of the two

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175(1) TEC on the environmental policy was challenged by the Commission, which requested the opinion of the Court of Justice pursuant to Article 300(6) TEC, now Article 218 (11) TFEU, claiming that the Protocol had been erroneously concluded under the legal basis of Article 175(1) TEC, and that the correct legal basis was instead Article 133 TCE on the Common Commercial Policy. The Court, in Opinion 2/00 of 6 December 2001, EU:C:2001:664, held that the environmental policy was the correct choice for the conclusion of the Cartagena Protocol, as it is, "in the light of its context, its aim and its content, an instrument intended essentially to improve biosafety and not to promote, facilitate or govern trade" (Opinion 2/00, paragraph 37). See G. Gattinara, "La competence consultative de la Cour de justice après les avis 1/00 et 2/00", *Revue du Droit de l'Union Européenne* (2003): 707 *ff*.

[4] The EU, represented by the Commission, participates in a large number of so-called regional fisheries management organisations, which are international organisations formed by countries with fishing interests in an area.

[5] In addition to Opinion 2/00 of 6 December 2001, EU:C:2001:664, see, among many others, the *Energy Star* judgment, case C-281/01, where the Court concluded that the 2001 EU-US Energy Star Agreement on the coordination of energy-efficient labelling programmes for office equipment had to be concluded under the common commercial policy, as its main objective was to regulate trade (see A. MacGregor and E. Brown, "ECJ Pronouncement on the Correct Legal Basis for the Conclusion by the European Community of the EU-US Energy Star Agreement", *International Trade Law & Regulation* (2003): 63 *ff*.; E. Neframi, "Politique commerciale et protection de l'environnement: une approche instrumentale du contentieux de la base juridique selon l'arrêt Commission/Conseil du 12 décembre 2002", *Revue du Marché commun et de l'Union Européenne* (2003): 462 *ff*.); on the contrary, in the cases regarding the conclusion and implementation of the 1998 Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade (respectively, cases C-94/03, *Commission v. Council* and C-178/03, *Commission v. European Parliament and Council*), the Court held that both the decision

EU competences: as the common commercial policy is an exclusive power of the Union, it is not surprising that the Commission tries to prompt the Court to extend its scope to include acts that have an impact on international trade. The Council, on the other hand, favours the environmental policy, a shared competence that leaves more room for action to the Member States. Some cases remain controversial, particularly in matters such as the sustainable management of natural resources, where the two aims, i.e. the regulation of trade and environmental protection, are inextricably linked, and it is very difficult to find the "centre of gravity" of the measures.

From a more substantial point of view, the EU's regulatory approach to the sustainable management of natural resources must take into consideration and address many different elements: production, movement in the internal market, and international trade. Different solutions are available and have been the subjects of experiments aimed at addressing those issues. There is the most drastic option of a complete ban on the production and marketing of resources where there is a serious risk of depleting them or of causing serious harm to the environment (this is the option adopted, with the exceptions that will be discussed later, for seal products); other options include certification systems and due diligence obligations for economic operators, or a combination of the two. In addition, the EU has recently put in place a system of corporate social responsibility and corporate sustainability that includes the obligation for corporations to report their action in the field of environmental protection and the sustainable use of natural resources[6]. The recognition by

for the conclusion of the Convention and the implementing regulation fell within the exceptional case of dual legal bases, as the Convention pursued the objective of regulating international trade in hazardous chemicals as well as the objective of protecting human health, and that the two objectives are inextricably linked (see C. Petteruti, "L'importazione e l'esportazione di sostanze pericolose tra politica ambientale e politica commerciale comune", *Diritto pubblico comparato ed europeo* (2006): 903 *ff*.; D. Shaffrin, "Dual Legal Bases in EC Environmental Law Revisited", *Review of European Community and International Environmental Law* (2006): 339 *ff*.); see also the first chapter of this study.

[6] This is the approach of Directive 2014/95/EU on the disclosure of non-financial and diversity information by certain large undertakings and groups, cited in the previous chapter.

EU institutions of voluntary schemes for the verification of compliance with sustainability criteria are also a feature of the most recent regulatory approach, as was the case in the diamonds and minerals regulations discussed in the previous chapter. All these options have an impact not only on the internal circulation of goods, but also on international trade, as they apply to both domestic and imported products. In international trade, the application of such measures can result – and often actually does – in restrictions on trade which can collide with WTO rules, again raising the controversial issue of balancing international trade rules and sustainable development needs in a way that produces effective environmental and human rights protection, while at the same time limiting the negative impact on international trade. In the following pages, I will discuss the international trade implications of some EU measures on the sustainable management of seal products (2), illegal timber (3), fisheries products (4), and biofuels (5).

2. The Seal Products Regime: tension between animal welfare, the EU internal market, indigenous peoples' rights and WTO rules

2.1. *The EU Regulation on seal products*

The EU Seal Regime is very interesting, as it not only involves issues of animal welfare protection, but also has an impact on the human rights of indigenous peoples. The efforts to balance the multiple interests at stake have led to controversies that have the merit of providing important, although sometimes controversial, contributions to the debate around the tensions between international trade, human rights and environmental protection[7]. The Seal Regime was introduced by Regu-

[7] I do not enter into the discussion of whether animal welfare protection can be considered an element of environmental protection, which is disputed. Seals are not in danger of extinction, so there was no immediate need to protect them. The EU measures were adopted to respond to public concern over the cruelty of the methods used to kill them.

lation No 1007/2009[8] under the legal basis of Article 95 TEC (now Article 114 TFEU), which confers on EU institutions the competence to adopt measures with the aim of establishing the common market. Measures adopted under this provision have, as their primary objective, the improvement of the functioning of the internal market through the approximation of national laws. The choice of this legal basis was later the object of judicial review, as it has been claimed that the objective of the functioning of the internal market is not coherent with a measure that almost completely bans trade in certain specific categories of products[9].

The system was completed by Commission Implementing Regulation No 737/2010[10], which lays down criteria for the implementation of the exceptions to the trade ban in seal products. After the conclusion of the WTO dispute settlement procedure for *EC-Seal Products*[11], the system was amended by Regulation (EU) 2015/1775[12] and the adoption of a new Implementing Regulation by the Commission (Regulation 2015/1850)[13] in order to take into account the findings of the Appellate Body.

Regulation 1007/2009 intervened in a situation where the EU had already prohibited the import for commercial purposes of skins of harp seal pups and hooded seal pups and of products derived therefrom

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[8] Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, in *O.J.* L 286 of 31 October 2009, 36.

[9] It is significant that the Seal Regulation can be found on the EU website as a *tradoc*, i.e. among the documents related to trade, rather than among those related to the internal market.

[10] Commission Implementing Regulation No 737/2010 of 10 August 2010, in *O.J.* L 216 of 17 August 2010, 1.

[11] EC-Seal Products, WT/DS400 and WT/DS401.

[12] Regulation (EU) 2015/1775 of the European Parliament and the Council of 6 October 2015, amending Regulation (EC) No 1007/2009 on trade in seal products and repealing Commission Regulation No 737/2010, in *O.J.* L 262 of 7 October 2015, 1. This Regulation has been adopted under the legal basis of Article 114 TFEU.

[13] Commission Implementing Regulation 2015/1850 of 13 October 2015, laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products, in *O.J.* L 271 of 16 October 2015, 1.

since 1983[14]. In 2006, the European Parliament, considering that seals (and particularly seal pups) are slaughtered in an inhumane way and are often skinned while they are still conscious, requested the Commission to draft a proposal for a regulation to ban the import, export and sale of all harp and hooded seal products[15]. Moreover, the Parliamentary Assembly of the Council of Europe also recommended that the Member States of the Council of Europe ban all cruel hunting methods and promote initiatives aimed at prohibiting trade in seal products[16]. In addition, some EU Member States had already autonomously banned the trade and sales of seal products, while in others, these activities were still permitted: such discrepancies in the domestic laws paved the way for the choice of Article 95 as the legal basis of the act. The Regulation's Preamble clearly shows the dual objective of the measure: promoting the welfare of animals in consideration of the fact that "[s]eals are sentient beings that can experience pain, distress, fear and other forms of suffering" (*recital* 1) and responding to the concerns of citizens and consumers, on the one hand, and on the other, harmonising the rules in the internal market as regards commercial activities concerning seal products[17]. It should be noted that the introduction of a regulation on seal products is not motivated by a concern about the conservation of the seal population but rather by the cruel methods of seal killing.

When talking about seal products, it is important to consider that not only are seal furs and skins involved, but also other kinds of products that often are more difficult to identify as being derived from seals, such as meat, oil, blubber, and items derived therefrom, which include products such as Omega-3 capsules, processed food and garments[18]. It is also important to point out that most seal products on the

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[14] Council Directive 83/129/EEC of 28 March 1983, in *O.J.* L 91 of 9 April 1983, 30.

[15] European Parliament, Resolution of 26 September 2006, P6_TA(2006)0369, in *O.J.* C 306 E of 15 December 2006, 194.

[16] Parliamentary Assembly of the Council of Europe (PACE), Resolution 1776/2006 of 17 November 2006.

[17] *Recitals* (4), (5), (6), (7), (8) of Regulation 1007/2009.

[18] According to the definitions in Article 2 of the Regulation, "seal" means specimens of all species of pinnipeds (*Phocidae*, *Otariidae*, *Odobenidae*), while "seal

EU market are imported from those few countries where seal hunting takes place: Canada, Norway, Greenland, Iceland and, on a smaller scale, Russia; in the EU, there is a limited production of seal products only in Finland and Sweden.

Article 3 of the Regulation establishes the conditions under which seal products can be placed on the market, defining the exceptions to the general ban on trade in seal products. The solution of a complete ban was preferred to a regulation of the hunting methods on account of the objective difficulties of monitoring compliance in the remote and hostile arctic environment where seal hunting takes place.

The most significant exception to the ban is provided by Article 3 (1): "[t]he placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence". This exception (Inuit exception or IC exception) has been included in consideration of the fact that seal hunting is an integral part of the culture and identity of the members of the Inuit society, as is recognised by the United Nations Declaration on the Rights of Indigenous Peoples (*recital* (14) of the preamble of the Regulation). Other exceptions to the ban are granted by Article 3(2)(a) and (b) in favour of the occasional entry of goods of personal use to travellers and of seal products placed on the market on a non-profit basis that result from the by-products of hunting regulated by national law and conducted for the sole purpose of the sustainable management of marine resources (MRM exception). Pursuant to Article 4 of the Regulation, "Member States shall not impede the placing on the market of seal products which comply with this Regulation". As a consequence of such free movement clause, even the Member States which, by means of national legislation, have prohibited the sale of seal products on their territory are under the obligation to admit those that comply with the exceptions to the ban.

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product" means "all products, either processed or unprocessed, deriving or obtained from seals, including meat, oil, blubber, organs, raw fur skin and fur skins, tanned or dressed, including fur skins assembled in plates, crosses and similar forms, and articles made from fur skins".

In order to better understand the scope of the Inuit exception and the trade-restrictive consequences of the Seal Regime, it is necessary to consider the definition of Inuit enclosed in the Regulation and the rules set up by the Commission for the verification of compliance with the requirements of Article 3. In accordance with Article 2 (4), "'Inuit' means indigenous members of the Inuit homeland, namely those arctic and subarctic areas where, presently or traditionally, Inuit have aboriginal rights and interests, recognised by Inuit as being members of their people and include Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaallit (Greenland) and Yupik (Russia)". There is no definition of "other indigenous communities". This deficiency is filled by the Commission Implementing Regulation 737/2010, whose Article 2(1) states that, for the purposes of the Regulation, "'other indigenous communities' means communities in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of the present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions"[19].

The verification mechanism necessary for the implementation of the exception is based on a certification system by which seal products can be placed on the market only if they are accompanied by an attesting document which certifies that the products fulfil the conditions required by Article 3(1)(a), (b) and (c) of the Implementing Regulation: namely seal hunting conducted by Inuit or other indigenous communities which have a tradition of seal hunting in the community and in the geographical region; seal hunts the products of which are at least

[19] This definition is identical to the statement of coverage (rather than a definition) that can be read in Article 1(1)(b) of ILO Convention No 169 of 1989 on indigenous and tribal peoples in independent countries. The United Nations bodies have avoided adopting a definition of the notion of indigenous peoples, and even the UN Declaration on the Rights of Indigenous Peoples adopted by the General Assembly in 2007 lacks a definition, preferring to refer to indigenous peoples on the basis of their self-recognition as such: "[i]ndigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions" (Article 33(1) of the UN Declaration).

partially used, consumed or processed within the communities according to their traditions; and seal hunts which contribute to the subsistence of the community. Such criteria pose significant interpretative issues due to the vagueness of the relevant concepts such as the measure of the traditional use, and the consumption and processing of the products ("at least partially" is a very indeterminate formulation that can open the way to abuses); the notion of contribution to the subsistence of the indigenous communities is also very indeterminate and difficult to interpret. All this makes the Inuit exception apparently very generous, thus undermining the effectiveness of animal welfare protection[20]. Nevertheless, this is only apparently true, as what is burdensome in the Commission's Implementing Regulation is the verification procedure. The accompanying document must be issued by a recognised body established at the national or regional level which will be included by the EU Commission on a list. In order to be included on the list, the bodies must submit a request to the Commission and demonstrate that they fulfil a number of conditions, including being subjected to an independent third-party audit, having the ability to monitor compliance, and acting in a manner that avoids conflicts of interest. The Commission was well aware of the burden such a mechanism imposed on indigenous communities, particularly those in third countries[21], as is confirmed by the justification the Commission itself provided in *recitals* (5) and (6) of the Preamble of the Implementing

[20] See M. Henning, "The EU Seal Products Ban. Why Ineffective Animal Welfare Protection Cannot Justify Trade Restrictions Under European and International Trade Law", *Arctic Review on Law and Politics* (2015): 74 *ff.*

[21] The consequent discrimination between Canadian and Norwegian Inuit, on the one hand, and Greenlandic Inuit, on the other, is at the centre of the WTO dispute. In Greenland, a Danish island with wide administrative autonomy, associated with the EU, the administrative management of seal products is based on the State-owned tannery Great Greenland, which sends to the Ministry of Fisheries, Hunting and Agriculture of Greenland a filled-out certificate accompanied by a list of batch numbers for all the concerned seal products. The Ministry controls and signs it before it is returned to the tannery (Government of Greenland, Ministry of Fisheries, Hunting and Agriculture, *Updated Data to: Management and Utilization of Seals in Greenland, Addendum to White Paper on Management and Utilization of Seals in Greenland of April 2012*, February 2015, 12, available on the website http://www.businessingreenland.gl: I last accessed the website in June 2018).

Regulation: "[w]ithin this exceptional framework, an effective mechanism to ensure an adequate verification of compliance with those requirements should be introduced. That mechanism should not be more trade-restrictive than necessary", and "[o]ther options would not be sufficient to achieve these aims". Essentially, the Commission justified this complex mechanism on the basis of the proportionality principle, maintaining that the adopted measures were the only possible choice to achieve the objective and that less trade-restrictive options would not be effective.

2.2. *Challenges to the EU Seal Regime: the ECJ cases and the WTO dispute*

As was to be expected, the EU Seal Regime raised disagreement among the indigenous communities in Greenland and non-member countries (Canada and Norway). According to the Inuit, the exemptions were unclear and flawed, and likely to cause a severe impact on the Inuit economy[22]. They claimed that the regulations undermined their traditional economic activities and that their voices had not been properly heard in the decision-making process. Moreover, the certification system was too complex and burdensome for them: all this led the Inuit to argue that the eventual aim of the regulations was to decimate the seal market within the EU[23]. At the same time, the growing awareness of the public towards animal welfare led to a significant reduction of the volume of sales of seal products, independently of the Regulation.

The long saga of judicial proceedings started even before the entry into force of the Regulation. Cases were brought to the EU General Court challenging the lawfulness of both the basic regulation and the

[22] K. Hossain, "The EU Ban on the Import of Seal Products and the WTO Regulations: Neglected Human Rights of the Arctic Indigenous Peoples?", *Polar Record* (2013): 154 *ff*. The author points out that today, in the Arctic indigenous communities, there is a clear inter-dependence between their formal and non-formal economies, which combine both traditional subsistence activities and a modern market presence. The hunting of seals and the commercialising of the by-products derived from the hunts are part of the culture traditionally practiced by the Inuit and other indigenous communities of Canada, Greenland and Norway.

[23] Hossain, "The EU Ban on the Import of Seal Products", 156.

implementing regulation. In the first EU case, applications for interim measures brought by several members of the Canadian, Norwegian and Greenlandic Inuit communities were rejected by means of an order of the President of the General Court[24]. The main ground was the lack of precise information on the alleged pecuniary and non-pecuniary damages the applicants would incur after the entry into force of the Seal Regime. The subsequent application for the annulment of Regulation 1007/2009 was dismissed by the General Court on September 6, 2011[25] in application of the Treaty rules on the admissibility of actions for annulment pursuant to Article 263 (4) TFEU[26], which allows natural and legal persons to "institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures"[27]. Such conclusion was confirmed on appeal by the Court of Justice on 3 October 2013[28]. Having failed to directly challenge the validity of the basic regulation, as the Court did not even consider the merits of the cases, which were blocked at the admissibility stage, the Inuit filed an application for the annulment of the Commission Implementing Regulation under Article 263 (4) as soon as it was finally published. Pursuant to Article 277 TFEU, they challenged the act of the

[24] Order of the President of the General Court of 25 October 2010, case T-18/10 R II (EU:T:2010:448), *Inuit Tapiriit Kanatami et al. v. European Parliament and Council*, after a previous application had already been rejected by order of 30 April 2010 (case T-18/10).

[25] Order of the General Court of 6 September 2011, case T-18/10, *Inuit Tapiriit Kanatami et al. v. European Parliament and Council*, EU:T:2011:419.

[26] See U. Villani, *Istituzioni di Diritto dell'Unione europea*, 5th ed. (Bari, Cacucci, 2017), 373 *ff.*; R. Schütze, *European Union Law* (Cambridge, Cambridge University Press, 2015), 354 *ff.*

[27] The General Court applied the new text of the Treaty provision on the action for annulment to a regulation that had been adopted before the entry into force of the Lisbon Treaty. It concluded that, given the equivalence of the co-decision procedure with the ordinary legislative procedure, the regulation had to be considered as a legislative act, and not as a regulatory act for the purposes of Article 263(4). Consequently, the Court had to verify whether the regulation was of direct and individual concern to the applicants and concluded in the negative.

[28] Judgment of 3 October 2013, case C-583/11 P, *Inuit Tapiriit Kanatami et al. v. European Parliament and Council*, EU:C:2013:625.

institution which formed the legal basis of the contested implementing regulation, i.e., Regulation 1007/2009, the basic regulation. The General Court[29] upheld the choice of Article 95 TEC as the correct legal basis for the basic regulation, accepting the reasons given by the Preamble and explained above. In particular, according to the Court, the concerns of citizens and consumers about the suffering of seals, and consequently, the aim of protecting the welfare of animals were in the background. The main objective of the regulation was the need to prevent disturbances of the operation of the internal market in the products concerned. This conclusion was confirmed, according to the Court, by the free movement clause in Article 4, which precludes the Member States from impeding the circulation of seal products by means of more restrictive national provisions. The claim by the applicants that in addition to Article 95, there was the need to refer also to Article 133 TEC (now Article 207 TFEU) for the impact of the measure on international trade was dismissed based on a questionable argument: the basic regulation does not prohibit the import or export of seal products, as Article 3(1) prohibits only the placing on the market of such products. As a consequence, the import of seal products is prohibited only in cases where those products are intended to be placed on the market in the Union: seal products can be imported, stored, and processed in the Union, provided that they are not released for free circulation (paras. 69 and 70 of the judgment). These considerations led the Court to affirm that the effects of the regulation on external trade are merely secondary (paragraph 71). Also, the proportionality test created by the Court was rather cursory, as it was limited to the acknowledgment of the reasons given by the Regulation itself: namely that the verification of compliance with the requirements attaining to the methods of seal hunting in order to avoid unnecessary pain, distress, fear or other forms of suffering of the animals is not feasible in practice, given the conditions in which seal hunting occurs, while other forms of harmonised rules, such as labelling requirements, would impose a significant burden on operators (paragraph 95). The conclusion was surreal: "[t]he legislature took the view that (…)

[29] Judgment of 25 April 2013, case T-526/10, *Inuit Tapiirit Kanatami et al. v. European Commission*, EU:T:2013:215.

a general prohibition on the placing on the market of seal products was the best means of guaranteeing the free movement of goods" (paragraph 96). The substantial claims made by the Inuit dealt with the effect of the EU measures on their activity, which would be severely affected by the burdensome requirements of the Regulation (they submitted that the Inuit exception was in reality an "empty box," given the difficulties they faced in implementing it). Further, they alleged the violation of economic rights derived from the ECHR and the EU Charter of Fundamental Rights, to be read in light of the United Nations Declaration on the Rights of Indigenous Peoples, particularly Article 19 thereof, which requires States to consult indigenous peoples before adopting measures that might affect their communities[30]. To dismiss those claims, the General Court merely pointed out the attention the EU legislature paid to the interests of indigenous peoples and the proportionality of the measures adopted. In particular, the General Court held that "[t]he document relied on by the applicants is a declaration and thus does not have the binding force of a treaty. It cannot be considered that that declaration can grant the Inuit autonomous and additional rights over and above those provided for by Union law" (paragraph 112). The very presence of the Inuit exception was, in the opinion of the General Court, a confirmation of the respect for the culture and identity of the members of the Inuit communities. The saga was concluded by the judgment of the Court of Justice, which dismissed the appeal against the General Court's decision[31], thus finalising the failure of the Inuit communities' attempt to challenge the Seal Regime in the EU's judiciary. The Court's arguments are not entirely convincing, as they failed to overcome the many inconsistencies of the Regulations, disregarding the undisputable

[30] There is no internationally binding legal instrument that specifically deals with the rights of indigenous peoples. The only one is ILO Convention No 169, cited above. The UN Declaration is a non-binding act. It states that members of indigenous communities are entitled to human rights as established by all relevant international conventions. In addition, they are entitled, under the Declaration, to specific rights that protect their culture, traditions, language, religion, and the relationship with their traditional land and resources. On indigenous peoples in international law, see J. Anaya, *Indigenous Peoples in International Law* (Oxford, 2000).

[31] Judgment of 3 September 2015, case C-398/13 P, *Inuit Tapiriit Kanatami et al. v. European Commission*, EU:C:2015:535.

impact of the Seal Regime on international trade and the relevance of the rights of indigenous peoples in the EU legal order. The logic of the judgment is particularly weak regarding the trade impact of the measure, as will become apparent considering the decisions that were being taken in the meantime in the framework of the WTO dispute settlement procedure.

Canada and Norway requested consultations in the framework of the WTO dispute settlement procedure in November 2009, and after the consultations failed, a panel was established by the WTO Dispute Settlement Body in 2012. The panel's report was issued on November 25, 2013[32], and the parties decided to appeal. The Appellate Body's report was subsequently issued on May 22, 2014[33]. The importance of the case from the standpoint of international trade law lies in the role of the exception for public morals under Article XX(a) of the GATT in relation to animal welfare. It was the first time that such a justification was accepted by the WTO Appellate Body. Canada and Norway claimed that the EU Seal Regime (which included the basic regulation and the implementing regulation) violated Articles I(1) and III(1) of the GATT 1994 and the WTO Agreement on Technical Barriers to Trade (TBT). Notably, they claimed that Canadian and Norwegian seal products were granted a less favourable treatment as compared to like products from the EU (a very limited production in Sweden and Finland), as well as from other non-EU countries (Greenland). While Norway has been gradually abandoning seal hunting[34], this activity has continued to be widely practised in Canada, with indigenous hunting representing only a small share of an activity that is primarily of a commercial character. In addition, they claimed that the certification mechanism was also discriminatory and trade restrictive in many respects, as it discouraged indigenous

[32] Panel Report, WT/DS400/R, WT/DS/401/R, *European Communities- Measures Prohibiting the Importation and Marketing of Seal Products.*

[33] Appellate Body Report, WT/DS400/AB/R, WT/DS401/AB/R, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products.*

[34] The Norwegian government started withdrawing subsidies to seal hunters in 2014, although Norwegians still consider seal hunting an important part of their traditions (see R. Nicoll, "Life on the Ice: One Last Hunt for Norway Sealers", *The Guardian*, April 9, 2017).

communities, especially Canadian[35], while advantaging Greenlandic Inuit, who are more organised and supported by the government. In sum, according to the complainants, the IC exception was in itself discriminatory, as it failed to draw a clear distinction between traditional and subsistence hunting and commercial hunting[36].

The main issue in this case was that the EU Seal Regime was designed to achieve two divergent policy objectives: the seal products ban was imposed to respond to the public concern over cruel methods of seal hunting, whereas the IC exception was conceived in order to protect the traditions and cultures of indigenous communities[37], mitigating the unavoidable adverse effects of the ban on those communities "to the extent compatible with the main objective of addressing the public moral concerns with regard to the welfare of seals"[38]. It is interesting to notice how the EU's attitude has changed with respect to the ECJ cases, where animal welfare was "in the background", with the main objective of the measure being the functioning of the internal market.

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[35] Indigenous communities in Alaska and Russia hunt seals primarily for their consumption (Panel Report, WT/DS400/R, WT/DS/401/R, paragraph 7.314.).

[36] In Canada's view, the Inuit hunt in Greenland has characteristics that are closely related to that of commercial hunts, and this demonstrates that the distinction between Inuit and commercial hunts is illusory in practice (Appellate Body Report, WT/DS400/AB/R, WT/DS401/AB/R, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, paragraph 2.7.).

[37] J.Y. Qin, "Accommodating Divergent Policy Objectives Under WTO Law: Reflections on EC-Seal Products", *American Journal of International Law* (2015): 308-14. This interpretation was denied by the panel: "For us, the interests that were accommodated in the measure through the exceptions must be distinguished from the main objective of the measure as a whole. Further, unlike the issue of seal welfare, we do not find in the evidence submitted that the interests covered by the IC, MRM, and Travellers exceptions are grounded in the concerns of EU citizens. Rather, the evidence suggests that they appear to have been included in the course of the legislative process. For all these reasons, we do not consider that the interests incorporated in the IC, MRM, and Travellers exceptions form independent policy objectives of the EU Seal Regime as a whole" (Panel Report, WT/DS400/R, WT/DS/401/R, paragraph 7.402.).

[38] Appellate Body Report, WT/DS400/AB/R, WT/DS401/AB/R, paragraph 2.110.

Despite addressing the problem, both the panel and the AB failed to provide clear criteria to reconcile such divergent objectives.

The conclusion was that the AB found that the effects of the EU Seal Regime were discriminatory and inconsistent with Articles I(1) and III(1) of the GATT. However, it accepted the EU's argument that the ban on seal products responded to public moral concerns over the welfare of seals and was thus legitimate under the general exceptions provision of Article XX(a) of the GATT, which permits Members to adopt measures in order to protect public morals. However, the AB held that the EU measure failed to comply with the conditions provided by the *chapeau* of Article XX, namely that the measures must not constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail"[39]. The AB held that

> [i]n sum, we have identified several features of the EU Seal Regime that indicate that the regime is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, in particular with respect to the IC exception. First, we found that the European Union did not show that the manner in which the EU Seal Regime treats seal products derived from IC hunts as compared to seal products derived from 'commercial' hunts can be reconciled with the objective of addressing EU public moral concerns regarding seal welfare. Second, we found considerable ambiguity in the 'subsistence' and 'partial use' criteria of the IC exception. Given the ambiguity of these criteria and the broad discretion that the recognised bodies consequently enjoy in applying them, seal products derived from what should in fact be properly characterized as 'commercial' hunts could potentially enter the EU market under the IC exception. We did not consider that the European Union has sufficiently explained how such instances can be prevented in the application of the IC exception. Finally, we were not persuaded that the European Union has made 'comparable efforts' to facilitate the access of the Canadian

[39] The AB also found that the MRM exception was inconsistent with WTO rules, on similar grounds, as it held that the exception was not clear in distinguishing between non-profit and commercial hunts, and could result in arbitrary or unjustified discrimination.

> Inuit to the IC exception as it did with respect to the Greenlandic Inuit. We also noted that setting up a 'recognised body' that fulfils all the requirements of Article 6 of the Implementing Regulation may entail significant burdens in some instances.

Simply put, the AB recognised that the main problem in the Seal Regime was balancing animal welfare concerns – acceptable under the public morals exception – and the protection of the interests and traditions of indigenous communities, but merely acknowledged the tension that derives from such diverging interests without further elaborating on the matter. What has been particularly criticised is that the AB did not give much consideration to indigenous peoples' rights[40], while the panel had at least mentioned the relevant international instruments as sources of evidence of the relevance of indigenous peoples' interests in the matter: "[i]n our view, these sources, taken in their entirety as factual evidence, demonstrate the recognized interests of Inuit and indigenous peoples in preserving their traditions and cultures. More specifically, in the case of seal hunts, the evidence before us shows that seal hunting represents a vital element of the tradition, culture, and livelihood of Inuit and indigenous communities"[41].

The main reason why the ban was considered inconsistent with the *chapeau* of Article XX is that the EU failed to show the rationale behind the IC exception in relation to the legitimate objective of protecting animal welfare: "[t]he European Union has not established, for example, why the need to protect the economic and social interests of the Inuit and other indigenous peoples necessarily implies that the European Union cannot do anything further to ensure that the welfare of seals is addressed in the context of IC hunts, given that IC hunts can cause the very pain and suffering for seals that the EU public is concerned about"[42]. In other words, why should indigenous hunts be more morally acceptable than commercial hunts, if both are painful and cruel for

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[40] E. Whitsitt, "A Comment on the Public Morals Exception in International Trade and the EC-Seal Product Case: Moral Imperialism and Other Concerns," *Cambridge Journal of International and Comparative Law* (2014): 1376 *ff*.

[41] Panel report, paragraph 7.295.

[42] Appellate Body report, paragraph 5.320.

seals? This tension between the two objects of protection and the lack of any attempt to consider both as worthy of protection represent the weakness of a case that has been appraised as opening free trade to legitimate concerns over animal welfare[43]. On the contrary, the AB's objections to the ambiguities of the definitions and distinctions between indigenous hunts and commercial hunts, and to the problems in the application of the IC exception are correct and again point out the difficulties in balancing conflicting interests.

2.3. *The reform of the EU Seal Regime*

Having lost the case, the EU had to comply with the AB report and amend the Seal Regime in accordance with the recommendations provided by the Appellate Body in order to remove the inconsistencies with WTO rules. The EU informed the WTO of the adoption of the reformed Seal Regime on October 25, 2015 after the expiry of the reasonable period of time it had agreed upon with Canada and Norway[44].

The Seal Regime was thus reformed with the adoption of Regulation (EU) 2015/1775[45], which amended the basic regulation and repealed the Commission implementing regulation. The new regulation removed the MRM exception because of the difficulties in distinguishing hunts that are carried out for the main purpose of marine resources management from large-scale commercial hunts, maintained the traveller exception and restricted the scope of the Inuit exception, imposing more stringent conditions. The preamble of the regulation makes

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[43] P. Serpin, "The Public Morals Exception After the WTO Seal Products Dispute: Has the Exception Swallowed the Rules?", *Columbia Business Law Review* (2016): 217 *ff.*; G. Shaffer and D. Pabian, "The WTO EC - Seal Products Decision: Animal Welfare, Indigenous Communities and Trade", *American Journal of International Law* (2015).

[44] European Communities – Measures prohibiting the importation and marketing of seal products, Status Report by European Union, 25 October 2015, WT/DS400/16/Add.7, WT/DS401/17/Add.7.

[45] Regulation (EU) 2015/1775 of the European Parliament and the Council of 6 October 2015, amending Regulation (EC) No 1007/2009 on trade in seal products and repealing Commission Regulation (EU) No 737/2010, in *O.J.* L 262 of 7 October 2015.

the different policy objectives of the measure more explicit: the ban on seal products was adopted with the objective of

> eliminating obstacles to the functioning of the internal market due to differences in national measures regulating trade in seal products. Those measures were adopted in response to public moral concerns about the animal welfare aspects of the killing of seals and the possible presence on the Union market of products obtained from seals killed in a way that causes excessive pain, distress, fear and other forms of suffering. Such concerns were supported by evidence showing that a genuinely humane killing method cannot be consistently and effectively applied and enforced in the specific conditions in which seal hunting takes place (*Recital* 1).

The measures are thus explained as the necessary remedy to an internal market distortion due to diverging national measures adopted out of public concern for the welfare of seals. At the same time, however,

> seal hunting is an integral part of the socio-economy, nutrition, culture and identity of the Inuit and other indigenous communities, making a major contribution to their subsistence and development, providing food and income to support the life and sustainable livelihood of the community, preserving and continuing the traditional existence of the community. For those reasons, seal hunts traditionally conducted by Inuit and other indigenous communities do not raise the same public moral concerns as seal hunts conducted primarily for commercial reasons. Moreover, it is broadly recognised that the fundamental, economic and social interests of Inuit and other indigenous communities should not be adversely affected, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples adopted on 13 September 2007 and other relevant international instruments (*Recital* 2).

In light of such premises, the regulation better specifies the conditions under which indigenous communities can continue to place seal products on the EU market. The new Article 3 (1) of the basic regulation now reads as follows:

> The placing on the market of seal products shall be allowed only where the seal products result from hunts conducted by Inuit or other indigenous communities, provided that all of the following conditions are fulfilled: (a) the hunt has traditionally been conducted by the community; (b) the hunt is conducted for and contributes to the subsistence of the community, including in order to provide food and income to support life and sustainable livelihood, and is not conducted primarily for commercial reasons; (c) the hunt is conducted in a manner which has due regard to animal welfare, taking into consideration the way of life of the community and the subsistence purpose of the hunt.

Compared to the conditions established by the repealed Commission regulation, it is clear that there was an effort on the part of the EU legislature to better specify the distinction between traditional hunts and commercial hunts. Nevertheless, it remains difficult to establish the limit of "sustainable livelihood" when considering a community whose largest source of income is marketing seal products, unless indigenous communities are still considered as primitive societies that rely only on a traditional subsistence economy, although for many of them this is not the case. In order to respond to the AB's objection about the contradiction between the "moral concerns" over the cruelty of seal hunts and the IC exception that allowed cruel and painful hunts by indigenous hunters, the new regulation introduced an additional condition requiring that the killings are executed in a way that respects animal welfare. The problem of the difficulty in the verification of compliance remains, as hunts continue to take place in remote arctic regions where monitoring is a hard task.

In order to be admitted to free circulation in the internal market, seal products must be accompanied by a document, either paper-based or in electronic form, attesting compliance with the mentioned conditions, issued by an independent body recognised by the Commission. The new implementing regulation details the procedures for the certification process and the requirements an entity must fulfil to be included on the list of recognised bodies, which are the same as in the old regulation. In sum, the burdensome certification procedures remain. In fact, they are made even more complex by the more stringent

criteria and subsequent monitoring difficulties. Considering both the WTO panel and Appellate Body's findings and the EU amendments, it is possible to say that in this very complex case, where the need emerged to balance the human rights of indigenous peoples with the moral concerns of the European citizens over animal welfare, the latter prevailed. It has been suggested that the EU's institutions failed to understand the complexity of the problem[46]. This is probably not entirely true: the institutions were well aware from the beginning of the legislative process that it was necessary to preserve the indigenous hunting activities but were faced with insurmountable difficulties in reconciling the divergent policy objectives.

3. Illegal Timber. The FLEGT Regime

3.1. *The background. CITES and REDD+*

Timber is undisputedly a resource that has enormous importance both for the economy and the global environment. Its responsible use is critical for the fight against deforestation, which, in turn, is a crucial element of climate change and global warming. Timber is in theory a renewable resource but, since forests need years and decades to regrow, the latter can safely be considered as exhaustible resources, and as such they are treated in international instruments devoted to their preservation. It is thus necessary to accurately manage the use of timber in order to preserve forests and the biodiversity habitats with which they are entrusted. The dangers to forests are not limited to an indiscriminate use of timber, as they also involve the relationship between forestry and other uses of the land, such as extensive agriculture and livestock. As an example, the production of biofuels, a source of renewable energy whose production has been developing recently, raises many contradictions in this respect, as it necessarily entails the allocation of wide extensions of land to growing crops for their pro-

[46] Hossain, "The EU Ban on the Import of Seal Products", 163.

duction, contributing in many cases to deforestation. The EU has addressed such problems with the adoption of measures aimed at promoting the responsible use of timber and establishing sustainability criteria for biofuels[47].

The first measure on illegal timber was a regulation adopted in 2005 which introduced the so-called FLEGT (Forest Law Enforcement, Governance and Trade) licencing scheme on the legal basis of Article 133 TEC on the Common Commercial Policy. The FLEGT regime, which had been started two years earlier by the Commission with an Action Plan, is based on the conclusion of voluntary partnership agreements with timber-producing third countries aimed at fighting against illegal logging. The regime was completed more recently with a regulation based on Article 114 TFEU on the obligations of operators who place timber and timber products on the market to adopt due diligence criteria about the supply chain of timber, to make sure it was legally harvested. The EU Timber Regime has thus acquired the shape of a comprehensive system that includes traditional regulatory measures, certification mechanisms, international bilateral cooperation and responsibility of operators.

The EU FLEGT has become an important feature of the effort to fight deforestation at the international level. There is no specific international convention addressing the protection and conservation of forests: the lack of agreement on this very sensitive issue is largely due to the relationship it bears to the principle of permanent sovereignty over natural resources[48], which is one of the pillars of the international law of development[49]. In the absence of a comprehensive legal instrument,

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[47] The sustainability criteria for biofuels are discussed below.

[48] This principle was first enunciated in the UN General Assembly Declaration on the permanent sovereignty over natural resources, No 1803 (XVII) of 14 December 1962 and later in Resolution No 3171 (XXVIII) of 17 December 1973.

[49] See R. Cadin, "Il diritto internazionale dello sviluppo: genesi, evoluzione e prospettive", in *Sviluppo e diritti umani nella cooperazione internazionale*, 3rd ed., ed. E. Spatafora, R. Cadin, and C. Carletti (Torino, Giappichelli, 2012), 43 *ff*. U. Villani, "Il diritto allo sviluppo: diritto umano e dei popoli", in *Il sistema universale dei diritti umani all'alba del XXI secolo. Atti del Convegno nazionale per la celebrazione del 50° anniversario della Dichiarazione Universale dei Diritti Umani, Roma, 10/11 dicembre 1998* (Roma: SIOI, 1999) clarifies that the right to development derives from the

the regulatory framework for the sustainable management and governance of forests is fragmented in a multiplicity of legal instruments, both binding and non-binding[50], directly or indirectly addressing the many problems of the sustainable management of forests. The most relevant of such international instruments, for the relation they have with the implementation of the EU FLEGT regime, are the Convention on International Trade in Endangered Species (CITES) of 1973 and the United Nations Framework Convention on Climate Change (UNFCCC), adopted during the UN Conference on Environment and Development held in Rio de Janeiro in 1992[51].

The CITES, to which the EU is a contracting party, is important in the context of the implementation of FLEGT because it includes many tree species among the controlled species which are listed in the three Appendices to the Convention[52]. This means that if trade in such enlisted species is permitted (it is generally prohibited for the species in Appendix I), it will be in any case subjected to CITES rules, and all timber and non-timber products derived from such tree species must be accompanied by a valid export permit from the country of origin in order to be exported to the EU. FLEGT is coordinated with CITES: a CITES export authorisation can replace a FLEGT certification, as will be better explained later.

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principle of autodetermination of peoples. The right of permanent sovereignty over natural resources is a critical element thereof.

[50] The result has been defined as "polycentric governance," i.e. a fragmented and segmented governance for forests: C. Dlamini and Y. Monouroy, "Governing Sustainable Forest Management Issues in Polycentric Governance: The EU FLEGT Action Plan as a Regulatory Catalyser", *Environmental Law Review* (2017): 6 *ff*.

[51] For other international instruments that are relevant for forest governance, see Dlamini and Monouroy, "Governing Sustainable Forest Management Issues", 14 *ff*.

[52] Appendix I includes species threatened with extinction. Trade in specimens of these species is permitted only in exceptional circumstances. Appendix II includes species not necessarily threatened with extinction, but in which trade must be controlled in order to avoid utilisation incompatible with their survival. Appendix III contains species that are protected in at least one country which has asked other CITES Parties for assistance in controlling the trade.

The UNFCCC's aim is to stabilise and reduce the concentration of greenhouse gases in the atmosphere, particularly reducing carbon emissions, in order to slow down global warming and thus mitigate climate change[53]. It recognises the importance of forests in pursuing such objectives, as they represent a relevant global carbon stock. Accordingly, the UNFCCC includes the commitment to support the reduction of emissions from deforestation and forest degradation and the enhancement of the role of forest conservation and the sustainable management of forests[54]. Such objectives were later converted in the UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation (REDD) launched in 2007 at the 13th Conference of Parties (COP 13) meeting in Bali, with the so-called Bali Action Plan[55]. The REDD concept was later extended to include the conservation of forests, the sustainable management of forests, and the enhancement of forest carbon stocks (so-called REDD+). The REDD+ idea is to provide performance-based or results-based incentives (financial contributions) to developing countries for reducing emissions from deforestation and for carbon sequestration (conservation of the carbon stocks), as well as for supporting associated land-use planning and reforms in forest governance policies. The regulatory framework for REDD+ was adopted at the COP 19 held in Warsaw in November 2013 (Warsaw Framework for REDD+). The 2015 Paris Agreement[56], adopted by the COP 21 meeting held in Paris, also includes a provision on forests and REDD+[57], Article 5, which encourages States to pursue

[53] The EU is a contracting party to the UNFCCC, to which it acceded with Council Decision No 94/69/EC of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change, in *O.J.* L33 of 7 February 1994, 11.

[54] See also Articles 2 and 3 (3) of the 1997 Kyoto Protocol.

[55] Decisions 1/CP13 and 2/CP13.

[56] The EU concluded the Paris Agreement with Council Decision (EU) No 2016/1841 of 15 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change, in *O.J.* L282 of 19 October 2016, 1.

[57] See also the joint statement of the UNFCCC Parties during the Paris Conference: "We leaders, today in Paris on November 30th 2015, recognize the essential role forests play in the long-term health of our planet, in contributing to sustaina-

the policy of results-based payments for reducing emissions from deforestation, at the same time recognising the importance of the non-carbon benefits that derive from the sustainable management of forests[58]. Such benefits include biodiversity protection, poverty reduction, food and water security, and the improved livelihoods of communities that depend on forests, with particular regard to indigenous communities' rights. The objective of the REDD+ program is to address and fight against deforestation and forest degradation drivers, such as the conversion of forests – which can happen legally as well as illegally, for agricultural crops, often grown for export as in the case of palm oil – by means of incentivising developing countries to adopt more sustainable forest management policies. The program should be funded by different sources, both public and private, but so far, it has mainly been financed by development cooperation funds at the international[59] as well as the national level.

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ble development, and in meeting our shared goal of avoiding dangerous climate change. We are committed to intensifying efforts to protect forests, to significantly restore degraded forest, peat and agricultural lands, and to promote low carbon rural development. We are committed to do our part as governments and invite others to join us in partnership to reverse deforestation in our lifetimes (…). This momentum compels us to deliver a successful outcome in Paris for the good of the climate, humanity and the world's forests".

[58] Article 5 of the Paris Agreement: "1. Parties should take action to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases as referred to in Article 4, paragraph 1 (d), of the Convention, including forests.

2. Parties are encouraged to take action to implement and support, including through results-based payments, the existing framework as set out in related guidance and decisions already agreed under the Convention for: policy approaches and positive incentives for activities relating to reducing emissions from deforestation and forest degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries; and alternative policy approaches, such as joint mitigation and adaptation approaches for the integral and sustainable management of forests, while reaffirming the importance of incentivizing, as appropriate, non-carbon benefits associated with such approaches".

[59] In 2008, the World Bank established the Forest Carbon Partnership Facility, which finances REDD+ projects.

The REDD+ program has a broader scope than FLEGT, the latter being focused only on fighting against illegal logging through trade. However, the two regimes share the same objectives and the same vision: enhancing the culture of sustainable forest management through incentives to developing countries where forests are situated. And both need the wide participation of all the stakeholders in the process, including governments, private companies, local communities and civil society.

3.2. *The EU FLEGT Regime*

The process of establishing a trade regime for timber started with the Action Plan on Forest Law Enforcement, Governance and Trade proposed by the Commission in 2003[60]. The objective of the Action Plan was the fight against illegal logging, which takes place when timber is harvested in violation of national laws. Illegal logging is often associated with corruption and organised crime, and can sometimes fuel violent conflict. It is the cause of enormous environmental damage and loss of biodiversity, and it ultimately has a devastating impact on climate change. Illegal logging undermines sustainable forest management and the livelihood of forest-dependent communities, including indigenous peoples. The Action Plan addressed the problem of forest conservation from the point of view of legality, rather than sustainability[61], although promoting the latter is the ultimate and wider objective of the EU's action. On this point, FLEGT can effectively interact with REDD+, whose main focus is instead on sustainability and the conservation of forests. The Commission argued that, since in many countries, forest legislation is based on sustainability, better law enforcement will likely lead to more sustainable forest management. The Action Plan envisaged the adoption of rules on trade in timber, based on bilateral Voluntary Partnership Agreements (VPAs) with timber-producing countries. The negotiation and conclusion of VPAs is necessary for

[60] Communication from the Commission to the Council and the European Parliament, *Forest Law Enforcement, Governance and Trade (FLEGT). Proposal for an EU Action Plan*, COM (2003) 0251 final of 21 May 2005.

[61] See Chapter 3 of the Action Plan.

the effectiveness of the system since no internationally agreed standard for the sustainable management of forests exists, and the definition of legal and illegal logging is based only on national laws. In such a situation, the EU could not autonomously and unilaterally regulate trade in timber and timber products without the cooperation of timber-producing countries, whose authorities are the only ones who can assess the legality of timber harvesting pursuant to their own domestic laws. According to the Action Plan, trade regulation through the VPAs should be accompanied by other EU interventions based on cooperation with timber-producing countries aimed at supporting policy reform, capacity building, and transparent verification systems, and supported by interventions at the EU level, such as in the field of public procurement[62], private sector initiatives based on the principles of corporate social responsibility, and financing and investment based on improved due diligence with particular regard to banks and other financial institutions investing in the forest sector.

The legislation that constitutes the FLEGT legal framework comprises Regulation (EC) No 2173/2005[63], which establishes the FLEGT licensing scheme for imports of timber into the EU and Regulation (EU) No 995/2010[64] laying down the obligations of operators who place timber and timber products on the market; in addition, three Commission Regulations lay down the detailed rules and procedures for the implementation of the regulations[65]. The system is completed by the

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[62] See the European Commission's Communication *Public procurement for a better environment*, COM (2008) 400 final, where the notion of Green Public Procurement is defined as a "process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life-cycle when compared to goods, services and works with the same primary function that would otherwise be procured". See also European Union, *Buying Green! A Handbook on Green Public Procurement*, 3rd ed. (Luxembourg, 2016).

[63] Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, in *O.J.*, L 347 of 30 December 2005, 1.

[64] 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, in *O.J.* L 295 of 12 November 2010, 23.

[65] Commission Regulation No 1024/2008 of 17 October 2008 laying down de-

VPAs concluded or in the process of being negotiated with partner countries. At the time of writing, six VPAs are in force[66], for one, negotiations have been concluded, but the agreement has not yet entered into force[67], while for eight countries, negotiations are under way but not yet concluded[68]. Only Indonesia started to issue FLEGT licenses in 2016. China is not a partner of the EU in the FLEGT framework but has established a close cooperation with the EU under the Bilateral Coordination Mechanism on Forest Law Enforcement and Governance.

The FLEGT Regulation of 2005 establishes a licensing scheme as a measure to ensure that only timber products that have been legally harvested in accordance with the national legislation of the producing countries may enter the internal market. The scheme applies to a wide range of timber products listed in Annexes II and III. Under Article 3 of the Regulation, the licensing scheme shall apply only to timber and timber products imported from partner countries, i.e. countries which have concluded a VPA with the Union, as the exporting license must be issued by the licensing authorities designated by the exporting countries on the basis of domestic legislation. The competent authorities designated by the Member States must monitor the implementation of the scheme and report to the Commission. Imports into the EU of timber originating from partner countries is prohibited unless the shipment is accompanied by a FLEGT license. Article 4(3) introduces

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tailed measures for the implementation of Council Regulation No 2173/2005, in *O.J.* L 277 of 18 October 2008, 23; Commission Delegated Regulation No 363/2012 of 23 February 2012 on the procedural rules for the recognition and withdrawal of recognition of monitoring organisations as provided for in Regulation (EU) No 995/2010, in *O.J.* L 115 of 27 April 2012, 12; Commission Implementing Regulation (EU) No 607/2012 of 6 July 2012 on the detailed rules concerning the due diligence system and the frequency and nature of checks on monitoring organisations as provided for in Regulation (EU) No 995/2010, in *O.J.* L 177 of 7 July 2012, 16.

[66] Cameroon (2011), Central African Republic (2012), Ghana (2009), Indonesia (2014), Liberia (2013), Republic of the Congo (2013).

[67] Vietnam (text agreed in 2017).

[68] Ivory Coast, Democratic Republic of the Congo, Gabon, Guyana, Honduras, Laos, Malaysia, Thailand.

an exemption from the licensing obligation for timber products of tree species covered by CITES[69].

As stated above, only Indonesia has started implementing the licensing scheme, and Ghana is completing the preliminary implementation processes. Negotiating and implementing a VPA is indeed a lengthy process which involves many administrative and legislative interventions on the part of the partner country. It must also be considered that the process of concluding a VPA is not limited to formal negotiations but also requires the involvement of all the stakeholders (NGOs, local and indigenous communities, operators of the forest industry, exporters, trade unions) in order to build a consensus around a procedure which might be onerous for them. The involvement of stakeholders is also required by the VPAs for the constant monitoring of the implementation of the agreement. Under the VPAs, the partner countries designate a licensing authority which shall issue FLEGT licenses for shipments of timber and timber products legally produced in the country. In addition, the partner countries must establish and implement a national verification system, or Timber Legality Assurance System (TLAS), to verify that timber and timber products have been legally produced. The TLAS must include compliance checks and procedures to ensure that timber of an illegal or unknown origin does not enter the supply chain. The effectiveness of the implementation of the TLAS must be assessed by an independent evaluator (or independent auditor, as it is called in the Republic of Congo VPA). All VPAs provide for social safeguards to minimise the possible adverse effects of the FLEGT scheme and its impact on communities whose way of life depends on forests, such as local communities, ethnic minorities, and indigenous communities. All VPAs are based on the premise of the common commitment to sustainable forest management and forest conservation[70].

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[69] Implemented by the Union with Regulation 338/97, in particular see Appendices I, II and III for the species lists.

[70] See, for example, Article 1 of the most recent VPA, which was concluded with Vietnam in 2017: "1. The objective of this Agreement, consistent with the Parties' common commitment to the sustainable management of all types of forest, is to provide a legal framework aimed at ensuring that all imports into the

The FLEGT licensing scheme thus covers only timber and timber products that are exported from countries which have concluded and implemented a VPA. This means – taking into account the length of the VPA negotiation and implementation process – that the majority of timber imports into the EU are not monitored. This is the reason why in 2010 the EU adopted Regulation No 995/2010 (the so-called EUTR, EU Timber Regulation), in force since 2013, which introduced a system of due diligence for EU operators who import timber from third countries. This regulation is considered as an environmental measure, as it has been adopted under the legal basis of Article 192(1) TFEU, and not as a trade measure, although it necessarily affects trade. The EUTR completes the timber regime, prohibiting the placing on the internal market for the first time of illegally harvested timber or timber products derived from such timber[71]. Operators placing timber and timber products on the internal market must take appropriate steps in order to ascertain that illegally harvested timber is not placed on the market. To that end, they must exercise due diligence through a system of measures and procedures aimed at minimising the risk of placing illegally harvested timber on the internal market, as detailed in Article 6 of the regulation. The regulation requires three elements inherent to risk management: access to relevant information on the timber shipment, risk assessment and mitigation of the risk identified. Due diligence procedures can be delegated to organisations recognised by the Commission which have developed due diligence systems meeting the requirements of the Regulation. Of course, due diligence obligations do not apply to timber and timber products that are accompanied either by a FLEGT license or a

Union from Viet Nam of timber and timber products covered by this Agreement have been legally produced and, in doing so, to promote trade in timber products from sustainably managed forests and harvested in accordance with the domestic legislation in the country of harvest". The text of the Agreement is available at http://ec.europa.eu/environment/forests/pdf/11_05_2017_EU_Vietnam_VPA.pdf.

[71] As many timber products undergo numerous processes after they are placed on the market, in order to make the due diligence obligations less burdensome, such obligations only apply at the moment of placing the products on the market for the first time. During subsequent trading operations, traders must nevertheless accompany the products with documents that permit the traceability of timber throughout the supply chain.

CITES certificate (Article 3 of the regulation on the status of timber and timber products covered by FLEGT and CITES).

The EU FLEGT Regime underwent a process of independent evaluation by a group of experts in 2016. The final report highlighted its innovative and comprehensive character and the important accomplishments in the improvement of forest governance in partner countries, but it also pointed out some weaknesses in the system. Despite continuing to be fully relevant, the FLEGT Action Plan needs to address new challenges, particularly with regard to deforestation and illegal forest conversion, which occurs primarily to make room for agricultural crops[72]. In this context, the synergies with REDD+ could enhance the effectiveness of both systems[73], as the FLEGT Regime addresses mainly the timber supply chain, trade and market access, while REDD+ is focused on monitoring the carbon and non-carbon benefits of forest conservation and addresses all deforestation and forest degradation drivers, not just illegal logging. It has been suggested that FLEGT and REDD+ might complement each other in stimulating action at the international level at a moment when the role of forests in mitigating climate change is receiving greater attention[74].

From the legal point of view, the EU FLEGT is a very interesting regulatory experiment which combines international cooperation in many ways similar to the Kimberley Process and private operators' due diligence obligations based on the concept of corporate sustainability (or corporate social responsibility). However, FLEGT is based on bilateral cooperation, lacking a multilateral framework as in the diamond regime. As the FLEGT Regime is focused on the enforcement of the do-

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[72] Evaluation of the EU FLEGT Action Plan, 2004-2014, *Final Report*, Volume 1, 27 April 2016, Key Message 1.

[73] Dlamini and Montouroy, "Governing Sustainable Forest Management Issues", *Environmental Law Review* (2017, vol. 19-1): 6-29, at 26-27 argue that FLEGT could be a regulatory catalyzer. As it is an innovative regime which brings together public and private actors in a binding regulatory framework, it could acquire an important role in the polycentric global governance of forest management, together with REDD+.

[74] A. Savaresi, "EU External Action on Forests: FLEGT and the Development of International Law", in *The External Environmental Policy of the European Union*, ed E. Morgera (Cambridge, Cambridge University Press, 2012): 149 *ff*.

mestic laws and regulations of the partner countries, the incentive of market access serves the goal of inducing third countries to improve law enforcement, and at the same time, to encourage them to enact a more sustainable forest governance.

4. Illegal, unreported and undocumented fishing

Illegal, unreported and undocumented (IUU) fishing is a problem that is in many ways similar to illegal timber. In both cases, the indiscriminate and uncontrolled harvest of natural resources seriously jeopardises biodiversity and negatively impacts the environment and the way of life of people who depend on such resources[75]. IUU fishing has been addressed at the international level by the United Nations Convention on the Law of the Sea (UNCLOS) of 1982[76], in par-

[75] "Illegal, Unreported and Unregulated (IUU) fishing depletes fish stocks, destroys marine habitats, undermines food security, distorts competition, puts honest fishers at a disadvantage and weakens coastal communities, particularly in developing countries. IUU fishing poses a serious environmental threat to fish stocks and can lead to the collapse of fisheries. The estimated global value of IUU fishing is at least 10 billion euros per year. Between 11 and 26 million tonnes of fish are caught illegally each year, which corresponds to at least 15% of world catches. Significant resources, revenue, nutrition and livelihoods are lost as a result. This poses serious challenges to human rights and security; maritime security; economic activity and trade, both at sea and on land" (European Commission, Communication on the application of Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing, of 1 October 2015 COM(2015) 480 final).

[76] United Nations Convention on the Law of the Sea (UNCLOS), December 10, 1982, 1833 U.N.T.S. 3. It is the most important legal instrument governing international maritime relations. It is in large part a codification of customary international law, but it also includes several important elements of innovation in light of the progressive evolution of international law, in particular with regard to the exploitation of natural resources. The EU joined the UNCLOS with Council Decision (EC) No 98/392, *O.J.* L 179 of 23 June 1998, 1, which also contained a declaration of competence that described in detail the distribution of competences between the Union and the Member States with regard to the Convention. On the participation of the Union in the UNCLOS, see E. Paasivirta, "The European Union and the

ticular, with the conclusion of the United Nations 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 of 4 August 1995 (UN Fish Stocks Agreement) and by the FAO, which adopted many action plans aimed at preventing, deterring and eliminating IUU fishing[77]. Regional Fisheries Management Organisations (RFMOs)[78] have designed measures to fight IUU fishing, such as catch documentation schemes, increased flag State obligations and IUU vessels lists. The United Nations has also recognised the importance of the fight against IUU fishing in the UN Sustainable Development Goals as one of the issues to tackle under the goal concerning the conservation and sustainable use of the oceans, seas and marine resources for sustainable development[79]. The EU started addressing the problem in the 90s in the framework of the

United Nations Convention on the Law of the Sea", *Fordham International Law Journal* (2015): 1045*ff*.

[77] The FAO's International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU Fishing) is a voluntary instrument agreed in 2001. There are three further FAO relevant developments: the adoption in 2009 of the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, which is yet to come into force, the adoption of the 2013 FAO Voluntary Guidelines for Flag State Performance and the proposed establishment of a Comprehensive Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels. See M.A. Young, *Trade-Related Measures to Address Illegal, Unreported and Unregulated Fishing, E15 Initiative* (Geneva, 2015), available at https://www.ictsd.org/sites/default/files/research/E15_Fisheries_Young_FINAL.pdf.

[78] The Union is a member of several of such organisations: six tuna RFMOs and eleven non-tuna RFMOs (European Commission, Communication on the application of Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing).

[79] See Goal 14: conserve and sustainably use the oceans, seas and marine resources for sustainable development, whose target 4 is by 2020 effectively regulate harvesting and end overfishing, illegal, unreported and unregulated fishing and destructive fishing practices and implement science-based management plans in order to restore fish stocks in the shortest time feasible, at least to levels that can produce the maximum sustainable yield as determined by their biological characteristics.

common fisheries policy with a number of regulations setting the discipline for the fishing activity of Member States' vessels and the terms and conditions under which vessels flying the flag of a third country may land and market their catches in Community ports. None of those regulations had conservation or sustainability aims, as they merely regulated the common fisheries policy. The only regulation with conservation objectives is Regulation 601/2004[80], which implemented the Convention on the Conservation of Antarctic Marine Living Resources of 1980[81].

In 2008, the EU legislature adopted Regulation 1005/2008[82], establishing a comprehensive regime for the fight against IUU fishing, which includes internal market and international trade elements[83]; in the following pages, I will mainly consider the international trade measures included in this regulation. The legal basis of the act is Article 37 TEC (now Article 43 TFEU) on the common agricultural policy, which includes fisheries. The innovation of this regulation, if compared to the previous ones, is that it applies not only to activities carried out by vessels flying the flag of a Member State or taking place in EU waters or in EU ports, but also to "all IUU fishing and associated activities carried out within the territory of Member States to which the Treaty applies, within Community waters, within maritime waters under the jurisdic-

[80] Council Regulation (EC) 601/2004 of 22 March 2004, laying down certain control measures applicable to fishing activities in the area covered by the Convention on the Conservation of Antarctic Marine Living Resources, in *O.J.*, L 97 of 1 April 2004, 16. The regulation applies to vessels flying the flag of a Contracting Party to the Convention, fishing in the ocean area surrounding the Antarctic continent, within the boundaries established by the Convention.

[81] The CCAMLR was concluded in Canberra in 1980 and approved by the Community with Council Decision No 81/691/EEC, in *O.J.* L 252 of 5 September 1981, 6.

[82] Council Regulation (EC) N0 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, in *O.J.* L 286 of 29 October 2008, 1.

[83] On the IUU fishing regime, see C. Fioravanti, "La pesca illegale, non dichiarata e non regolamentata nel diritto comunitario", *Rivista di Diritto agrario* (2009): 161 *ff.*; M.F. Orzan, "Il ruolo dell'Unione europea nella lotta alla pesca illegale, non dichiarata e non regolamentata", *La politica marittima comunitaria* (2009): 139 *ff.*

tion or sovereignty of third countries and on the high seas", as stated in Article 1(3). It has, thus, an impact on activities carried out outside the territorial scope of the Treaties by operators who do not have the nationality of a Member State.

The definition of IUU fishing is contained in Article 2 (2)(3) and (4) of the Regulation, and it is very detailed[84]. The provision emphasises the relevance of the national laws and regulations of the flag State as well as of all applicable international norms in determining the illegality of fishing activities. The Regulation prohibits the importation of fishery products obtained from IUU fishing. To achieve this goal, it reiterates and details the responsibilities of the Member States and third States alike as coastal, port, flag and market countries deriving from international law. In addition, it puts in place a system aimed at im-

[84] "2. 'illegal fishing' means fishing activities: (a) conducted by national or foreign fishing vessels in maritime waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations; (b) conducted by fishing vessels flying the flag of States that are contracting parties to a relevant regional fisheries management organisation, but which operate in contravention of the conservation and management measures adopted by that organisation and by which those States are bound, or of relevant provisions of the applicable international law; or (c) conducted by fishing vessels in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organisation; 3. 'unreported fishing' means fishing activities: (a) which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or (b) which have been undertaken in the area of competence of a relevant regional fisheries management organisation and have not been reported, or have been misreported, in contravention of the reporting procedures of that organisation; 4. 'unregulated fishing' means fishing activities: (a) conducted in the area of application of a relevant regional fisheries management organisation by fishing vessels without nationality, by fishing vessels flying the flag of a State not party to that organisation or by any other fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organisation; or (b) conducted in areas or for fish stocks in relation to which there are no applicable conservation or management measures by fishing vessels in a manner that is not consistent with State responsibilities for the conservation of living marine resources under international law". The provision emphasises the relevance of the national laws and regulations of the flag State as well as all relevant international norms in determining the illegality of fishing activities".

proving the traceability of fishery products through a certification scheme which requires that all fishery products imported into the EU be accompanied by a catch certificate containing all the relevant information, validated by the flag State of the vessel[85] (Article 12). The same rule applies for the exportation of fishery products from the EU. The flag Member State is responsible for the validation of the catch certificates (Article 15). Catch documentation issued by an RFMO is recognised as a valid substitution for the national catch certificate (Article 13). The Member States have the responsibility to carry out verification procedures and inspections in order to identify violations and may, in the case of ascertained non-compliance, refuse importation[86] (Articles 17 and 18). The acceptance by the EU of catch certificates issued by a third country is not automatic, as it is subject to some requirements set out in Article 20(1):

> [t]he acceptance of catch certificates validated by a given flag State for the purposes of this Regulation shall be subject to the condition that the Commission has received a notification from the flag State concerned certifying that: (a) it has in place national arrangements for the implementation, control and enforcement of laws, regulations and conservation and management measures which must be complied with by its fishing vessels; (b) its public authorities are empowered to attest the veracity of the information contained in catch certificates and to carry out verifications of such certificates on request from the Member States. The notification shall also include the necessary information to identify those authorities[87].

[85] Annex II to the Regulation provides a specimen of the certificate.

[86] Between 2010 and 2013, the Member States received more than 810,000 catch certificates and 108,000 processing statements and sent more than 6,400 requests for verification (European Commission, Communication on the application of Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing, of 1 October 2015, COM/2015/0480 final).

[87] As of 2018, ninety-two third countries have notified their competent authorities under the IUU Regulation and apply the EU catch certification scheme for exports to the EU (European Commission, *Information on States and their Competent Authorities notified under Article 20 (1) and (2) of IUU Regulation (EC) No 1005/2008 of 29 September 2008, as of 14 May 2018*).

This provision is completed by Article 20(2) on the possibility of administrative cooperation between the Commission and the third States. Third States which have not notified the Commission or whose notification is considered unsatisfactory cannot be admitted to the certification scheme, with the consequence that their vessels are excluded from exportation to the EU. Such requirements are apparently merely administrative, but they evidently entail the prerequisite that the third State has enacted laws, regulations and conservation and management measures consistent with the sustainable management of marine resources, which is the objective of the Regulation.

The certification scheme is completed by a system for the exchange of information between the Member States and between them and the Commission. Such dissemination of information makes it possible for the Commission to intervene in cases of non-compliance. The first step is the so-called *Community Alert System* disciplined in Chapter IV of the Regulation. An alert notice can be published by the Commission in the *Official Journal* of the EU if there is reasonable evidence that non-compliance by fishing vessels from certain third countries is occurring. After an alert notice, the Member States must intensify verifications and investigations on the third State or individual vessels concerned. Where the non-compliance is confirmed, the Commission may take additional measures, which, according to the situation, may involve individual vessels or third countries. Under Article 27 of the Regulation, the Commission shall establish a Community IUU vessel list, i.e. a sort of blacklist of vessels for which there is evidence of engagement in IUU fishing. The owners of the vessels have the possibility to be heard before being included on the list. IUU vessels included on the lists established by RFMO are also included on the Community list under Article 30.

The Commission, on the basis of all available information, may identify third countries that it considers as non-cooperating in the fight against IUU fishing and propose to the Council the inclusion of such countries on a list of non-cooperating third countries established according to Article 33. The procedure envisages a pre-identification (Article 32), the so-called *yellow card*, which puts the third country in the condition to cooperate with the Commission in order to improve fish-

ery governance by revising the legal framework and improving monitoring capacities. If the third State fails to resolve the IUU fishing problems, under Article 31 it can be identified as a non-cooperating third country (*red card*). The list is published in the *Official Journal* of the EU[88]. Non-complying vessels and non-cooperating countries face measures which include non-admittance to EU ports and the prohibition of export of fishery products to the EU market for single blacklisted vessels and for all the fishing vessels flying the flag of the non-cooperating countries, whose catch certificates shall not be accepted (Articles 37 and 38).

Such sanctions, which introduce a conditionality system, are aimed at incentivising compliance with national and international norms on the sustainable use and conservation of marine biological resources by refusing market access to non-complying vessels or countries. A *green card* (removal of a third State from the list of non-cooperating countries, Article 34) can be granted if the non-cooperating third countries adopt structural reforms in the fisheries sector and implement them.

5. Sustainability criteria for biofuels and bioliquids. A challenge for sustainable international trade

5.1. *The Renewable Energy Directive: RED*

Biofuels are alternative fuels made from organic matter (biomass) such as crops and agricultural residue. The most frequently used are bioethanol and biodiesel, with the first commonly made of starch plants including corn and sugarcane, and the second made out of oil seeds such as soybeans, palm oil, rape seeds and sunflower seeds. They

[88] At the time of writing, three countries are on the list of non-cooperating third countries, Cambodia (since March 2014), Comoros (since July 2017) and St. Vincent and Grenadines (since July 2017). Belize was listed in November 2013 and delisted in December 2014, Guinea, listed in March 2014, was delisted in October 2018, and Sri Lanka was listed in February 2015 and delisted in June 2016. Several other countries have been pre-identified. The relevant information can be found on the website https://ec.europa.eu/fisheries/cfp/illegal_fishing_en. I last accessed the website in July 2018.

started to be used in the early 2000s as a response to climate change concerns over greenhouse gas (GHG) emissions as more sustainable than fossil fuels. Many countries, including the U.S. and the EU[89], started to adopt policies to promote the use of biofuels in the framework of policies in favour of renewable energy sources. However, the initial enthusiasm over biofuels was soon reduced by the realisation of the considerable environmental and social costs of biofuels in terms of deforestation and land-use change, both direct and indirect[90], often as a consequence of land-grabbing, especially in developing countries and at the expense of indigenous peoples[91], and the consequent impact on food prices and food security. As has been observed, rural poor people suffer as a result of increases in food prices but do not benefit from the increased production of biofuels, because in most developing countries, the cultivation of biofuel feedstock is dominated by large-scale corporate farming[92]. Additional doubts about the climate protection efficiency of biofuels derive from the increased GHG emissions caused by the extensive use of chemical fertilizers and pesticides for the cultivation of biofuel feedstocks.

The first generation biofuels, which mainly use agricultural feedstock as a raw material, were followed over the years by new generations, which produce energy from biomass from agricultural or wood residues and algae[93]. Although the production process for such new biofuels is still rather expensive, they can be considered as more efficient in terms of greenhouse gas emissions and are less demanding in terms of land

[89] The first legislative intervention was Directive 2003/30/EC on the promotion of the use of biofuels or other renewable fuels for transport.

[90] Direct land-use change refers to the direct conversion of land for planting biofuel feedstocks, while indirect land-use change involves the conversion of land for food production or other purposes which is indirectly triggered by biofuel production.

[91] A. Lehavi, "Land Law in the Age of Globalization and Land Grabbing", in *Comparative Property Law*, ed. M. Graziadei and L. Smith (Cheltenham, Edward Elgar, 2017), 290 *ff*.

[92] Fantu Farris Mulleta, "The Environmental and Social Sustainability of Biofuels: A Developing Country Perspective", *Journal of Ethiopian Law* (2012): 202 *ff*.

[93] N.B. Ahmad, "Blood Biofuels," *Duke Environmental Law and Policy Forum* (2017): 265 *ff*.

and water use. In sum, biofuels' sustainability is still highly controversial, and at the same time, subject to an ongoing technological evolution which might, in the long run, improve their sustainability.

Biofuels are disciplined in the Renewable Energy Directive (RED)[94], whose Article 17 establishes very stringent sustainability criteria for biofuels and bioliquids[95]: greenhouse gas emissions savings of at least 35 percent, which are due to increase to 50 percent in 2017 and to 60 percent in 2018; biofuels and bioliquids must not be made from raw materials obtained from land with high biodiversity value, including primary forests and high biodiverse grasslands, or from land with high carbon stock, such as forests or wetlands, or from peatland. The sustainability criteria are merely environmental, as they do not consider the social impact of biofuels[96]. The criteria are applicable "[i]rrespective of whether the raw materials were cultivated inside or outside the territory of the Community". Economic operators, directly or by means of voluntary certification schemes, must submit reliable information and use independent auditing for the verification of compliance. Verification obligations apply whether the biofuels or bioliquids are produced within the Community or are imported (Article 18 (3), paragraph 4, of the RED).

The RED contains no trade measures, as compliance with the sustainability criteria is not a condition for the importation of biofuels. How-

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[94] Directive 2009/28/EC of the European Parliament and the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, in *O.J.* L 140 of 5 June 2009, 16. On the RED see, among many, S. Renckens, F. Skogstad, and M. Mondou, "When Normative and Market Power Interact: The European Union and Global Biofuels Governance", *Journal of Common Market Studies* (2017): 1432 *ff.*; R. Leal-Arcas and A. Filis, "Legal Aspects of the Promotion of Renewable Energy within the EU and in Relation to the EU's Obligations in the WTO", *Renewable Energy Law and Policy Review* (2014): 3 *ff.*; S. Romppanen, "The Role and Relevance of Private Actors in EU Biofuel Governance", *Review of European, Comparative and International Environmental Law* (2013): 340 *ff.*

[95] The same criteria are reiterated in Article 7b of Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 on the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions, in *O.J.* L 140 of 5 June 2009, 88.

[96] The Commission, under Article 23 (1), has the duty to monitor the positive and negative effects of the regime on food security and food prices.

ever, biofuels which do not comply with the sustainability criteria are not eligible for financial incentives and State aid under the RED, and do not count toward the attainment of the national renewable energy obligations of the Member States (at least 10 percent renewable energy in transport by the year 2020, according to Article 3(2) of the RED). The obligation for each Member State to achieve its national target makes it *de facto* imperative for biofuels imported into the EU to fulfil such criteria[97].

5.2. *Towards RED II*

The need for a revision of the RED arose for several intertwined reasons: the rapid development of research on innovative and supposedly more sustainable biofuels and the many concerns over the environmental and social impact of the first generation biofuels are the most significant. The RED has already been amended by Directive 2015/1513, aimed at reducing indirect land-use change for biofuels and bioliquids (ILUC Directive)[98]. The most serious environmental challenge caused by the production of food-based biofuels of agricultural origin is in fact the displacement of existing agricultural activities to previously non-cultivated lands to give way to biofuel feedstocks. The forced displacement of food-producing agricultural activities can be the cause of deforestation and the depletion of other natural habitats, thus contributing to a loss of biodiversity and an increase in GHG emissions. Such indirect land-use change can thus jeopardise the whole renewable energy framework in terms of reduced GHG savings. The ILUC Directive does not directly address the ILUC issue, which would have an impact on the sovereign rights of States – particularly third countries – to decide how to manage their natural resources. However, it limits the share of food-based biofuels and biofuels from other crops grown on agricultural land to 7 percent of the total 10 percent of renewable sources of energy required for each Member State

[97] J. Grigorova, "EU's Renewable Energy Directive Saved by GATT Art. XX?", *Oil, Gas & Energy Law Intelligence* (2015): 4-5.

[98] Directive (EU) No 2015/1513 of the European Parliament and of the Council of 9 September 2015 amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable resources, in *O.J.* L 239 of 15 September 2015, p.1.

by the RED. The remaining 3 percent should come from other alternative sources, such as biofuels from used cooking oil and animal fats, and advanced types of biofuels from waste and residues. Interestingly, the ILUC Directive, in Article 2 (w) of the RED (will become Article 2 (u) in the RED II), introduced a new definition of the concept of low indirect land-use change risk biofuels and bioliquids: "biofuels and bioliquids, the feedstocks of which were produced within schemes which avoid displacement effects of food and feed crop based biofuels, bioliquids and biomass fuels through improved agricultural practices, as well as the cultivation of crops on areas which were previously not used for cultivation of crops and which were produced in accordance with the sustainability criteria for biofuels and bioliquids set out in Article 26". The role of the biofuels industry in the displacement of agricultural activities is, however, disputed. Poverty and unemployment are, according to some authors, the main drivers for ILUC situations, rather than the development of the biofuel industry[99]. On the contrary, it has been argued that the biofuel industry, which is mainly in the hands of large-scale corporations, severely impacts the life and economy of small farmers in developing countries and for this reason there is an urgent need to take care of the ILUC problem[100].

The Commission proposal for a revised and recast RED (RED II)[101], submitted to the EU legislature in November 2016, reinforces the existing sustainability criteria for biofuels – Article 26, which amends Article 17 of the RED – and introduces new risk-based greenhouse gas emissions saving criteria for forest biomass[102], extends the scope of the directive to cover biomass[103] and biogas for heating and cooling[104] and

[99] E. Pavlovskaia,"Analysis of the Main Innovations in Directive 2015/1513 on Renewable Energy", *Renewable Energy Law & Policy Review*, 2015, 294.

[100] Fantu Farris Mulleta, "The Environmental and Social Sustainability of Biofuels", 208 *ff*.

[101] COM (2016) 767 final of 30 November 2016.

[102] Article 26 (7) of the proposal for RED II in the June 2018 text.

[103] The revised version of Article 2 (c) defines biomass as "the biodegradable fraction of products, waste and residues from biological origin from agriculture (including vegetable and animal substances), forestry and related industries including fisheries and aquaculture, as well as the biodegradable fraction of waste, including industrial and municipal waste of biological origin".

[104] Article 23 of the proposal for RED II.

promotes the use of advanced biofuels and biofuels from waste and residues. On 21 June 2018 an informal agreement on the revision and recast of the RED was reached in the Trilogue procedure between representatives of the Parliament, the Council and the Commission[105]. This is the final step of the legislative process, after which the Parliament and the Council should approve the text as defined in the Trilogue without further amendments.

RED II is part of a package of legislation in energy matters proposed by the Commission, which includes a regulation, approved on 30 May 2018, on the inclusion of greenhouse gas emissions and removals from land-use, land-use change and forestry in the 2030 climate and energy framework (the so-called LULUCF Regulation)[106]. The LULUCF Regulation establishes for the Member States the obligation that emissions on their respective territory must not exceed removals, in order to comply with the commitments of the Paris agreement on climate change. Such obligation must be met by means of a sustainable management of land and forests for which the Member States must account through reports to the Commission.

Article 26 (5) and (6) of the RED II Directive establish enhanced sustainability requirements for biofuels, bioliquids and biomass fuels produced from forest biomass to minimise the risk of using forest biomass derived from unsustainable production. Such criteria include the requirement that "the country in which forest biomass was harvested has national and/or sub-national laws applicable in the area of harvest as well as monitoring and enforcement systems in place ensuring" the legality of harvesting operations, the regeneration of harvested areas, the protection of highly biodiverse ecosystems like wetlands and peatlands. The LULUCF concerns are included in Article 26 (6), which requires the countries of origin of forest biomass to be involved in the Paris Agreement emission savings mechanisms for forests or to have otherwise sustainable forest management policies in place[107]. In-

[105] Interinstitutional File: 2016/0382 (COD) of 21 June 2018.

[106] Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018, in *O.J.* L 156 of 19 June 2018, p. 1.

[107] "6. Biofuels, bioliquids and biomass fuels produced from forest biomass shall be taken into account for the purposes referred to in points (a), (b) and (c) of

terestingly, while biofuels of any other material must fulfil all the criteria of Article 26 (2) to (8), biofuels, bioliquids and biomass fuels produced from waste and residues, other than agricultural, aquaculture, fisheries and forestry residues, need only fulfil the greenhouse gas emissions saving criteria set out in paragraph 7. This implies a choice, on the part of the EU institutions, in favour of biofuels produced from waste and residues.

Such new sustainability criteria, as for the original RED, apply irrespective of the origin of the biomass. The application of the enhanced sustainability criteria to non-EU countries of origin of biofuels will heavily affect international trade and might raise international trade disputes in the WTO. At the same time, the new provisions have an extraterritorial impact on non-EU States and operators which must comply with the EU requirements and even shape their own land and forests governance policies accordingly if they want to access the EU market. As in the RED Directive, the RED II does not expressly prohibit trade in biofuels which do not comply with the sustainability criteria, but non-sustainable biofuels do not contribute towards the Union target and Member States renewable energy share and to measuring compliance with renewable energy obligations and are not eligible for

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paragraph 1 if the country or regional economic integration organisation of origin of the forest biomass meets the following LULUCF requirements: (i) is a Party to, and has ratified, the Paris agreement; (ii) has submitted a Nationally Determined Contribution (NDC) to the United Nations Framework Convention on Climate Change (UNFCCC), covering emissions and removals from agriculture, forestry and land use which ensures that either changes in carbon stock associated with biomass harvest are accounted towards the country's commitment to reduce or limit greenhouse gas emissions as specified in the NDC, or there are national or sub-national laws in place, in accordance with Article 5 of the Paris Agreement, applicable in the area of harvest, to conserve and enhance carbon stocks and sinks; (iii) has a national system in place for reporting greenhouse gas emissions and removals from land use including forestry and agriculture, which is in accordance with the requirements set out in decisions adopted under the UNFCCC and the Paris agreement; When evidence referred to in the first subparagraph is not available, the biofuels, bioliquids and biomass fuels produced from forest biomass shall be taken into account for the purposes referred to in points (a), (b) and (c) of paragraph 1 if management systems are in place at forest holding level to ensure that carbon stocks and sinks levels in the forest are maintained".

financial support for the consumption of biofuels, bioliquids and biomass fuels. Import of non-sustainable biofuels is thus strongly discouraged.

5.3. *Sustainability criteria for biofuels and WTO law*

Despite being measures adopted in the framework of the EU internal environmental and energy policies, the sustainability criteria for biofuels have a significant impact on international trade since, as mentioned before, they are applicable irrespective of the origin of the raw material (biomass) from which the biofuels are produced.

For this reason, in 2013, Argentina filed a complaint against the EU in the framework of the WTO dispute settlement procedure. In its request for consultation[108], Argentina interestingly stated that it does not object either to the use of sustainability criteria or to the methodology by which GHG emission savings are calculated, thus confirming the widespread consensus on the issue of the sustainability of biofuels. However, it complained that the default value for GHG emission savings from soybean biodiesel, largely produced in Argentina, had been established at 31 percent, while the RED threshold is 35 percent. The default values, established in Annex V to the RED, provide values for GHG emission savings with respect to fossil fuels for the listed biofuels and bioliquids. Operators may use the default values for verification purposes, or as an alternative, they may calculate, on the basis of a very complex formula, the actual value of their production. Argentina claims that the need to calculate the actual value of Argentine soybean biodiesel would be excessively burdensome for exporters and producers, and would result in discrimination in violation of several WTO rules. The case is still at the consultation stage and is probably waiting for the adoption by the EU legislature of the revised Renewable Energy Directive (RED II)[109].

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[108] WT/DS459/1 of 23 May 2013, European Union and certain Member States – Certain measures on the importation and marketing of biodiesel and measures supporting the biodiesel industry.

[109] European Commission, *Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast)*, COM(2016) 767 final/2, of 23 February 2017.

In any case, measures such as the RED sustainability criteria for biofuels raise several issues of WTO consistency[110]. The request for consultations from Argentina claimed violations of Article I (non-discrimination) and Article III (national treatment) GATT 1994, as well as of the Agreement on Technical Barriers to Trade (TBT). Without going into detail on the case, which involves many technical issues of little interest here, it is worth considering the major questions that are posed by this kind of environmental regulation. The first problem is the unilateral character of the sustainability criteria, which are not supported by internationally recognised standards. This consideration led the Argentinian government to claim that such an arbitrary definition of sustainability, not sufficiently supported by scientific evidence or international norms, represents a disguised protection of domestic biofuels production. The unilateral definition of the standards represents a different approach to environmental regulation compared to the fight against IUU fishing and illegal timber described above. The definition of IUU fishing or illegal timber is based on the national laws of the exporting States, although the Union calls upon such States to adopt resource conservation and monitoring policies: in those cases, the EU pressure and influence is present, but indirect. For biofuels, on the contrary, the EU unilaterally establishes sustainability criteria which must also be complied with by non-EU producers if they want to obtain certain benefits in the EU market. Under WTO rules, this kind of approach can be considered a technical barrier to trade regulated by the TBT Agreement, which requires that technical measures and standards be transparent and non-discriminatory. According to the definition provided by Annex 1 to the TBT Agreement, a technical regulation is a "document which lays down product characteristics or their related processes and production methods (…) with which compliance is mandatory". The biofuels sustainability criteria lay down not so much the product characteristics but rather the process and production methods (PPM), particularly the criteria on

[110] R. Leal-Arcas and A. Filis, "Legal Aspects of the Promotion of Renewable Energy within the EU and in Relation to the EU's Obligation in the WTO", *Renewable Energy Law & Policy Review* (2014): 3 *ff.*; S. Switzer and J.A. McMahon, "EU Biofuels Policy - Raising the Question of WTO Compatibility", *International and Comparative Law Quarterly* (2011): 713 *ff.*

land-use change which prohibits the conversion of forest lands, grasslands, wetlands and peatlands into biofuel cultivation. Of course, the EU could object to a WTO panel that its sustainability criteria are not binding, as they do not entail an import ban for those biofuels that do not comply with them.

The national treatment objection raises many doubts as well. The first one is the definition of "like product" under Article III (1) of the GATT. In order to be relevant for the purposes of this provision, a differentiated treatment must affect imported "like products". It has been argued that sustainable biofuels and non-sustainable biofuels are not like products, as they have a substantially different impact on the environment and on climate change[111].

In any case, the EU would probably seek a justification for the measures resorting to the general exceptions provided by Article XX, particularly paragraphs (b) for the protection of human, animal or plant life or health and (g) for the conservation of exhaustible natural resources.

This leads us to the next big issue, which is at the heart of the EU policy and will be more extensively discussed later, i.e. the extraterritorial effects or impact of its trade regulation[112]. Both exceptions in Article XX GATT in fact assume that a WTO Member may adopt trade restrictive measures in pursuit of the non-trade goals of protecting human, animal or plant life or health, or the conservation of exhaustible natural resources on its own territory, not on the territory of other States.

The lack of a sufficient nexus between the measure and the territory or the population of the State which enacts the measure, although not explicitly requested by the relevant provision, could be considered by WTO panels and the Appellate Body as a reason for the inconsistency of the measure with WTO rules. This is a conclusion that can be drawn based on many GATT and WTO cases, which will be analysed in more detail in the next chapter: in *U.S.-Tuna I (Mexico)* and *U.S.-Tuna II (EEC)*,

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[111] W.Th. Douma, "Legal Aspects of the European Union's Biofuel Policy: Protection or Protectionism?," *German Yearbook of International Law* (2010): 400.

[112] As explained before, although the RED is not a trade measure, it has a significant impact on trade, so to some extent, it can be assimilated as a trade regulation.

the panel held that unilateral measures cannot be justified when they are aimed at the protection of resources outside the jurisdiction of the Member State. In the *U.S.-Shrimp/Turtle* case, the Appellate Body found a nexus with the U.S. territory in the consideration that turtles are migratory and highly endangered animals which, in their migration, also live on U.S. territory. In the *EU-Tariff Preferences* case, discussed in the second chapter of this study, the panel held that "the policy reflected in the Drug Arrangements is not one designed for the purpose of protecting human life or health in the European Communities and, therefore, the Drug Arrangements are not a measure for the purpose of protecting human life or health under Article XX(b) of GATT 1994"[113].

While the exception regarding the protection of human health could be used, despite the difficulty of proving a direct risk to the health of EU citizens deriving from the use of non-sustainable biofuels, it is doubtful, in light of the mentioned precedents, that WTO rules allow EU measures aimed not only at the protection of EU natural resources, but also of the forests and other natural areas situated in third countries. The protection of forests and other highly biodiverse and wild areas, which undisputedly are to be considered as "exhaustible natural resources" for the purposes of Article XX (g) of the GATT, has a direct and positive effect not only on the environment of the countries where the forests are located, but also on the global fight against climate change[114]. From this perspective, it can be argued that the sustainability criteria for biofuels, which contribute to the reduction of GHG emissions directly through the GHG emission savings threshold and indirectly through the land-use criteria, produce global effects in the fight against climate change, and that these effects also include the EU. Such an interpretation, however, has been defined as "arduous", as no evident nexus exists between the sustainability criteria and the EU territory[115].

A possible solution for the EU would be the public morals exception of Article XX (a) GATT 1994. The AB accepted this justification in the Seal Products case described above and accepted that the EU, out

[113] WT/DS246/R, paragraph 7.210.

[114] See Douma, "Legal Aspects of the European Union's Biofuel Policy", 411.

[115] Grigorova, "EU's Renewable Energy Directive", 16.

of its citizens' concern over the welfare of animals – living mostly outside the territory of the Union – could adopt a ban on the import of seal products. The public morals concern for the protection of forests and other wild areas worldwide, which is shared by the majority of EU citizens, might support the sustainability criteria in the WTO framework. The RED explicitly mentions this argument in the preamble, in *recital* (69):

> The increasing worldwide demand for biofuels and bioliquids, and the incentives for their use provided for in this Directive, should not have the effect of encouraging the destruction of biodiverse lands. Those finite resources, recognised in various international instruments to be of value to all mankind, should be preserved. Consumers in the Community would, in addition, find it morally unacceptable that their increased use of biofuels and bioliquids could have the effect of destroying biodiverse lands. For these reasons, it is necessary to provide sustainability criteria ensuring that biofuels and bioliquids can qualify for the incentives only when it can be guaranteed that they do not originate in biodiverse areas.

It is impossible at this stage of the dispute between the EU and Argentina over the sustainability criteria for biofuels to understand how the panel and the AB might interpret the relevant norms in order to issue a decision on the matter. What is certain is that the EU measures, in light of the present international law situation, are on the edge between a probably unlawful interference with the sovereign rights of other States and a legitimate contribution to the worldwide fight against climate change.

6. Conclusions

The examples of EU measures to promote the sustainable use of natural resources through trade which have been discussed in this chapter suggest some considerations on the EU action in this field. The EU has adopted a wide range of different approaches to address this matter

through trade: certification schemes based on the legality of the products according to the laws and policies of the countries of origin or to international law (timber and IUU fishing), a complete trade ban (seal products), certification schemes based on EU sustainability standards (biofuels), and a variety of verification mechanisms which include the Member States' responsibility and corporate social responsibility. The common feature in all these trade regimes (or regimes which affect trade indirectly, as they are based on Treaty provisions addressing policies apart from trade, such as the internal market or the environmental protection policy) is that they pursue the goal of promoting sustainability in the use of natural resources not only in the Member States, but also in third countries. Even where the certification schemes apply the law and policies of the country of origin, the Union's influence is palpable, as it is expected that the third countries which want to export to the Union will adopt sound conservation policies and commit to verification and certification mechanisms, sometimes agreed upon in bilateral treaties (FLEGT VPAs) and in other cases established in EU acts (IUU fishing, seal products certification mechanism for the Inuit exception). Even when the verification requires the due diligence of (European) operators, the latter, in order to trace the supply and custody chain of the products, must request certifications and information from their foreign counterparts.

In addition, measures affecting international trade with non-trade objectives produce distortions of trade and often result in discrimination and differentiation of treatment, thus colliding with WTO rules. The difficult balance of trade and non-trade interests in the WTO dispute settlement case-law has been mentioned above and has been widely studied[116]. However, the EU regulatory experiments provide a new challenge to the WTO rules, particularly when they touch upon sensitive issues such as the principle of permanent sovereignty over natural resources and the principle of common but differentiated responsibility.

Such policies for the promotion of its values worldwide are part of the DNA of the Union and, after the entry into force of the Lisbon Trea-

[116] See also for references to the case-law and to the legal literature, Reid, *Balancing Human Rights.*

ty, they are also mandatory objectives of the EU's external action under Article 21 TEU. The Union's values are projected towards the outer world and thus interference with third countries' policies and interests are inevitable. On the other hand, in discussing the fight against climate change, which is the primary objective of the biofuels sustainability criteria and of the Timber Regime, it is impossible not to start from the consideration that climate change is a global problem and that deforestation and land-use change, wherever they take place, produce devastating effects on the whole planet. The EU's norms about market access and trade influence third countries in many ways: some authors have described such influence as an extraterritorial reach of EU law[117], while according to others, it results more in a territorial extension of the scope of EU law[118].

As such a controversial trend in EU trade regulatory policy with non-trade objectives is an inherent feature of most of the cases that have been addressed in this book, the issue will be discussed more extensively in the next chapter, where I will try to pick up the threads of a network of EU initiatives that share the same goal: promoting the enhancement of sustainable development beyond the limits of the Union's territory.

[117] E. Barett Ludgate, "Biofuels, Sustainability and Trade-Related Regulatory Chill", *Journal of International Economic Law* (2012): 157 *ff*.

[118] J. Scott, "The New Extraterritoriality", *Common Market Law Review* (2014): 1343 *ff*.; J. Scott, "Extraterritoriality and Territorial Extension in EU Law", *American Journal of Comparative Law* (2014): 87 *ff*.

Chapter VI
Conclusions.
The EU Between Unilateralism and Multilateralism. Global Reach and Global Responsibility in the EU's Trade Action for the Promotion of Sustainable Development

1. Picking up the threads: EU's action for the promotion of sustainable development through trade between unilateralism and multilateralism

From the analysis that precedes, we can now try to highlight some common features and trends in the evolution of the role of sustainable development in the EU's trade policy (and in EU actions adopted in different areas which affect international trade). Such reflection is especially relevant after the entry into force of the Lisbon Treaty and the introduction of Article 21 TEU, which includes sustainable development among the common objectives of the Union's external action. All the acts of EU legislation that have been examined show that the Union aims at spreading its fundamental values of human rights protection, good governance, the rule of law and environmental protection, including climate change mitigation, in the outside world. The second underlying objective in the EU's regulation of international trade is that of "levelling the playing field", i.e. limiting as much as possible the disadvantages that European operators (producers or exporters) may incur if faced with international competition which is not bound by the strict rules established by the EU institutions. As a matter of fact, protecting the interests of the Union and of its Member States and citizens is another crucial objective of the Union's action. The balance be-

tween the two finalities, which is necessary to avoid inconsistencies with WTO rules, must be based on the principle of proportionality, which requires decision-makers to choose measures that are less likely to produce distortions in international trade, and on the principle of non-discrimination, which in turn requires them not to introduce differentiated treatment towards third States. In sum, a trade measure which pursues non-commercial aims must not result in a disguised protectionist measure and must be necessary to achieve the goal (as is clearly stated in the *Chapeau* of Article XX GATT 1994). The restrictions on trade, according to WTO case-law, must be carefully balanced with the non-commercial aim the measure is meant to achieve.

The Union has resorted to different methods in order to pursue the said objectives. Such methods range from positive and negative conditionality (incentives to respect certain human rights and environmental core standards, and trade sanctions in the case of non-compliance) to trade bans (the prohibition on trade in goods which raise human rights or environmental objections in EU public opinion), to certification schemes (aimed at ascertaining that certain products fulfil legal, social or environmental standards established at the EU or international level), to due diligence requirements for economic operators (obligations for importers or other operators to keep track of the supply chain and chain of custody of products in order to prevent the risk of the illegal supply of natural resources or other controlled goods), to non-binding, comprehensive cooperation involving all the stakeholders, such as in the case of the Bangladeshi garment industry.

In many cases, the measures adopted by the EU have clashed with WTO rules, and in the previous pages, I have considered the problems that may arise in the unilateral regulation of international trade with respect to the multilateral trade rules of the GATT/WTO.

However, if the WTO has assumed the ambitious task of regulating at the multilateral level the process of the globalisation of international trade – it is not for this study to establish whether this has produced some success or important shortcomings –, international economic relations, and even more so if they affect general issues such as human rights protection or the protection of the environment, must also take account of the general legal framework of international law.

The EU and its Member States are active in the promotion of the evolution of international law through the participation in international conferences and multilateral treaties, and they largely rely on internationally established standards whenever this is possible or on internationally shared values (for example, the EU ban on torture and death penalty goods is founded on the Convention against Torture and on the repeated General Assembly resolutions calling for a moratorium on the death penalty). It can be said that the EU tends to mirror a wide international consensus on most of the issues it regulates unilaterally. To give another example, in the implementation of conditionality measures in the framework of the Generalised System of Preferences, the Union has always acted in coordination with the ILO, thus falling under the cover of multilateral international institutions.

There are cases, however, where internationally agreed standards are absent because negotiations have failed or because reaching a multilateral agreement has proven to be lengthy and difficult, and cases where the EU rules are stricter than the multilateral ones and have a heavy impact on the activities and interests of foreign countries' citizens and governments.

The most relevant implication of the EU's measures which have been examined in this book with respect to international law concerns the disputed and discussed extraterritorial effects of many EU measures that regulate trade with environmental and human rights protection objectives. A common feature of all the measures that have been considered is their intent to influence the behaviour of third countries in the attempt to change it in the direction of an increased commitment towards sustainable development. Nevertheless, such influence can vary in intensity and, more importantly, can have a differentiated legal impact on the sovereignty of the third States concerned. In Chapter II of this study, I argued that the Generalised System of Preferences GSP+ scheme is, in substance, based on an agreement between the EU and the beneficiary State, the latter manifesting its consent to the scheme, conditionality included, through an application submitted to the Commission and the acceptance in writing of the human rights and sustainable development commitments. The EU influence, here, is based on the reciprocal interests of the parties: the interest of the beneficiary State in receiving substantial market

access privileges and the interest of the Union in the sustainable development of its trade partners (which is also important from the point of view of the political stability and reliability of developing countries). In the cases of the imposition by the Union of binding standards and certification requirements, the influence is more direct and can trespass into the controversial realm of extraterritoriality, which will be discussed below.

From a different point of view, another interesting feature is the involvement of private economic operators in the enforcement mechanism of European environmental and social standards through the system of corporate social responsibility or corporate sustainability. This element stems from the consideration of the growing role of private companies, especially the large ones, in transnational relations. Their activity has an impact not only on economic relations at the international level, but also on the environment, on the social rights of workers, and on climate change. The EU, in the wake of corresponding developments in the framework of the OECD and the UN, has started to establish stringent due diligence rules for private corporations in the field of environmental damage prevention, the sustainable use of natural resources, and the protection of social rights and gender equality. Again, this development has generated both appreciation and criticism: the first from those who say that a stricter discipline of the impact of big corporations on the environment and on social and labour rights was long overdue, and the latter from those who claim that European companies will be loaded with an excessive, time-consuming and costly burden which is likely to jeopardise their international competitiveness.

2. The problem of extraterritoriality in the EU regulation of trade for the protection of global goods

The protection of the natural environment has been considered for decades as a common concern of the international community and as a common good that cannot be confined within State boundaries[1]. This

[1] On the issues of the responsibilities of States with respect to marine pollution and the notion of *erga omnes* obligations of States in this field under general interna-

is even more true for the global climate. The effects of GHG emissions are felt well beyond State borders and have a global impact on climate change. It is thus inevitable that unilaterally enacted measures aimed at preventing the harmful effects of human activities on the natural environment and the global climate will produce some extraterritorial effects.

The issue is two-sided: on the one side, there is the recognition by international law of the transboundary impact of environmental damages, and on the other side, the discussed possibility for States (the EU can be equated to a State, as it is an international legal subject and has the legislative competence to regulate activities in the concerned fields) to unilaterally adopt measures which involve some kind of transboundary application in order to prevent harm to the environment. Clearly, the two faces of the coin are strictly related: if an activity taking place on the territory of a State has a harmful impact on the territory of another State, the latter may adopt measures to prevent and address such harmful consequences.

The issue of the transboundary effects of dangerous and highly polluting human activities on the environment is deeply rooted in the development of international law. The first case addressing the issue of the extraterritorial effects of environmental damages dates back to the famous *Trail Smelter* dispute between the United States and Canada decided by an arbitral tribunal in 1941. The tribunal affirmed that under the principles of international law, "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence"[2].

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tional law, see P. Picone, "Obblighi reciproci ed obblighi *erga omnes* degli Stati nel campo della protezione internazionale dell'ambiente marino dall'inquinamento", in *Diritto internationale e protezione dell'ambiente marino*, ed. V. Starace (Milano, Giuffrè, 1983): 15 *ff.*

[2] United States-Canada, *Trail Smelter case*, April 16, 1938 and March 11, 1941, *United Nations Reports of International Arbitral Awards*, Vol. III, 1905 *ff.*; more recently, see Corte Interamericana de Derechos Humanos, Opinión consultiva OC-23/17 of 15 November 2017 (www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf).

Notwithstanding the principle established in the *Trail Smelter* case, the issue of transboundary environmental protection has remained highly sensitive and disputed in international law, especially when it affects the discussions between developed and developing countries on environmental protection[3]. The principle of the sovereign right of all States to exploit the natural resources present on their territory collides with all the possible restrictions coming from other States and not agreed upon through an international treaty. Principle 2 of the 1992 Rio Declaration is very cautious in this respect, as it attempts to reconcile two apparently irreconcilable needs, i.e. the sovereign rights of the territorial States and the responsibility towards mankind for a sustainable use of natural resources: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". This text has been carefully formulated with the objective of safeguarding the sovereign rights of States over the natural resources present on their territory, while at the same time warning against the possible harmful transboundary effects of activities taking place under the sovereignty of a State. Principle 19 urges States to cooperate in order to prevent and mitigate the transboundary adverse effects of their activities on the environment: "States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse

[3] As is well known, the developing countries insisted on the principle of common but differentiated responsibility, which acknowledges the different role developed countries had during the industrialisation era in contributing to pollution and environmental degradation. Principle 7 of the Rio Declaration reads as follows: "States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. 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".

transboundary environmental effect and shall consult with those States at an early stage and in good faith". Against this background, unilateralism and extraterritoriality assume a very controversial role. The European Union, as has been repeatedly mentioned, has integrated sustainable development as an objective of its external action, and in pursuing such objective, it has not hesitated to adopt unilateral acts aimed at influencing, more or less heavily, the behaviour of third countries[4].

In order to determine whether EU measures affecting international trade with non-trade objectives, such as environmental protection and human rights, can be considered extraterritorial and whether they are lawful under international law, it is necessary to consider the international law principles on State jurisdiction and the relevance of the issue of jurisdiction within the framework of the WTO/GATT.

2.1. *The notion of jurisdiction in public international law*

Jurisdiction forms an integral part of a State's sovereignty[5]. It is possible to say that it is the most relevant expression of a State's sovereignty. It describes the power of a State to prescribe and enforce laws and regulations: it has been categorised as legislative or prescriptive jurisdiction, adjudicatory jurisdiction and enforcement jurisdiction, to describe its different manifestations. All exercises of public authority by a State, such as imposing taxes, prosecuting crimes, and regulating trade, involve an exercise of State jurisdiction[6]. The rules that limit the juris-

[4] L. Ankersmit, J. Lawrence, and G. Davies, "Diverging EU and WTO Perspectives on Extraterritorial Process Regulation", *Minnesota Journal of International Law Online* (2012): 35, describe this EU approach as "evangelical", as the Union seeks to spread its values and world view beyond its own borders.

[5] On the problem of jurisdiction in international law, see C. Ryngaert, *Jurisdiction in International Law* (Oxford, Oxford University Press, 2008); F. A. Mann, "The Doctrine of International Jurisdiction Revisited after Twenty Years", *Collected Courses of the Hague Academy of International Law* (1984): 9 *ff.*; M. Akehurst, "Jurisdiction in International Law", *British Yearbook of International Law* (1975): 145 *ff.*; F.A. Mann, "The Doctrine of Jurisdiction in International Law", *Collected Courses of the Hague Academy of International Law* (1964): 1 *ff.*

[6] A. Orakhelashvili, "State Jurisdiction in International Law: Complexities of a Basic Concept", in *Research Handbook on Jurisdiction and Immunities in International Law*, ed. A. Orakhelashvili (Cheltenham, Edward Elgar, 2015), 1 *ff.*

diction of the different States are necessary to preserve the character of the international community as a community of equal and independent subjects. The sovereign equality of States has been the pillar of the international community and of international law for many centuries. Among its corollaries, sovereign equality entails the prohibition for all States against interfering in the domestic affairs of other States, and the rules on jurisdiction have precisely the function of distributing the legislative and enforcement competences among the different States[7]. In this situation, which is still valid despite the significant evolution of international law, the fundamental basis for a State's legislative or enforcement jurisdiction is territory. The territorial dimension of sovereignty retains its centrality in an international community that has become more and more interdependent and interconnected. But at the same time, a jurisdiction based exclusively on the State's territory raises many problems in the contemporary development of international relations. As a matter of fact, legal doctrine and jurisprudence (national and international), as well as the practice of States, show that States enjoy a wide freedom to enact legislation that, in many ways, can affect conduct that takes place beyond their territorial limits. In the landmark case *Lotus*, the Permanent Court of International Justice (PCIJ) stated that a State (Turkey), could try a French officer who was responsible for a collision between a French vessel and a Turkish one that occurred on the high seas. The Court held that

> the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts

[7] C. Ryngaert, "The Concept of Jurisdiction in International Law", in *Research Handbook on Jurisdiction and Immunities in International Law*, ed. A. Orakhelashvili (Cheltenham, Edward Elgar, 2015), 51, describes the international law rules on jurisdiction as the basic "traffic rules" of the international legal order.

> which have taken place abroad, and in which it cannot rely on some permissive rule of international law (…). Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules (…). In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty[8].

The Court distinguished between the exercise of jurisdiction by a State outside its territory and the exercise of jurisdiction by a State within its territory with respect to persons, property or acts outside its territory. According to the Court, while the first option is excluded under international law, with respect to the second one, States have broad discretion[9]. This statement, although it dates back to 1927, is still considered as corresponding to customary international law. It can be understood as leaving liberty to the States as to the exercise of jurisdiction within the limits of permissive rules. Such permissive rules allow extraterritorial jurisdiction in all cases where there is a connection between the conduct or the persons and the State[10]. Traditionally, such connections are identified in nationality, the protection of the State's essential interests and security, and universal jurisdiction, where jurisdiction is based on the nature of the crimes, even where a link or nexus with a particular State is lacking[11]. As Orakhelashvili put it, the initial decision to establish and

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[8] Permanent Court of International Justice, *The Case of the S.S. "Lotus"*, in *Collection of Judgments*, Series A, No 10, September 7, 1927.

[9] International Law Commission, Report 2006, Annex V, Extraterritorial Jurisdiction, 231.

[10] Mann, "The Doctrine of Jurisdiction", refers to a "meaningful connection" or "genuine link" with the matter the State wants to regulate. Such connection must be a "legal connection" and not a mere political, economic, commercial or social interest (see L. Bartels, "Article XX of GATT and the Problem of Extraterritorial Jurisdiction", *Journal of World Trade* (2002): 370).

[11] This is the case of universal criminal jurisdiction with respect to crimes against humanity, war crimes, or genocide.

exercise jurisdiction is always a matter of domestic law, while the ultimate criteria as to whether that jurisdiction is established or exercised lawfully are inevitably international[12]. According to Bartels, a two-step test should be applied in order to determine the lawfulness of the exercise of State jurisdiction. The first step is to define legislation as extraterritorial according to the legal connection between the legislation and the extraterritorial subject matter. The second step is to ask whether the legislation has an impermissible practical effect on persons abroad[13]. In addition, in the contemporary globalised world, legal transactions and conduct that have international relevance are very frequent and can often be an object of interest or have a legal connection with more than one State. It is thus necessary to coordinate such cases of concurrence of jurisdiction[14]. Interestingly, Munari highlights the character of the contemporary international society as a society without boundaries, where many relations are totally de-territorialised and delocalised, as happens with Internet-based transactions. In this context, States often establish the limits of their extraterritorial jurisdiction on the basis of the values (and of the interests) they want to defend or promote[15].

This is particularly true for subject matters, which are by nature extraterritorial or trans-territorial, such as the environment[16] and the global climate, but also human rights, whose protection represents a common interest of all mankind. In these fields, the territorial limitations of jurisdiction are obsolete at the very least. In this context, there is the need – and possibly also the obligation – for States to act for the protection of the common good[17]. At the same time, however, the reach of unilateral extra-

[12] Orakhelashvili, "State Jurisdiction in International Law", 13.

[13] Bartels, "Article XX of GATT", 378, 381.

[14] F. Munari, "Sui limiti internazionali all'applicazione extraterritoriale del diritto europeo della concorrenza", *Rivista di Diritto internazionale* (2016): 37.

[15] Munari, "Sui limiti internazionali all'applicazione extraterritoriale", 65-66.

[16] F. Francioni, "Extraterritorial Application of Environmental Law", in ed. K.M. Meessen, *Extraterritorial Jurisdiction in Theory and Practice* (The Hague, Brill-Nijhoff, 1996): 123 *ff.*

[17] For an analysis of these issues, see B. Cooreman, "Addressing Environmental Concerns through Trade: A Case for Extraterritoriality", *International and Comparative Law Quarterly* (2016): 229 *ff.*; B. Cooreman, *Global Environmental Protection through Trade. A Systematic Approach to Extraterritoriality* (Cheltenham, Edward Elgar, 2017).

territorial legislation needs to be balanced with other principles that form an integral part of contemporary international law, *in primis* the principles of sovereign equality of States, of permanent sovereignty over natural resources and of the shared but differentiated responsibility between developed and developing States, according to which developed States, bearing the largest portion of responsibility for the current state of deterioration of the environment, must also bear the largest burden in mitigating the damage and reversing the situation[18].

2.2. *Extraterritorial trade measures in the GATT/WTO case-law*

International trade law, which is regulated by the WTO agreements, is obviously a part of international law. It is thus bound to apply the rules of international law on the extraterritorial application of domestic measures. The attitude of WTO panels and of the Appellate Body is quite restrictive on the issue of the extraterritoriality of trade measures, as it has always felt the need to ascertain the existence of a territorial nexus between the State which enacted the measure and the object it intended to regulate. As has been mentioned in the previous chapters, Article XX of the GATT provides States with exceptions to the application of the general rules of the GATT and thereby allows States to adopt trade restrictive measures aimed at protecting national interests such as public morals, human, animal or plant life or health, and exhaustible natural resources. The issue of the extraterritorial reach of trade measures aimed at protecting natural resources has been raised in three landmark cases, *U.S. – Tuna (Mexico)*[19], *U.S. – Tuna II (EEC)*[20], and *U.S. Shrimps*[21]. All three cases dealt with measures adopted to protect the life of wild animals –

[18] M. Young, "Trade Measures to Address Climate Change: Territory and Extraterritoriality", in *Research Handbook on Climate Change and Trade Law*, ed. P. Delimatsis (2016), 329 *ff*.

[19] U.S. – Restrictions on Imports of Tuna (Mexico), Panel Report of 3 September 1991, DS21/R.

[20] U.S. – Restrictions on Imports of Tuna (EEC, Tuna II), Panel Report of 16 June 1994, DS29/R.

[21] U.S. – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R Panel Report of 15 May 1998 and WT/DS58/AB/R Appellate Body Report of 12 October 1998.

dolphins and sea turtles, respectively – from accidental killings during tuna and shrimp fishing. The United States had adopted measures restricting the imports of tuna and shrimp from third countries that were not caught with dolphin- and turtle-friendly methods. Such measures integrated what is generally called a process and production method (PPM) measure, i.e. a trade measure which subjects market access for certain products to the condition that they are produced according to the requirements and criteria established by the regulating State. PPMs are by their nature unilateral and produce effects in third countries, as foreign economic operators are forced to comply if they wish to export their products to the regulating country[22]. In the first *Tuna* case, the panel held that the U.S had no jurisdiction to enact measures aimed at protecting animals outside its jurisdiction. Accordingly, such measures were not justifiable under the general exceptions of Article XX (b) and (g). The panel observed that the issue of jurisdiction is not clearly addressed in the text of Article XX (b), and that the drafting history of the GATT demonstrated, in the panel's view, that the drafters intended the provision to cover the protection of human, animal and plant life or health within the jurisdiction of the importing country and not on the territory of another State or on the high seas[23]. The panel further held that the extraterritorial application of measures aimed at protecting exhaustible natural resources was not justifiable under Article XX (g), as "if the extra-jurisdictional interpretation of Article XX(g) suggested by the United States were accepted, each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardising their rights under the General Agreement"[24]. Furthermore, the U.S. measures did not meet the requirement of "necessity" under Article XX (b), as the U.S. apparently did not demonstrate "that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many States and the

[22] Ankersmit, Lawrence, and Davies, "Diverging EU and WTO Perspectives", 8.

[23] DS21/R, paragraph 5.26.

[24] *Ivi*, paragraph 5.32.

high seas"[25]. In the following case, *Tuna II*, the panel admitted that the GATT did not exclude the possibility of measures adopted "with respect to things located, or actions occurring, outside the territorial jurisdiction of the party taking the measure. An example was the provision in Article XX (e) relating to products of prison labour. It could not therefore be said that the General Agreement proscribed in an absolute manner measures that related to things or actions outside the territorial jurisdiction of the party taking the measure"[26]. However, according to the panel, Article XX (b) and (g) do not allow the adoption of measures that force other countries to change their policies: "If (…) Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties"[27].

The Appellate Body in *U.S. – Shrimps* did not substantially change this approach[28]. As a matter of fact, it avoided the issue of the extraterritorial application of a U.S. trade measure aimed at encouraging other countries to use turtle excluder devices (TEDs) while fishing for shrimp. Rather, it relied on scientific evidence demonstrating that many species of sea turtles are migratory animals which spend part of their lives in waters under U.S. jurisdiction, thus providing a territorial nexus with the State enacting the measure[29]: "[f]inally, we observe that sea turtles are highly mi-

[25] *Ivi*, paragraph 5.28.

[26] DS29/R, paragraph 5.16.

[27] *Ivi*, paragraph 5.26.

[28] The *Shrimp* case was discussed in the WTO/GATT 1994 framework, while the previous ones were under the old GATT framework.

[29] The position of the EU in the case on the issue of the extraterritoriality of resources protection measures is very interesting, as it does not exclude the possibility for a conservation measure to have extraterritorial reach: "[t]he European Communities would not want to exclude the possibility, as a last resort, for a WTO Member, on its own, to take a 'reasonable' measure with the aim of protecting and preserving a particular global environmental resource. However, such a measure would only be justified under exceptional circumstances and if con-

gratory animals, passing in and out of waters subject to the rights of jurisdiction of various coastal States and the high seas (…). The sea turtle species here at stake (…) are all known to occur in waters over which the United States exercises jurisdiction". Such considerations allowed the AB to conclude that "[w]e do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)"[30]. Nevertheless, the contested measure was found to be inconsistent with the requirements of the *Chapeau* of Article XX: namely the AB held that the trade restrictive measure "does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized, legitimate environmental purposes but which, at the same time, are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade". This conclusion was reached because, *inter alia*, the U.S. had failed to seriously commit to international negotiations aimed at reaching a multilateral agreement on the protection of sea turtles. Interestingly, the AB referred, in this respect, to Principle 12 of the Rio Declaration:

> The protection and conservation of highly migratory species of sea turtles, that is, the very policy objective of the measure, demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent

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sistent with general principles of public international law on 'prescriptive jurisdiction'. The Member would have to demonstrate that its environmentally protective measure was 'reasonable', that is, no more trade restrictive than required to protect the globally shared environmental resource. Such a measure should be directly connected to the environmental objective and not go beyond what was required to limit the environmental damage. Finally, in such a case, the Member should have made genuine efforts to enter into cooperative environmental agreements with other Members. This is consistent with Principle 12 of the Rio Declaration on Environment and Development" (WT/DS58/AB/R, paragraph 73).

[30] WT/DS58/AB/R, paragraph 133.

> sea turtle migrations (…). Of particular relevance is Principle 12 of the Rio Declaration on Environment and Development, which states (…): unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus[31].

Finally, the issue of the extraterritorial reach of unilateral trade measures was only implicitly considered by the AB in the *EU Seal Regime* case:

> As set out in the preamble of the Basic Regulation, the EU Seal Regime is designed to address seal hunting activities occurring 'within and outside the Community' and the seal welfare concerns of 'citizens and consumers' in EU member States. The participants did not address this issue in their submissions on appeal. Accordingly, while recognizing the systemic importance of the question of whether there is an implied jurisdictional limitation in Article XX (a), and, if so, the nature or extent of that limitation, we have decided in this case not to examine this question further[32].

From this statement, it is possible to infer that the AB intended to identify the necessary nexus between the measure and the regulating subject in the public morals concerns of its own citizens[33]. In the *EC – Tariff Preferences* case discussed in Chapter II of this book, the panel found that "the policy reflected in the Drug Arrangements is not one designed for the purpose of protecting human life or health in the European Communities and, therefore, the Drug Arrangements are not a measure for the purpose of protecting human life or health under Article XX(b) of GATT 1994". In this case, the lack of a territorial connection to the regulating party was considered as a ground for the inconsistency of the measure under the exception of Article XX (b).

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[31] *Ivi*, paragraph 168.

[32] WT/DS400/AB/R, paragraph 5.173.

[33] R. Howse, J. Langille, and K. Sykes, "Pluralism in Practice: Moral Legislation and the Law of the WTO After *Seal Products*", *George Washington International Law Review* (2015): 124 *ff*.

To sum up, GATT/WTO case-law is not clear and explicit on the issue of the extraterritorial reach of trade measures having the aim of protecting the national interests of the enacting party and producing extraterritorial effects. From the analysed cases, however, it is possible to draw the conclusion that both the panels and the Appellate Body require some kind of "nexus" between the regulating State and the protected interest. In the *Seal Products* case, the nexus appears to be less "territorial" than in the *Shrimps* case, the former relying on the moral concerns of citizens, and the latter stressing the movements of turtles that also affect the territorial waters of the U.S. The *Tuna* cases can be compared, *mutatis mutandis*, to the *Tariff Preferences* case: in both, the contested measures were considered inconsistent with GATT Article XX, as they were aimed at protecting interests (the life of dolphins and the life and health of people in developing countries, respectively) which held no territorial connection with the enacting parties.

Moreover, the GATT/WTO condemns the "coercive application" of measures which have the effect of forcing other States to change their domestic policies[34] and requires States to prefer a multilateral approach to the regulation of issues of international interest rather than unilateral action. On the basis of such an interpretation of the relevant GATT provisions, it might prove difficult for the EU to convince a WTO panel and the AB of the consistency of measures such as the biofuels sustainability criteria. An important element is the engagement of the Union in international negotiations aimed at establishing multilateral standards for the protection of a common good such as the global climate. The failure of such negotiations, provided that they were undertaken in good faith, might open the way to unilateral measures as the "second best alternative" to address a global problem[35]. But again, unilateral measures must not hide discriminatory and protectionist purposes and must respond to legitimate international interests.

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[34] Bartels, "Article XX of GATT", 389.

[35] C. Ryngaert and M. Koekkoek, "Extraterritorial Regulation of Natural Resources. A Functional Approach", in *Global Governance Through Trade* (Cheltenham, Edward Elgar, 2015): 245 *ff*. The author speaks, in this respect, of "constructive unilateralism".

2.3. *Extraterritorial jurisdiction and EU measures affecting international trade*

The EU's jurisdiction must be considered from two different perspectives. One is the territorial reach of the Treaties and of EU legislation, which is determined by the territories, territorial waters and airspaces of the Member States, including their overseas territories, as specified in Article 355 TFEU. The other perspective – inherent to the EU's nature as an integration organisation – depends on the EU's internal rules on the distribution of competences between the EU itself and its Member States (Articles 2-6 TFEU and the relevant case-law of the Court of Justice). A measure enacted *ultra vires* is null and void and can be annulled by the Court (Article 263 TFEU), as the Court of Justice is the institution which has the power to determine the scope of the EU's competences on the basis of the Treaties[36].

As for extraterritorial jurisdiction, the Union has adopted a very cautious attitude which can be exemplified by the *amicus curiae* brief it submitted to the U.S. Supreme Court in the *Kiobel* case[37]. The case dealt with the application of the U.S. Alien Tort Statute (ATS) to a civil lawsuit stemming from the actions of Shell Oil in the Niger Delta in the early 1990s. The suit was filed on behalf of Dr. Barinem Kiobel, a murdered Ogoni leader, and eleven other Nigerians from the Ogoni region who suffered crimes against humanity including extrajudicial killings, torture, and other violations of international law. Eshter Kiobel, Dr. Kiobel's widow, and the other petitioners in the case alleged that they or their family members were entitled to compensation from Shell and the other respondents, whom they alleged aided and abetted the government of Nigeria in the commission of these abuses[38]. The EU argued that the jurisdictional limits of the ATS should be defined according to international law, recalling the traditional grounds for extraterri-

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[36] J.H.H. Weiler and U.R. Haltern, "The Autonomy of the Community Legal Order - Through the Looking Glass", *Harvard International Law Journal* (1995/96): 411 *ff.*

[37] European Commission, *Amicus Curiae Brief on Behalf of the European Union in Kiobel v. Royal Dutch Petroleum*, 13 June 2012, No 10-1491. The Supreme Court's Opinion was delivered on April 17, 2013, 569 U.S. __ (2013).

[38] J.C. Lawrence, "Kiobel and the Commission", *European Law Blog*, October 15, 2015, https://europeanlawblog.eu/2012/10/15/kiobel-and-the-commission/.

torial jurisdiction mentioned above: nationality, the protection of security interests of the State of fundamental importance, or universal jurisdiction over a narrow category of serious violations of international law involving conduct of universal concern, provided that States with a nexus to the case are unwilling or unable to provide a forum, and no international remedies are available. The controversial issue in *Kiobel* was the application of the principles of universal jurisdiction, which developed as criminal jurisdiction aimed at fighting against the impunity of persons suspected of international crimes, to civil suits. The EU argued that although less established than its criminal counterpart, universal civil jurisdiction is consistent with international law if confined by the limits in place for universal criminal jurisdiction[39]. Interestingly, the Supreme Court, applying the presumption against extraterritoriality, held that the United States had no jurisdiction over the case, as the ATS only applies to cases which "touch and concern" the territory of the United States with sufficient force to displace the presumption against extraterritorial application[40]. In this case, all the relevant conduct took place outside the United States.

A field where extraterritorial application has acquired relevance is antitrust law. Here, the U.S. follows the criterion of the "effects," and thus applies U.S. antitrust law to conduct taking place abroad if it produces harmful effects on competition inside the U.S. market. However, the EU has adopted the more flexible approach of the "implementation theory", which can be considered as a disguised effects doctrine[41], as it allows the Union to address anti-competitive conduct decided abroad whenever the conduct is implemented inside the Union and, evidently, produces its effects there.

[39] European Commission, *Amicus Curiae Brief*, 17.

[40] 569 U.S. __ (2013), paragraph IV.

[41] Munari, "Sui limiti internazionali all'applicazione extraterritoriale", 45. The leading judgment was *Woodpulp*, delivered on September 27, 1988, joined cases 89, 104, 114, 117 and 125 to 129/85, EU:C:1988:447.

2.4. *The ATAA case and the territorial nexus in the case-law of the Court of Justice*

Getting closer to the subject matter that forms the object of the present study, the Court of Justice addressed the issue of the extraterritorial application of EU law in the *ATAA* case[42]. The case originated from a reference for a preliminary ruling under Article 267 TFEU from the High Court of Justice of England and Wales. The claimants, ATAA and three airlines whose headquarters were located in the U.S., asserted that Directive 2008/101[43] was not compatible with international law and was therefore invalid. The contested Directive extended the EU emissions trading scheme (ETS)[44] to aviation services, thereby obliging airlines operating in Europe, both European and non-European, to comply with obligations to monitor, report and verify their emissions for all flights taking off from or landing at a European airport. The problem that originated the controversy was, however, overtaken by subsequent events. In 2016, the EU decided to maintain the geographic scope of the EU ETS limited to intra-European Economic Area flights from 2017 onwards in light of a Resolution adopted in October 2016 by the International Civil Aviation Organisation (ICAO) which established a sys-

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[42] Judgment of 21 December 2011, case C-366/10, *Air Transport Association of America (ATAA) et al. v. Secretary of State for Energy and Climate Change*, EU:C:2011:864. See also Judgment of 23 April 2015, case C-424/15 Zuchtvieh-Export, EU:C:2015:259, where the Court ruled that Regulation (EC) No 1/2005 on the protection of animals during transport (O.J. L 3 of 5 January 2005, p. 1) applies not only to the transport of live animals taking place entirely within the territory of the EU, but also to transport operations having their point of departure within that territory and their destination in a third country.

[43] Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, in *O.J.* L 8 2009, 3.

[44] Simply put, the EU emissions trading system is based on a "cap and trade" mechanism, whereby companies are attributed a cap in the GHG that can be emitted by installations. Within the cap, companies can buy emission allowances that they can trade with one another as needed. After each year, a company must surrender enough allowances to cover all its emissions; otherwise, heavy fines are imposed.

tem of global market-based measures to address CO2 emissions from international aviation as of 2021. The system, called the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), requires airlines to monitor their CO2 emissions and to stabilise them[45]. With an international standard for emissions from aviation in place, although on a voluntary and non-binding basis, the EU unilateral regulation of the matter lost its meaning, and the EU duly gave way to the ICAO scheme with respect to international flights. The EU decision to suspend the application of the ETS to non-EU airlines was, however, also prompted by the heated criticism the EU faced from non-EU countries[46].

Getting back to the case, which retains all its interest as the findings of the Court can also be applied to other situations involving the extraterritorial reach of EU unilateral measures, the national court in its questions for a preliminary ruling referred to several international law principles, both conventional and customary. The latter are the most interesting, as they relate to the issue of the extraterritorial application of unilateral measures: (a) the principle that each State has complete and exclusive sovereignty over its airspace; (b) the principle that no State may validly purport to subject any of the high seas to its sovereignty; (c) the principle of the freedom to fly over the high seas; and (d) the principle that aircraft overflying the high seas are subject to the exclusive jurisdiction of the country in which they are registered[47]. The British court wanted to know whether the Directive was to be considered invalid if and in so far as it extended the application of the ETS to those parts of the flights which take place outside the airspace of the Member States, namely over the high seas or in the airspace of a third country, as contravening one or more of the principles of customary international law mentioned above. It is interesting to consider the Opinion of Advocate General Kokott before examining the findings of the Court. AG Kokott first considered that Directive 2008/101 is con-

[45] ICAO Assembly, Resolution A39-3 of 6 October 2016.

[46] International Law Commission, *Fifth Report on the Protection of the Atmosphere*, 8 February 2018, Shinya Murase Special Rapporteur, A/CN.4/711, 12.

[47] Case C-366/10, Opinion of Advocate-General J. Kokott, delivered on October 6, 2011, paragraph 38.

cerned solely with aircraft arrivals at and departures from aerodromes in the EU, and that "it is only with regard to such arrivals and departures that any exercise of sovereignty over the airlines occurs"[48]. In this respect, "it is undoubtedly true that, to some extent, account is taken of events that take place over the high seas or on the territory of third countries. This might indirectly give airlines an incentive to conduct themselves in a particular way when flying over the high seas or on the territory of third countries, in particular to consume as little fuel as possible and to expel as few greenhouse gases as possible. However, *there is no concrete rule regarding their conduct within airspace outside the EU*"[49]. According to the AG, "it is by no means unusual for a State or an international organisation also to take into account in the exercise of its sovereignty circumstances that occur or have occurred outside of its territorial jurisdiction". However, from an international law perspective, the particular facts must display a sufficient link with the State or the international organisation concerned. In the case at hand, the adequate territorial link was provided by the presence of the aircraft in an airport on the territory of one of the Member States[50]. The AG added that "in general, the EU may require all undertakings wishing to provide services within its territory to comply with certain standards laid down by EU law. Accordingly, it may require airlines to participate in measures of EU law on environmental protection and climate change (…) whenever they take off or land at an aerodrome within the territory of the EU"[51]. Having established this principle and identified the territorial link of the measure, the AG went on to explain the rationale behind the extraterritorial application of the contested measure to parts of flights taking place outside the territory of the EU: "[s]uch an approach reflects the nature as well as the spirit and purpose of environmental protection and climate change measures. It is well known that air pollution knows no boundaries and that GHG contribute towards climate change worldwide irrespective of where they are emitted; they can have effects on the environment and climate in every

[48] *Ivi*, paragraph 146.

[49] *Ivi*, paragraph 147. The emphasis is mine.

[50] *Ivi*, paragraphs 149-150.

[51] *Ivi*, paragraph 151.

State and association of States, including the EU"[52]. The Court largely followed the arguments suggested by the AG. It stated that the EU is bound by international law and must respect international law in the exercise of its powers[53]. While the EU has no jurisdiction over the high seas or over the territory or airspace of third countries, EU legislation may be applied to an aircraft operator when the aircraft is in the territory of one of the Member States. In such a case, that aircraft is subject to the unlimited jurisdiction of that Member State and of the EU[54]:

> it is only if the operator of such an aircraft has chosen to operate a commercial air route arriving at or departing from an aerodrome situated in the territory of a Member State that the operator, because its aircraft is in the territory of that Member State, will be subject to the allowance trading scheme. As for the fact that the operator of an aircraft in such a situation is required to surrender allowances calculated in the light of the whole of the international flight that its aircraft has performed or is going to perform from or to such an aerodrome, it must be pointed out that, as European Union policy on the environment seeks to ensure a high level of protection (…), the European Union legislature may in principle choose to permit a commercial activity, in this instance air transport, to be carried out in the territory of the European Union only on condition that operators comply with the criteria that have been established by the European Union and are designed to fulfil the environmental protection objectives which it has set for itself, in particular where those objectives follow on from an international agreement to which the European Union is a signatory, such as the Framework Convention and the Kyoto Protocol. Furthermore, the fact that, in the context of applying European Union environmental legislation, certain matters contributing to the pollution of the air, sea or land territory of the Member States originate in an event which occurs partly outside that territory is not such as to call into question, in the light of the principles of customary international law capable of

[52] *Ivi*, paragraph 154.

[53] Case C-366/10, Judgment of the Court, paragraph 123.

[54] *Ivi*, paragraph 124.

> being relied upon in the main proceedings, the full applicability of European Union law in that territory[55].

The AG and the Court identified the territorial link in the presence of the aircraft in EU airports, but interestingly, both stressed the ulterior jurisdictional ground of the effects that pollution occurring outside the territory produces within EU boundaries and the multilateral source of the environmental protection objectives pursued by the EU legislation.

From the *ATAA* judgment, it is possible to draw some criteria to understand the interpretation the Court gave of the notion of the jurisdiction of the EU and of the extraterritorial application of EU law. First, the Court affirmed the need for a territorial link between the EU legislation and the subjects, facts and conduct it wants to regulate. Such a territorial link or nexus is provided, in the case at hand, which deals with the provision of services, by the presence of the aircraft on EU territory for landing or take-off. A similar territorial link could be identified, in the context of trade in goods, in the presence of the importer on EU territory and on the subsequent access of the goods to the EU market: from this perspective, what matters for the purpose of determining jurisdiction is the location where the rules are enforced, not what has happened before enforcement[56]. A second important consideration is that the Court clearly stated that operators who want to have access to the EU market (to provide services, as in the *ATAA* case, or to export goods) must comply with EU legislation on environmental protection. This is a condition for market access, and it falls within the limits of EU jurisdiction, even if it affects conduct which takes place abroad, for example, requiring a certification of compliance or a certification of origin or specific production methods. The Court argued that EU requirements are not binding for non-European service providers, but they must comply if they choose to provide services inside the EU territory. The third conclusion that can be drawn from the judgment is that the Court – and more explicitly the Advocate General – indirectly considered the effects criterion in the establishment of jurisdiction, as

[55] *Ivi*, paragraphs 127-129.

[56] Ankersmit, Lawrence, and Davies, "Diverging EU and WTO Perspectives," 37.

they referred to the trans-boundary character of air pollution[57]. A fourth thing that it is worth considering is that the Court strongly stressed the international multilateral origin of the objectives of environmental protection and fight against climate change, referring to the UNFCCC and the Kyoto Protocol. Such a reference limits the unilateral character of the EU measures, which are consistent with internationally agreed objectives.

3. Concluding comments

As pointed out before, the existence of an extraterritorial effect of trade measures pursuing non-economic goals is disputed in the legal literature. Some authors argue that trade measures, because of their very nature, are applied at the border, thus creating a territorial link as the basis for jurisdiction[58]. Market access is indeed the object of unilateral trade regulation, and as such, the latter is applied within the territory of the regulating State, thus excluding any extraterritorial effects[59]. Other authors, on the contrary, suggest that there is indeed an extraterritorial effect connected to unilateral trade measures aimed at influencing foreign conduct[60], as market access is precluded to non-complying products.

According to Bartels, there are different types of import measures which are extraterritorial in a relevant sense: activities-based measures (process and production method measures, such as goods produced in violation of core labour standards[61] or by child labour or causing de-

[57] T. Koziel, "Extraterritorial Application of EU Environmental Law. Implications of the ECJ's Judgment in Air Transport Association of America," *Columbia Journal of European Law Online* (2012): 4 *ff*.

[58] See Young, "Trade Measures to Address Climate Change", 336-37.

[59] Ryngaert and Koekkoek, "Extraterritorial Regulation of Natural Resources", 260.

[60] E. Barett Ludgate, "Biofuels, Sustainability and Trade-Related Regulatory Chill", *Journal of International Economic Law* (2012): 157 *ff*.

[61] Article XX (e) allows trade restrictions relating to products of prison labour, which is a case of a process and production method; furthermore, this specific provision allows restrictive measures which necessarily entail an extraterritorial effect, since they target goods produced by prisoners in the exporting country.

forestation or heavy pollution), product-based measures (ivory, wildlife, conflict diamonds and minerals) and boycotts (goods from a certain enterprise or State involved in human rights violations)[62]. All these measures, as well as export measures such as the export ban on torture and death penalty goods, have the objective of changing the behaviour of foreign States and economic operators, forcing or encouraging them to apply the standards of human rights and environmental protection established by the regulating entity (the EU), by multilateral legal instruments or by general international law. Such extraterritorial reach of EU regulations has been described by Scott as a "territorial extension", a concept which is distinct from extraterritoriality. Scott suggests that a measure will be regarded as extraterritorial when it imposes obligations on persons who do not enjoy a relevant territorial connection with the regulating State, while a measure will be regarded as giving rise to territorial extension when its application depends upon the existence of a relevant territorial connection, but where the relevant regulatory determination will be shaped as a matter of law by conduct or circumstances abroad[63]. Such a territorial extension is used by the EU to prompt the adoption by third countries of laws consistent with its human rights or environmental standards, or also to promote the enforcement of existing third country norms[64] (this is the case, for example, of the timber regime and of the illegal, unreported and unregulated fishing regulation).

From a more political point of view, trade measures with extraterritorial reach have been considered as an expression of the EU's moral imperialism[65], which tries to impose the dominant EU culture over the traditions of indigenous peoples, as in the controversial case of the Seal Products Regulation.

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[62] Bartels, "Article XX of GATT", 384.

[63] J. Scott, "The New Extraterritoriality", *Common Market Law Review* (2014): 1343 *ff.*; J. Scott, "Extraterritoriality and Territorial Extension in EU Law", *American Journal of Comparative Law* (2014): 89.

[64] Scott, "Extraterritoriality", 107-08.

[65] E. Whittsitt, "A Comment on the Public Morals Exception in International Trade and the EC-Seal Products Case: Moral Imperialism and other Concerns", *Cambridge Journal of International and Comparative Law* (2014): 1376 *ff.*

Several authors have pointed out the contradiction of this kind of measures with the accepted principle of the common but differentiated responsibility for environmental deterioration of developed and developing countries[66] according to Principle 7 of the Rio Declaration, and with the requirement expressed in Principle 12 that "[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus".

Many problems are involved on the issue of extraterritoriality. In light of the analysis performed in the previous chapters, it is possible to draw the conclusion that there is no doubt that, to a greater or lesser extent, the considered measures do have an extraterritorial impact. The latter may be justified under international law with the territorial links that are normally present in the relevant EU acts (territorial extension) and under WTO law recurring to the exceptions of Article XX of the GATT. The success of this option is not always guaranteed, however, as the GATT/WTO case-law demonstrates.

A second issue is whether the extraterritorial reach of EU unilateral measures may be justified on the basis of the global interests such measures intend to protect. The environment, the global climate, and human rights are all shared interests and form part of a common heritage of the international community as a whole, and each subject of the international community has the right and the duty to act in pursuance of their protection. In this perspective, it could be argued that the EU may act on behalf of the international community for the protection of global goods and values[67]. These considerations lead to the problem of unilateralism, which is disfavoured by the international community and the WTO as an expression of protectionism, and even, as mentioned above, imperialism. In this context, the EU is involved and ex-

[66] Ankersmit, Lawrence, and Davies, "Diverging EU and WTO Perspectives". 40 *ff.*; Koziel, "Extraterritorial Application of EU Environmental Law", 6.

[67] See P. Picone, *Comunità internazionale e obblighi "erga omnes"* (Napoli, Jovene, 2006) for a theorisation of the notion of *erga omnes* obligations in international law as the obligation of all States to protect the fundamental values of the international community.

tremely active in multilateral negotiations for the protection of the environment and of sustainable development, including human rights. Moreover, the EU tends to act, whenever it is possible, in coordination with multilateral institutions, such as the ILO and the United Nations. Recourse to unilateral measures should thus be – and frequently is – the last resort in cases where negotiations fail or proceed too slowly. In such situations, unilateral action may prompt the adoption of multilateral standards or the adoption by third countries of national legislation in line with EU standards. The need for unilateral measures to be the last resort is important in light of the consideration that such measures often also have a secondary and less "evangelical"[68] finality, as they aim at levelling the playing field in international trade relations. This implies that the EU's goal is to reduce possible trade distortions due to the different and generally lower sustainability standards applied by partner countries. Forcing foreign operators to comply with EU standards through market access requirements contributes toward placing all actors in the market in the same position, thus reducing the disadvantages that EU operators face from being under the obligation to comply with high and costly sustainability standards.

The Union's legislation on the promotion of sustainable development, human rights, and environmental and climate protection is on the razor's edge of this tension between territoriality and extraterritoriality, multilateralism and unilateralism. As a prominent power in international trade, the Union uses its leverage towards third countries to promote its values. As the present research tried to demonstrate, the EU's action in favour of the promotion of such values, which is part of the Union's "mission" under the Treaties, despite often raising issues concerning its consistency with public international law and trade law, is very careful in determining the jurisdictional nexus of the single measures and, more substantially, in giving priority to multilaterally agreed measures and cooperation within international institutions.

The action towards the improvement of corporate social responsibility and sustainability goes in the same direction. It aims at enhancing the coherence of the EU's action at all levels, through the involvement of

[68] Ankersmit, Lawrence, and Davies, "Diverging EU and WTO Perspectives," 3.

private companies. The latter should be under the obligation to comply with EU social and environmental standards including where operating outside the territory of the Union. Obligations of due diligence and disclosure of corporate social and environmental policies pursue the objective of attaining more transparency in the corporate action and stimulating the consumers' awareness about the behaviour of companies.

All these actions on the part of the EU must nevertheless be supported by an enhanced coherence of the Union in pursuing the objectives of sustainable development and human rights protection, both at the domestic level and at the international level. Only in this way is it possible for the Union to achieve the role of leading power for the promotion of global values and common goods.

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