UNICA

UNIVERSITÀ
DEGLI STUDI
DI CAGLIARI

Ph.D. DEGREE IN
LEGAL SCIENCES

Cycle XXXIV

PERKING-UP EU ACTORNESS THROUGH SUSTAINABILITY IN FOREIGN DIRECT INVESTMENTS. A LEGAL PERSPECTIVE

IUS/14

Ph.D. Student: Sofia Tzortzi

Supervisor Prof. Francesco Seatzu

Final exam. Academic Year 2020/2021
Thesis defence: April 2023 Session

Στην Έττα, που με γέννησε κι έκτοτε με στηρίζει. Αναντίρρητα κι αναμφισβήτητα.

Και στο Βάσο μου, που εγώ γέννησα. Με την ελπίδα να τα καταφέρω.

Abstract

In the constantly metamorphosing EU legal order, the law of foreign direct investment has evolved from a scattered and limited implied power to an exclusive competence, expressly provided for in the Treaty. International investment law for its part has endured in the last years great criticism due to severely suspected bias towards investors' interests, and a general lack of balance between the protection of public interest and that of investments. Albeit a progressive recognition of the necessity to address such question in the newer generation of investment treaties by the inclusion of various terms aiming to ensure the protection of overriding interests such as environmental and social rights, construal and enforcement of investment treaties by investor-state arbitration panels as well as investor-state dispute settlement *ipsum esse* remains largely problematic. After examining the compatibility of 'traditional' international investment law within the confines of Union law -EU's sustainable development policies, values and objectives- I prove that to a large extent many of its aspects are potentially in breach of legally binding EU principles enshrined in the Treaties. In that respect, the EU legal order had to shape-up its foreign investment policy differently, in a way that is compatible with Union law. Given the external dimension of this policy, these issues are addressed not only internally, but within the EU's relations with the world, in the context of a general revamp of international investment law. Applying numerous variables, the Union has sought to become one of the pioneers in the overhaul of international investment law, thus strengthening its world 'actorness' as the forerunner of sustainability in the bloc of developed states consistently with its objectives under article 21 TEU, and further enhancing the export of its values. I conclude that, overall, the EU's endeavours for a 'purge' of international investment law which is consistent with the Union's legal order, is substantially contributing towards a more responsible, fair and rules-based system and to the positioning of the EU as a responsible world leader, steering towards sustainable development.

TABLE OF CONTENTS

Acknowledgements **7**

Plagiarism disclaimer **8**

List of abbreviations **10**

List of cases **12**

Introduction **25**

My claim | objectives & limitations 25

Structure 27

Methodology & sources 29

Terminology and definitions 30

Setting the framework 31

Progressive European integration 31

The concept of actorness 38

Low politics as the appropriate arena for the development of EU actorness 40

Defining sustainable development 44

International business responsibility in the era of SDGs 54

Chapter 1 | International investment law in the era of SDGs **60**

1.1 The nuts and bolts of international investment law 60

1.2 Sustainable development and international investment law: an odd couple 66

1.2.1 Arbitration and arbitrariness 78

1.2.2 Questions of impartiality and independence of arbitrators in ISDS 93

1.2.3 Legal 'saphêneia' and consistency in International Investment Law 107

1.2.4 Jurisdiction ratione materiæ and lack of consent 111

1.3 Sub-conclusion 115

Chapter 2 | implementing the SDGs in the EU 121

2.1 Framework 121

2.2 A Union of law 128

2.3 Judicial independence as a fundamental value & right 134

2.4 Social Europe 136

2.5 The protection of fundamental rights in the EU 139

2.6 The progress of EU environmental law & policies 144

2.7 Environmental integration principle 151

2.8 Business responsibility in the EU legal order 157

2.9 Sub-conclusion | a short critique 160

Chapter 3 | The quest for EU's world 'actorness' 163

3.1 The bumpy road to today's CFSP: back to square one? 163

3.2 The relationship between EU and international law 187

3.3 Implied external powers: constitutionalisation of a constitutionalising judge-made doctrine 190

3.4 Common Commercial Policy: if the EU can do something, that is trade! 204

3.5 The EU as a sustainable global actor 210

3.5.1 The enforceability of Articles 3 and 21TEU 210

3.5.2 External sustainable trade | Trade & sustainable development) 214

3.5.3 EU's environmental & climate diplomacy 222
3.5.4 Human rights, global peace and security 235
3.5.5 The case for extraterritorial application in and of the EU legal order 236
3.6 Sub-conclusion 239
Chapter 4 | EU law on foreign investments 241
4.1. The Lisbon celebration of the EU investment policy's coming of age 241
4.2 New competences, new challenges 245
4.3 The notion of FDI | Opinion 2/15 248
4.4 Compatibility of international investment law with Union law 250
4.5 Aligning international investment law with the EU system of values. 256
4.5.1 Non-trade values in EU investment protection agreements 256
4.5.2 Reforming investment arbitration 258
4.5.3. Sustainable investment facilitation agreements (SIFAs) *266*
4.6 Comparative case study: CETA & USMCA 269
4.6.1 Policy space 271
4.6.2 Expropriation exceptions – indirect expropriation 275
4.6.3 Fair and equitable treatment 276
4.6.4 Dispute resolution 277
4.6.5 Results 277
4.6.6 Assessment 280
4.7 Sub-conclusion 281
Concluding remarks 283
List of references | bibliography 287

Acknowledgements

Undertaking a PhD as a mid-career project, amidst the Covid-19 breakthrough and the coming of new family member, proved to be a challenging task. Thankfully, the coordinators of the doctoral programme of the law school of the University of Cagliari showed immense understanding and offered me great support. I am therefore enormously grateful for all the significant help and academic guidance I received from Professor Gianmario Demuro and Professor Silvia Corso, throughout this cursus.

I am also indebted to my supervisor, Professor Francesco Seatzu, who showed faith in me and entrusted me with this topic. I cherished the desire to work on a matter unknown to me back in 2019, and Professor Seatzu gave me that opportunity, without ever doubting me.

A very special thanks to my supervisor abroad, Professor Ilias Bantekas, whose direction, insights and -above all- sincere, generous and altruistic assistance have been invaluable assets and my confidence booster!

What can I possibly say about my husband… Sotiris, you are my rock. Side by side, hand in hand, forever. Thank you for putting up with me throughout this process, although alien to you. Your unconditional love and your serenity kept me going.

I wish to also thank my father, Ioannis; an engineer who nonetheless read my thesis and cared enough to try to understand it. To my dear Konstantina: thank you for taking care of my angel while I was writing. The gratitude to my mother, Etta, goes even further. This work is partly dedicated to her.

Last but not least, this project would have been impossible from day one till the last, without the treasured friendship, encouragement and practical help of Dr Katerina Akestoridi. Katerina you are a talented, knowledgeable lawyer and academic but above all you are a caring, kind and giving person. I am proud to be your friend.

Plagiarism disclaimer

I hereby declare this thesis is my own and autonomous work. All sources have been indicated as such. All texts, either quoted directly or paraphrased, have been indicated by citations in footnotes. This work (entirely or partly) has not been submitted to any other examination authority or publisher.

25 March 2023

Sofia Tzortzi

This page is left intentionally blank

List of abbreviations

BIT	Bilateral Investment Agreement
CARIFORUM	Caribbean Forum
CCP	Common Commercial Policy
CETA	EU-Canada Comprehensive Economic Trade Agreement
CFSP	Common Foreign Security Policy
CIFA	Cooperation and Investment Facilitation Agreement
CJEU	Court of Justice of the EU
CR	Corporate Responsibility
CSDDD	Directive on Corporate Sustainability Due Diligence
CSR	Corporate Social Responsibility
DoV	Duty of Vigilance
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EFTA	European Free Trade Organisation
EGA	Environmental Goods Agreement
EIA	Environmental Impact Assessment
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IA	Impact Assessment
IBA	the International Bar Association
ICC	International Chamber of Commerce
ICCA	International Court of Arbitration
ICS	Investment Court System
ICSID	World Bank's Center for the Settlement of Investment Disputes
IHRL	International Human Rights Law
IIA	International Investment Agreement
IIL	International Investment Law
ILO	International Labour Organization
IPR	Intellectual Property Rights
ISA	Investor State Arbitration
ISDS	Investor-State Dispute Settlement
ITA	Investment Treaty Arbitration
ITL	Integration Through Law
LCIA	London Court of International Arbitration
LCR	Low-carbon, climate-resilient
LULUCF	land use, forestry and agriculture
MEA	Multilateral Environmental Agreement
MFN	Most Favoured Nation
MIAM	Multilateral Investment Appellate Mechanism

MIC	Multilateral Investment Court
MNC/MNE	Multinational Corporation/Company/Enterprise
MST	Minimum Standard of Treatment
NAFTA	North America Free Trade Agreement
NFRD	Non-Financial Reporting Directive
NTPO	Non-Trade Policy Objective
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
RBC	Responsible Business Conduct
RIT	Regional Investment Treaty
SCC	Stockholm Chamber of Commerce
SDDA	German supply chain due diligence act (German)
SDG	Sustainable Development Goals
SEA	Single European Act
SIA	Sustainability Impact Assessment
SIFA	Sustainable Investment Facilitation Agreement
SSDS	State to State Dispute Settlement
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIPs	Trade-Related aspects of Intellectual Property Rights
TSD	Trade and Sustainable Development
UN	United Nations
UNCITRAL	United Nations Commission for International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNFCCC	United Nations Framework Convention for Climate Change
UNHRC	United Nations Human Rights Council
USA	United States of America
USMCA	USA-Mexico-Canada Agreement
VCLT	Vienna Convention of the Law of the Treaties
WTO	World Trade Organization

List of cases

1. Courts of justice | case-law

Court of Justice of the EU

Case C-156/21 *Hungary v Parliament and Council* [2022] ECLI:EU:C:2022:97

Case C-344/04 *IATA and ELFAA v Department of Transport* [2006] ECLI:EU:C:2006:10

C-621/18 *Andy Wightman and Others v Secretaty of State for Exiting the European Union* [2018] EU:C:2018:999

C-496/99 P *Commission v CAS Succhi di Frutta* [2004] ECR I- 3801

Joined Cases C-212/80 to C-217/80 *Meridionale Industria Salumi and Others* [1981] ECR I-2735

Cases C46/87 and C227/88 *Hoechst AG v Commission of the European Communities* [1989] ECR I-2859

Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] EU:C:2018:117

Case C-216/18 PPU *Minister for Justice and Equality* (Deficiencies in the system of justice) [2018] EU:C:2018:586

C-279/09 *DEB* [2010] ECR I- 13849

Case C-452/16 PPU *Openbaar Ministerie v Krzysztof Marek Poltorak* [2016] EU:C:2016:858

Case C-477/16 PPU Openbaar Ministerie v Ruslanas *Kovalkovas* [2016] EU:C:2016:861

Case C-471/98 *Commission of the European Communities v Kingdom of Belgium* [2002] ECR I- 968

Case 26-62 *NV Algemene Transport- en Expeditie Onderneming Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1

Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung* [2018] EU:C:2018:257

Case C-380/09 P *Melli Bank PLC v* Council of the European Union [2012] ECLI:EU:C:2012:137

Case C-556/17 *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal* [2019] EU:C:2019:626

Case C-619/18 *European Commission* v *Republic of Poland (Independence of the Supreme Court)* [2019] EU:C:2019:531

Case 6/64 *Flamino Costa v ENEL* [1964] ECR 585

Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR 1339

Case 513/99 *Concordia Bus Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikene* [2002] ECR I-7213

Case 644/18 *European Commission v Italian Republic* Judgment of the Court [2020] ECLI:EU:C:2020:895

Case C-114/12 *European Commission v Council of the European Union* [2014] ECLI:EU:C:2014:2151

Case 149/77 *Gabriel Defrenne v Société anonyme belge de navigation aérienne Sabena III* [1978] ECR 1365

Case C-275/96 *Anne Kuusijärvi v. Riksförsäkringsverket* [1998] ECR I-3419.

Case C-290/00 *Johann Franz Duchon v Pensionsversicherungsanstalt der Angestellten* [2002] ECR I-3567

Case C-170/95 *Office national de l'emploi v Calogero Spataro* [1996] ECR I-2921

Case C-215/99 *Friedrich Jauch v Pensionsversicherungsanstalt der Arbeiter* [2001] ECR I-1901

Case C-43/99 *Ghislain Leclere, Alina Deaconescu v Caisse nationale des prestations familiales* [1996] ECR I-2921

Case 6-72 *Europemballage Corporation and Continental Can Company Inc v Commission of the European Union* [1973] ECR-0215

Case 29-69 Erich *Stauder v City of Ul –Sozialamt* [1969]ECLI:EU:C:1969:57

Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECLI:EU:1970:114

Case 6-75 *Ulrich Horst v Bundesknappschaft* [1975] ECLI:EU:C:1975:94

Case C-73/08 *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française* [2010] ECR 1-2735

Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659

Case C-339/10 *Krasimir Asparuhov Estov, Monika Lyusien Ivanova, Kemko International EAD v Ministerski savet na Republika Bulgaria* [2010] ECR I-11465

C-457/09 *Claude Chartry v Belgian State* [2011] ECR I-819

Case C-466/11 *Gennaro Currà and Others v Bundesrepublik Deutchland* [2012] ECLI:EU:2012:465

Case C-92/14 *Liliana Tudoran and Others v SC Suport Colect SRL* [2014] ECLI:EU:2014:2051

Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] EU:C:2013:107

Case C-824/18 *A.B. and others v Krajowa Rada Sadownictwa and Others* [2021] ECLI:EU:C:2021:153

Case C-279/09 *DEB Deutsche Energiehandels-und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECLI:EU:C:2010:811

Case C-137/13 *Herbaria Kräuterparadies GmbH v Freistaat* Bayern [2013] OJ C171/14

Case C-22/70 *Commission v Council* (AETR/ERTA) [1971] ECR- 263

Case C-246/07 *European Commission v Kingdom of Sweden* [2010] ECR I-3317

Case C-266/03 *Commission of the European Communities v Grand Duchy of Luxemburg* [2005] ECR I-4805

Case C-433/03 *Commission of the European Communities v Federal Republic of Germany* [2005] ECR I-6985

Case C-284/16 *Slovak Republic v Achmea BV* [2018] ECLI:EU:C:2018:158

Case C-284/95 *Safety Hi-Tech SrL v S. T.Srl* [1998] ECR I-4301

Case C-3, 4 and 6 - 76 *Cornelis Kramer and Others* [1976] ECR- 1279

Case C-318/98 *Fornasar and Others* [2000] ECR I-4785

Case C-377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v Autiridade Tributária e Aduaneira* [2014] EU:C:2014:1754

Case C-379/92 *Criminal Proceedings Against Matteo Peralta* [1994] ECR I-3453

Case C-459/03 *Commission of the European Communities v Ireland* [2006] ECR I-4635

Case C-600/14 *Federal Republic of Germany v Council of the European Union* [2017] ECLI:EU:C:2017:935

Case C-600/17 *Pina Cipollone v Ministero della Giustizia* (*COTIF I*) [2019] ECLI:EU:2019:29

Case C-62/88 *Hellenic Republic v Council of the European Communities (Chernobyl)* [1990] ECR I-1545

Case C-91/05 *Commission of the European Communities v Council of the European Union* (*Small Arms and Light Weapons*) [2008] ECR I-3651

Case T-349/99 *Miroslav Miskovic v Council of the European Union* and Case T-350/99, *Bogoljub Karic and Others v Council of the European Union* [2000] [removed from the registrar]

Joined cases C-585/18, C-624/18 and C-625/18, *A.K and Others v Sad Najwyższy, CP v Sad Najwyższy and DO v Sąd Najwyższy* [2019] ECLI:EU:C:2019:982

Joined Cases C-626/15 and 659/16 *Commission v Council* [2018] ECLI:EU:C:2018:925.

Joined cases C-798/18 and C-799/18, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others, Athesia Energy Srl and Others v Ministero dello Sviluppo economico and Gestore dei servizi energetici (GSE) SpA* [2021] ECLI:EU:C:2021:280

Case C-124/20 *Bank Melli Irav v Telekom Deutschland GmbH* [2021] ECLI:EU:C:2021:1035

Joined cases C-122/07 and C-122/08 *Miroslav Miskovic v. Council of the European Union*

Case T-192/16 *NF v European Council* [2017] ECLI:EU:T:2017:128

C-401/99 *Thomsen v Amt für ländliche Räume Husum* [2002] ECR I-5775

Case C-424/13 *Zuchtvieh-Export GmbH v Stadt Kempten* [2015] ECLI:EU:2015:259

Case C-121/15 *Association nationale des opérateurs détaillants en énergie (ANODE) v Premier ministre and Others* [2016] ECLI:EU:2016:637

Opinions pursuant to article 218(11) TFEU

CJEU Opinion 1/75, Opinion of the Court of 11 November 1975 [1975] ECR -1355

CJEU Opinion 1/76, Opinion of the Court of 26 April 1977 [1977] ECR- 741

CJEU Opinion 2/92, Opinion of the Court of 24 March 1995 [2005] ECR I-00521

CJEU Opinion 1/94, Opinion of the court of 15 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property [1994] ECR I-5267

CJEU Opinion 2/94, Opinion of the court of 28 March 1996, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1996] ECR I-1759

CJEU Opinion 2/00, Opinion of the Court of 6 December 2001[2000] ECR I-9713 (Cartagena Protocol)

CJEU Opinion 1/13, Opinion of the court (Grand Chamber) of 14 October 2014, Accession to the Convention on the civil aspects of international child abduction [2014] ECLI:EU:C:2014:2303

CJEU Opinion 2/13, Opinion of the Court (Full Court) of 18 December 2014, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:2014:2454

CJEU Opinion 2/15, Opinion of the Court (Full Court) of 16 May 2017, Free trade Agreement between the European Union and the Republic of Singapore [2017] ECLI:EU:C:2017:376

Opinions of Advocate Generals

Joined Cases C-626/15 and C-659/16 *Commission v Council* [2018] ECLI:EU:C:2018:925, Opinion of Advocate General Kokott

CJEU Opinion 3/15, Opinion of the Court on 14 February 2017, EU accession to the Marrakesh Treaty [2017] ECLI:EU:C:2017:114, Opinion of Advocate General Wahl

Case C-515/08 *Vitor Manuel dos Santos Palhota and Others* [2010] ECR I-9133, Opinion of Advocate General Cruz Villalon

Case 22-70 *Commission of the European Communities v Council of the European communities* [1971] ECR-263, Opinion of Advocate General Dutheillet de Lamothe

Case C-402/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, Opinion of Advocate General Poiares Maduro

Case C-600/14 *Federal Republic of Germany v Council of the European Union* [2017] ECLI:EU:C:2017:935, Opinion of Advocate General Szpunar

Case C-66/13 *Green Network SpA v Autorità per l'energia elettrice e il gas* [2014] ECLI:EU:C:2014:2399, Opinion of Advocate General Yves Bot

International Court of Justice

Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Provisional Measures) [2006] ICJ Rep 113

Elettronica Sicula S.P.A. (ELSI) (*USA v Italy*) [1989] ICJ Rep 15

Gabčikovo – Nagymaros Project (Hungary/Slovakia) [1997] ICJ Rep 7

English courts

Stilk v Myrick [1809] EWHC KB J58

European Court of Human Rights

Fadeyeva v Russia ECHR 2005-IV

Öneryıldız v. Turkey App no 48939/99 (ECtHR, 30 November 2004)

Ergi v Turkey (1998) 32 EHRR 388

M.C. v Bulgaria App no 39272/98 (ECtHR, 4 December 2003)

Elia S.r.l. v. Italy App no. 37710/97 (ECtHR, 2 August 2001)

Pine Valley Developments Ltd and Others v. Ireland App no 12742/87 (ECtHR, 29 November 1991)

Fredin v. Sweden [1991] 13 EHRR 784

Z.A.N.T.E. – Marathonisi A.E. v. Greece App no 14216/03 (ECtHR, 6 December 2007)

Brosset-Triboulet and Others v. France App no 34078/02 (ECtHR, 29 March 2010)

Depalle v. France App no 34044/02 (ECtHR, 29 March 2010)

Chapman v. UK App no 27238/95 (ECtHR, 18 January 2001)

Brosset-Triboulet and Others v. France App no 34078/02 (ECtHR, 29 March 2010)

2. Arbitration tribunals | awards

Compañia del Desarrollo de Santa Elena S.A. v Republic of Costa Rica, ICSID Case No. ARB/96/1 (Date of Award, 17 February 2000)

McKesson Corp. v Iran, 116 F.Supp.2d 13 (D.D.C 2000)

Eco Minerals Corp. v Republic of Colombia ('Eco Oro'), ICSID Case No. ARB/16/41) (pending)

Phoenix Action Ltd. v the Czech Republic, ICSID Case No. ARB/06/5 (Date of Award, 15 April 2009)

Loewen Group, Inc. and Raymond L. Loewen v United States, ICSID Case No.ARB(AF)/98/3 (Date of Award, 26 June 2003)

Marvin Roy Feldman Karpa v Mexico, Case No.ARB(AF)/99/1 (Date of Award, 16 December 2002)

Middle East Cement Shipping and Handling Co. S.A. v Egypt, ICSID Case No.ARB/99/6 (Date of Award, 12 April 2002)

Técnicas Medioambientales Tecmed, S.A. v The United Mexican States, ICSID Case No. ARB (AF)/00/2 (Date of Award, 29 May 2003)

Saluka Investments BV v The Czech Republic ICGJ 368 (PCA 2006)

Société Générale de Surveillance S.A. v Islamic Republic of Pakistan, ICSID Case No. ARB/01/13 (Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003)

Hulley Enters. Ltd. (Cyprus) v. Russian Federation, PCA Case No 205-03/AA 226 (PCA 2014)

Plama Consortium Ltd v Bulgaria, ICSID Case No.ARB/03/24 (Date of Award, 27 Auguat 2008)

Gustav F W Hamester GmbH & Co KG v Republic of Ghana, ICSID Case No ARB/07/24 (Award date, 18 June 2010)

MTD Equity Sdn. Bhd. And MTD Chile S.A. v Republic of Chile, ICSID Case No Arb/01/7 (Date of Award, 25 May 2004)

Chemtura Corporation v Government of Canada, PCA Case No 2008-01 (PCA 2010)

Parkerings-Compagniet AS v Lithuania, ICSID Case No. ARB/05/8 (Date of Award, 11 September 2007)

Electrabel v Hungary, ICSID Case No.ARB/07/19 (Date of Award, 5 November 2015)

Asian Agricultural Products Ltd (AAPL) v Sri Lanka, ICSID Case No.ARB/87/3 (1990) 4 ICSID Rep. 245

Salini Costruttori SpA and Italstrade SpA v Morocco, ICSID Case No ARB/00/4 (Decision on Jurisdiction, 23 July 2001)

Lemire v Ukraine, ICSID Case No. ARB/06/18 (Decision on Jurisdiction and Liability, 14 January 2010)

Tokios Tokelés v Ukraine, ICSID Case No.ARB/02/18 (Decision on Jurisdiction, 29 April 2004)

Iron Rhine Arbitration (Belgium/Netherlands) (2005) *27* RIAA XXVII

Indus Waters Kishenganga Arbitration (Pakistan v India), PCA Case No. 2011-01 (Partial Award, 20 December 2013)

Alasdair Ross Anderson et al. v Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3 (Date of Award, 19 May 2010)

Charanne and Construction Investments v Spain, SCC Case No V 062/2012 (Date of Award, 21 January 2016)

Ethyl Corporation v Canada (Award on Jurisdiction) (1998) 7 ICSID Rep 1

Metalclad Corporation v The United States of Mexico, ICSID Case No. ARB(AF)/97/ (Date of Award, 30 August 2000)

Talsud S.A. v United Mexican States, ICSID Case No. ARB(AF)/04/4 (Date of Award, 16 June 2010)

Azurix Corp. v Republic of Argentina, ICSID Case No. ARB/01/12 (Date of Award, 14 July 2006)

Methanex Corporation v United States of America (Final Award of the Tribunal on Jurisdiction and Merits) [2005] 44 ILM 1345

Dawood Rawat v. Republic of Mauritius, PCA Case No. 2016-20 (Date of Award, 6 April 2018)

Spyridon Roussalis v Romania, ICSID Case No. ARB/06/1 (Date of Award, 7 December 2011)

WTO Appellate body

United States: Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body (12 October 1998*) WT/DS58*

WTO Appellate Body, *Standards for Reformulated and Conventional Gasoline* (29 April 1996) WT/DS2/AB/R, 17

This page is left intentionally blank

Introduction

My claim | objectives & limitations

My thesis is founded on the hypothesis that the EU has been long and desperately seeking for an assertion of its 'actorness' through foreign policy. I suggest that once the EU realized that 'high politics' was not the most appropriate arena for the conquest of the coveted 'actorness,' it turned its interest into other areas which were already under its auspices; namely international trade agreements, as well as the environment, climate action, and development, all falling under the general realm of 'sustainable development' (SD).

These areas, albeit not traditionally labelled 'high politics', bear some very important characteristics:

(a) they are considered less 'delicate' by sovereign states and competence over them has already been conferred to the Union;

(b) their policy-making and negotiations of thematic international agreements require increased technical expertise, which makes EU leaders more dependent on the EU bureaucracy;

(c) despite their categorization under 'lower politics' their significance on the international agenda has been incremental; and

(c) the actually measurable volume (in population and GDP) of the interlocutor-State has an added value on its bargaining power on these matters.

Building on the once 'thought-provoking'[1] argument on the reversal of 'high' and 'low politics' due to the greater significance of international economic dealings over international politics of war and diplomacy, the growing importance of core

[1] David Allen, 'Who Speaks for Europe?' The Search for an Effective and Coherent External Policy' in John Peterson and Helen Sjursen (eds), *A Common Foreign Policy for Europe? Competing Visions of the CFSP* (Routledge 1998) 47.

economic and sustainability issues for security and foreign policy[2] I argue that areas of EU exclusive and shared competence have become the focal point[3] and consequently ideal 'kingpins' for EU's external action and consequently 'actorness'. Moreover, they may drift -with the appropriate momentum- concerted action also in security and foreign policy. Member States are more than willing for the Union to steer on these issues and the EU has been put as a *de facto* and *de jure* recognized global actor in the picture of international relations[4]. Following the hypothesis of Gehring, Oberthür, and Mühleck that recognition of the EU in international fora depends on action capability rather than other factors such as formal membership, it was inevitable for the EU to be able to assert her role worldwide and grow her global profile in areas of 'control over governance resources' such as decision-making, legislative and enforcement powers as well as financial assets.[5] External trade is the first and utmost of all; the EU holds exclusive competence thereto since its establishment. But environment, climate and -to a certain extent- SD overall are better flagships for EU's portrayal as the 'good' actor, the pioneer driving the rest of the world on the right track. The EU as a global actor aims at operating on the basis of its values inscribed in the treaty. Within this context, EU's *newer* competences over Foreign Direct Investment (FDI) opened the door widely for a new stage of actorness and a very fruitful venue to concretely apply Article3(5) TEU[6]. It is an opportunity the EU seized right away.

---

[2] Stephen Woolcock, European Union Economic Diplomacy: The Role of the EU in External Economic Relations (Ashgate 2012) 10.

[3] Michael Smith, 'Does the Flag Follow Trade? 'Politicisation' and the Emergence of a European Foreign Policy' in J.Peterson, H.Sjuesen (eds) ibid, 81.

[4] Tom Delreux 'EU Actorness, Cohesiveness and Effectiveness in Environmental Affairs' (2014) 21 Journal of European Public Policy 1017.

[5] Thomas Gehring, Sebastian Oberthür and Marc Mühleck, 'European Union Actorness in International Institutions: Why the EU is Recognized as an Actor in some International Institutions, but not in Others' (2013) 51 Journal of Common Market Studies 849.

[6] Consolidated Version of the Treaty of the European Union [2008] OJ C115/13, Art 3(5): In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

My claim is that since the EU contends to be a world pioneer over sustainable development, it attempts to instigate an 'upgrade'[7] in international investment law by infiltrating her own high threshold of sustainability standards and values to all mega Free Trade Agreements (FTAs) concluded with third countries or regions. This effort can add a precious boost towards a, *at last,* truly fair and equitable international investment law for all, especially developing countries, and ultimately enhance the position of the EU as a world sustainability leader.

Structure

In order to present my thesis successfully, the first chapter will touch upon the basic features of international investment law, its disparagements and problem areas in relation to the objectives of protecting the public interest and promoting sustainable development. I will demarcate the way which led to its legitimacy crisis and how, despite its progression towards a more principle-based system which embraces non-investment values, international investment law is still largely obscure and an overwhelmingly advantageous venue for investors as opposed to the public interest. In my analysis, I identify the main areas which have brought upon this 'crisis' and further conclude that the redesign of the current system requires changes in the following areas:

1. The host States' rights to regulate in order to protect overriding public interests;
2. Legal certainty on certain standard clauses, such as the Fair and Equitable Treatment (FET) principle; and

[7] Jorge Viñuales employs the term 'upgraded approach' to address how international investment law may be improved namely in four areas: (a) environmental differentiation, (b) the level of 'reasonableness' expected by investors over the FET standard, (c) the police powers doctrine and (d) the scope of emergency clauses. J. Viñuales, 'The Environmental Regulation of Foreign Investment Schemes Under International Law' in Pierre-Marie Dupuy and Jorge Viñuales (eds), *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (CUP 2013) 291-308. I employ the term 'upgrade' in a different way, encompassing how EU investment law may include and enforce SD concerns.

3. Enhancement of Investor-State Dispute Settlements' (ISDS) independence and impartiality.

My second chapter discusses the EU legal framework surrounding sustainable development over the entire spectrum of related objectives. The Union's legal order embraces a wide-ranging matrix of rules covering the protection of the environment, human and social/labour rights, the fundamental democratic values of the rule of law, the right to access to justice, and general responsibility in the conduct of business.

My third chapter's aim is to prove my point that the EU succeeds in its world actorness by engaging not in what we call 'traditional' foreign relations but in the so-called low-politics, and specifically by positioning itself as a sustainable global leader. In the first place, I engage into a historic overview of the Common Foreign Security Policy (CFSP) from its genesis till today where I discuss failed attempts of supranational external and security policies but also a relative normative progress from the first treaty establishing the European Coal and Steel Community (Paris treaty) to the current treaties on EU and the Functioning of EU (treaties of Lisbon). I conclude, however, on its virtual ineffectiveness or meagre success. Nevertheless, this does not mean that that EU is not present on the international scene. On the contrary, it is very much present but in different areas, labelled as low politics. I am focusing on presenting the increasingly glorious EU diplomacy in economic policies -namely trade- as well as in climate, the environment and human rights through which the EU attempts to put into practice the values and objectives enshrined in Articles 3 and 21 TEU in an effort to position itself as the most responsible player amongst the developed world.

I could not possibly go forward in my theorem without a proper analysis of the 'new' EU investment law. Hence, the fourth chapter will discuss the basic principles and provisions of investment law that lie in primary and secondary EU legislation, in an effort to illustrate the regulatory framework for EU foreign investment. This part

will focus on the case-law of the Court of Justice of the EU (CJEU) given that the Court's role in shaping the specifics of the new policy has been pivotal from many points of view. For instance, it has resolved outstanding questions on competence allocation and the legality of ISDS. As such, it has paved the way for a new era in investment protection of European companies inside the EU and abroad. My final point shall be a brief comparative analysis of selective items of two of the most representative of new-generation International Investment Agreements (IIAs): the EU-Canada Comprehensive Economic Trade Agreement (CETA) and the USA-Mexico-Canada Agreement (USMCA). The investment chapter of CETA is the most complete EU-mega FTA so far, serving as a point of reference for EU's future agreements. The USMCA, the successor of the North America Free Trade Agreement (NAFTA), is one of the most tested and complete FTAs from the other side of the Atlantic. On the basis of this comparative analysis as well as all other examined elements of EU's policy on international investment, I will conclude on whether the EU has achieved to raise its sustainability actorness within this context.

Methodology & sources

This thesis has been developed on the basis of literature reviews, studies of relevant primary and secondary law, case-law as well as targeted interviews of officials and practitioners. I take a descriptive and inductive approach to my study based on comprehensive legal research, which includes a theoretical and empirical analysis of relevant legal provisions, their interpretation and implementation, and case-law. Since I partly discuss the present-day picture of EU investment law through its evolution over time, some (limited) historical -or better chronological- overview of the evolutive path of relevant law through treaty texts and doctrines is also present. Amendments of primary and secondary legislation are also presented in detail. Moreover, as the role of the judiciary in the European rule of law is key, the study of case-law plays a very central part in my evaluation. I mainly analyse the jurisprudence of CJEU' but refer to case-law of Courts in other jurisdictions where

appropriate. Qualitative assessment is also run through case analysis of arbitral awards. My findings are assessed principally through the prism of authority and systematic judicial content analysis. Last but not least, in the final section of the thesis I apply comparative legal methodology when I juxtapose the investment chapter in CETA with its equivalent in USMCA.

Terminology and definitions

- Investment treaties: My preferred term for investment treaties throughout this treatise shall be International Investment Agreement (IIA). I will use the term generically, also encompassing Bilateral Investment Treaties (BITs).
- Regional trade and investment treaties: When referring to regional agreements such as EU's agreements with third countries (e.g. CETA), I will use 'mega free trade agreements with investment chapters ('mega FTAs') or sometimes mega-regionals and regional investment treaties (RITs).
- Investment arbitration: Investor State Dispute Settlement (ISDS) is mostly used in combination with '(investment) arbitration' instead of the less employed terms of Investment Treaty Arbitration (ITA) or Investor State Arbitration (ISA), also encountered in literature.
- Business responsibility: I choose to use the term Responsible Business Conduct (RBC) and Corporate (Social) Responsibility (CSR or CR), interchangeably.
- Sustainable development: as already analysed in the corresponding section above, I will use the concept from its three-fold standpoint, i.e. the reconciliation between economic growth, social development, and environmental protection. The notion will be treated as an aim in its own right, which dictates the respect of all human and environmental rights in the pursuit of growth, therefore meaning that the main driver for sustainable development is the protection of overriding public interests as a means to harness possibly profligate economic activity.

Setting the framework

'Make jump faster than decay' | Odysseas Elytis, 'Maria Nefeli' (1978)

Progressive European integration

If I were asked to find one word to depict the EU's legal history, I would opt for 'metamorphosis'.[8] The choice does not merely lie in my Greek heritage compelling me to favour the use of Greek-rooted terms. Any synonym of non-Greek provenance could do the trick: 'transformation', 'evolution' or 'mutation' would also work. Professor Joseph H. Weiler discussed this 'mutation' and its distinct categories at the outset of the completion of the single market, the Maastricht Treaty and the genesis of the EU, in a ground-breaking work in the history of European studies and law entitled 'The transformation of Europe'. [9] [10] Weiler's 30-year-old thesis is still valid and hale.[11] Much ink has been spilled on the expansion of the EU in the light of the various tenets of 'deepening'[12] theories or the 'widening' perspective[13] and the possible reconciliation of the (sometimes) conflicting schools of thought. Notwithstanding the undisputed significance in analysing integration theories, the

[8] Metamorphosis [noun] /ˌmɛtəˈmɔːfəsɪs/mɛtəmɔːˈfəʊsɪs/ 1. Zoology (in an insect or amphibian) the process of transformation from an immature form to an adult form in two or more distinct stages '*the persistence of the larval tail during metamorphosis*' 2. A change of the form or nature of a thing or person into a completely different one 'his metamorphosis from presidential candidate to talk-show host'. Origin. Late Middle English via Latin from Greek metamorphōsis, from metamorphoun 'transform, change shape', OUP, 'Metamorphosis', Oxford English Dictionary

[9] Joseph H Weiler, 'The transformation of Europe' (1991) 100 The Yale Law Journal 2403. Note that despite the acknowledgement that 1992 was one of the 'larger-than-life-date', Weiler denies that it would be the only 'seismic' event of change. It is suggested that Community transformation of the time was also preceded by and founded on other events.

[10] Miguel Poiares Maduro and Marlene Wind (eds), *The Transformation of Europe: Twenty-Five Years On* (CUP 2017).

[11] ibid.

[12] Paul Craig offers a concise overview on the various integration theories rationalising EU's development taking us all the way through 'liberal intergovernmentalism', 'new institutionalism', 'constructivism', neo-functionalism (spillovers), supranationalism and so on. Paul Craig, 'Integration, Democracy and Legitimacy', in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (3rd edn, OUP 2021).

[13] The ways the EU should develop based on the two main schools of thought refer to 'an ever-closer union' and enlargement to more member states. Most European integration textbooks shall refer to these theories. For a comprehensive analysis of key and policy areas throughout the past decade see: P. Craig, ibid.

"standard story" is -simply put- that over the years the EU is being conferred increasing competences and powers,[14] in a cumulative process of constitutionalisation. The gradual "locking in" of policies leads to further integration. The gradual "locking in" of values leads to further legitimacy and formation of a common identity.

Law and the Court, albeit not being necessarily the only integration catalysts, play very central roles in the process: the normative *crystallisation* of any transformation -whatever its origin- is crucial for the solidification of any new competence and pronounced principle.

Let's have a closer look at this 'origin' of change. The 1992 'metamorphosis' of the -then- Community(ies) cannot be associated with a single "Big Bang" event. Although it would be appealing to think so, the Community's transformation is part of a continuum. The EU is being gradually mutating thanks to its reflexes in response to exogenous factors, such as policy trends in the international field. Once laying hands on one area, the Union has proven very decisive in consolidating its 'ownership' and from then on, in implementing it according to its common objectives, values, and principles.[15] Most often, this consolidation of expansion comes foremost with the Court's authority through its teleological interpretation of EU law and the well-established principles of direct effect and primacy of Union law. In that framework, if the Court upholds the legality of a new area's belonging within the jurisdictional limits of the EU (sometimes even without Treaty amendment[16]) there is an unconditional green light for the Union to act upon it. This would be a characteristic of the singular and still strangely successful *sui generis* 'EU way' of integration and -

[14] Kiran Klaus Patel, 'Widening and deepening? Recent Advances in European Integration History' (2019) 64 Neue Polit. Lit. 327 <https://link.springer.com/article/10.1007%2Fs42520-019-00105-4> accessed 15 December 2020; Arthur Benz and Christina Zimmer, 'The EU's Competences: The "vertical" Perspective on the Multilevel System' (2010) 5(1) Living Reviews in European Governance <http://www.europeangovernance-livingreviews.org/Articles/lreg-2010-1/download/lreg-2010-1Color.pdf> accessed 15 December 2020

[15] The Union is founded under specific common values and objectives. Most of them are clearly set out by now in the Treaties, and namely Article2-5, 6, 9 TEU. Consolidated Version of the Treaty on European Union (n 6).

[16] Joseph Weiler, 'The Community System: the Dual Character of Supranationalism' (1981) Yearbook of European Law 267.

consequently- endurance.[17] Besides, as Cappelletti, Seccombe and Weiler pointed out already in the 1980s in their 'Integration Through Law' (ITL) volumes, 'the law has a vital role to play' in the political process of integration since *inter alia* 'it defines many of the political actors and the framework within which they operate, controlling and limiting their actions and relations, and determining, at least partially, the effects and effectiveness of their acts'.[18] Obviously it would be misleading to locate the cardinal material locus of change solely in the realm of law.[19] Notwithstanding, legal and constitutional structural change has been crucial in its interaction with political process.

Prominent examples of ITL and/or 'integration through case-law' would be the increased constitutionalisation of the Union from a 'low intensity constitutionalism'[20] to a highly cosntitutionalised Union, framed under specific and expressly stated values, principles and objectives. Moreover, EU policies in environment, climate action and sustainable development show EU's power expansion. In this picture, the evolution of EU's external competences is of particular interest. As noted by Allan Rosas, 'EU external relations law offers one of the best ways of understanding the essential features of the Union legal order'.[21] Besides, it is an area where we can probably have a display of most, if not all, Union instruments, ranging from a loose intergovernmental cooperation to exclusive competences of Common Commercial Policy (CCP) and the conclusion of international agreements necessary for enabling Union internal competences, as well as all possible

[17] A paraphrasis of the official ASEAN anthem 'The ASEAN way'. See in this respect, for example, Rodolfo C. Severino, 'The ASEAN way and the rule of law - Address' (International Law Conference on ASEAN Legal Systems and Regional Integration, University of Malaya, Kuala Lumpur, 3 September 2001) <https://asean.org/?static_post=the-asean-way-and-the-rule-of-law> accessed 2 February 2021.

[18] Mauro Cappelletti, Monica Seccombe and Joseph H.H. Weiler (eds), Integration Through Law: Europe and the American Federal Experience. Volume 1: Methods, Tools and Institutions. Book 1. A Political, Legal and Economic Overview (Walter de Gruyter 1986) 4.

[19] J.Weiler, 'The Transformation of Europe' (n 9).

[20] Miguel Poiares Maduro, 'Altneuland: The EU Constitution in a Contextual Perspective, How Constitutional Can the European Union Be? The Tension Between Intergovernmentalism and Constitutionalism in the European Union' (2004) Jean Monnet Working Papers 5/04 <https://www.jeanmonnetprogram.org/archive/papers/04/040501-18.pdf> accessed 8 September 2021

[21] Allan Rosas, 'Mixity past, present and future. Some observations' in Merijn Chamon and Inge Govaere (eds), *EU External Relations Post-Lisbon, The Law and Practice of Facultative Mixity* (Brill 2020) 8.

combinations therein,[22] and judicial activism. From that standpoint, it has been argued that the expansion of the scope of the CCP 'has been […] the most effective method of broadening the EU competences.'[23]

Inextricably linked to international trade, foreign direct investment (FDI) is one of the most fast-growing areas in the ambit of international investment law.[24] In the fashionable 'EU way', the Union has not stayed mute in sight of this reality. After decades of futile struggle to expand EU competences in FDI, the advent of EU investment law is now a fact. New articles 206 and 207 TFEU -read jointly with Article 3(1)(e) and 3(2) TFEU- prescribe a larger scope for EU's external exclusive competences under the CCP, now also expressly covering FDI which is decisively a field breaking new ground in EU powers, and thus belonging to the limb of further integration. The new competence is built on solid foundations, as it emanates from new constitutional provisions[25] of the treaty as well as comprehensive interpretation by the Court:[26] the new EU state of affairs needs no guesswork. It is now clear that the EU is competent in concluding bilateral investment treaties -incorporated in comprehensive free trade agreements- as a full-time party.

The idea of the progressive expansion of EU competences is the embodiment of the process of gradual integration, as envisaged by the EU founding fathers. Common supranational administration of the coal and steel industries would pave the way for further integration into additional economic spheres, ultimately leading to a political Europe. Whether one explains this process through neofunctionalism, federalism or intergovernmentalism, the main point is that -as well predicted in the

---

[22] M.Cappelletti and others (n 18) 55.
[23] Dorota Leczykiewicz, 'Common Commercial Policy: The Expanding Competence of the European Union in the Area of International Trade' 6 (2011) German Law Journal 1674.
[24] Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales (eds), The Foundations of International Investment Law: Bringing Theory into Practice (OUP 2014).
[25] I am applying the wording first used by the Court at the landmark case *Les Verts*, where for the first time the Treaty was referred to as 'the basic constitutional charter' of the Union in the standard notion of *res publica*. Case 294/83 *Parti écologiste 'Les Verts' v. European Parliament* [1986] ECR 1339, 1365.
[26] CJEU Opinion 2/15, Opinion of the Court (Full Court) of 16 May 2017 on the Free trade Agreement between the European Union and the Republic of Singapore, ECLI:EU:C:2017:376.

Schuman declaration of 9 May 1951- Europe was not going to be made all at once. For the architect of neofunctionalism, Ernst Haas[27] the process of European integration would be ensured if political elites, driven by economies of scale[28], decided to shift the national loyalties towards a new supranational centre.[29] [30] [31] This shift would not occur overnight; it is a process of incremental expansion to integrated policy areas. Integration would start from the mere technical harmonization in the realm of lower politics (e.g. coal, import duties) because member states would more easily 'depoliticize'[32] those and therefore surrender them to regional supranational decision-making authorities. Simply put, the fulfilment of one original integrative goal will sway and impose harmonization of more areas because the former will only be assured by taking those increased actions.[33]

Legal integration has been achieved to a large extent thanks to the judicial activism with the Court of Justice of the EU[34] being recognized as -at intervals- one of the main catalysts of EU integration.[35] [36] The results of the Court's rulings speak for themselves. From the makeover and rebranding of the treaty into a fundamental

[27] Philippe C. Schmitter, "Neo-neofuntionalism' (2002) European University Institute <https://www.eui.eu/Documents/DepartmentsCentres/SPS/Profiles/Schmitter/NeoNeoFunctionalismRev.pdf > accessed 10 January 2021. Arne Niemann, 'EU External Trade and the Treaty of Lisbon: a Revised Neofunctionalist Approach' (2013) 9 Journal of Contemporary European Research 633.

[28] Liesbet Hooghe and Gary Marks, 'Grand Theories of European Integration in the Twenty-First Century' (2019) 26 Journal of European Public Policy 1113.

[29] Ernst Haas, The Uniting of Europe: Political, Social, and Economic Forces 1950-1957 (Stanford University Press 1958).

[30] Philippe C. Schmitter and Zoe Lefkofridi, 'Neo-Functionalism as a Theory of Disintegration' ('European Disintegration - A Blind Spot of Integration Theory?', 22nd CES Conference, Paris, 8-10 July 2015) <https://www.eui.eu/Documents/DepartmentsCentres/SPS/Profiles/Schmitter/Neo-F-Disintegration.final.pdf> accessed 15 January 2021

[31] Jakob C. Øhrgaard, 'Less than Supranational, more than Intergovernmental: European Political Cooperation and the Dynamics of Intergovernmental Integration' (1997) 26 Millennium Journal of International Studies 1

[32] ibid.

[33] A.Niemann (n 27).

[34] Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47(1) International Organization 41.

[35] Koen Lenaerts, 'Some Thoughts about the Interaction between Judges and Politicians' (1992) 1 University of Chicago Legal Forum <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1111&context=uclf> accessed 27 April 2022.

[36] For realists national politics prime over EU law. A.Burley, W.Mattli (n 34)

constitutional text[37] and the establishment of a novel legal order,[38] to the protection and the broadening of the European agenda, the Court has fulfilled the task that the "law is observed" in the interpretation and application of the treaties[39] through 'constructive methods of interpretation'.[40] In this context, the Court has 'spilled over' strict single market areas 'into a variety of domains dealing with issues such as health and safety at work, professional qualification and […] political participation rights'.[41]

In that respect, case-law dealing with the Union's 'competence creep'[42] and more specifically with the EC/EU's powers to conclude international agreements on the basis of implied powers, hence not explicitly conferred by the treaty but required in order to give full effect to the implementation of certain EC/EU competences, constitutes an ideal illustration of judge-made neofunctional spill-over. The Court by developing in a line of cases[43] the principle of complementarity -i.e. that the external EC/EU competence is a prerequisite for the fulfilment of its internal competences[44]- and parallelism, offered the *de jure* legitimacy for the expansion of the Union's external competences in practically all areas of EU competence, whether exclusive or shared. The so-called 'ERTA doctrine' is now codified in Article3(2) and 216 TFEU and the Court is called to construe how to put it in practice.

Traditionally the most important halt in this process came from the theoretical rival of neofunctionalism, intergovernmentalism. Formulated by Stanley Hoffman as

---

[37] Parti écologiste 'Les Verts v. European Parliament (n 25)
[38] Case 26/62, *Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1; 1963 CMLR 105; Case 6/64, *Costa v ENEL* [1964] ECR 585, 593; 1964 CMLR 425
[39] Now Article19 TEU
[40] A.Burley, W.Mattli (n 34)
[41] ibid
[42] By competence creep we refer to the situation whereby EU acts in an area where it has not been explicitly conferred a competence, see: Stephen Weatherill 'Competence Creep and Competence Control' (2004) 23 Yearbook of European Law 1.
[43] The first landmark case on the matter was C-22/70 *Commission v Council* (AETR/ERTA) [1971] ECR 263 (the *ERTA* case) followed by C-3, 4 and 6/76 *Kramer* [1976] ECR 1279 (the *Kramer* case) and CJEU Opinion 1/76, Opinion of the Court of 26 April 1977, 'Draft Agreement establishing a European laying-up fund for inland waterway Vessels', ECLI:EU:C:1977:63CJEU which endorsed the 'expansive articulation of the implied powers doctrine', Paul Craig and Gráinne de Búrca, *EU law: Texts, Cases and Materials* (7th edn, OUP 2020) 360-366
[44] Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU law* (3rd edn, OUP 2021); Paul Craig and Gráinne de Búrca, *EU law* (n 43).

a critique to the former, intergovernmentalism argued that integration has the potential to thrive in 'low politics' but is virtually impossible in 'high' policy areas, such as foreign relations and external security. The reasoning lies in the theorem of a sturdy divide between high and low politics, and in that in low policy areas sovereign states can find advantages in integrating whereas in high politics, the impediments set due to conflicting interests shall be insuperable.

The purpose of the present thesis is not to over-theorise; besides this is not a work of political or social science but is focused on the law. Nonetheless, I consider important to find some theoretical underpinnings for my hypothesis as a means of legitimizing it. Inarguably, both neofunctionalism and (liberal) intergovernmentalism are the most prominent theories in explaining progress and milestones in the EU history, or simply the 'grand theories of European integration'.[45] This does not mean that they are panaceas. They both share important flaws since they fail to detect certain linkages among state and non-state actors, capture the essence of EU decision-making and identify categories necessary to capture distinctive features of the EU.[46] I do not address this as a problem but rather as an opportunity to attempt an iconoclastic approach, which combines the two contending theories. I too attempt to '[eschew] the temptation both of a strict natural-law-type *a priori* affirmation of a particular model of integration […] and of the inward-looking positivistic visionless step-by-step approach'[47] and reconceptualize these two theories in a view to project my personal vision on EU integration paths without however invalidating them but combining them in our reality.

I therefore argue that being in a 'post-national constellation' where both supranational and international structures are necessary to come to terms with the

[45] Dermot Hodson and Uwe Puetter, 'The European Union in Disequilibrium: New Intergovernmentalism, Post-functionalism and Integration Theory in the post-Maastricht Period' (2019) 26 Journal of European Public Policy 1153.
[46] Thomas Risse-Kappen, 'Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union' (1996) 34 Journal of Common Market Studies 53.
[47] M.Cappelletti and others (n 18) 8.

challenges of globalization and to respond to the requirement for security, peace and prosperity, both sovereign member states and supranational bodies play their distinctive roles in the process.[48] Besides, EU institutions themselves embody both fragments, the Council being the most prominent example. The so-much-praised by intergovernmentalists division between low and high politics is existent, but nowadays low politics gain ground. Economic and commercial diplomacy have become ever more important for international relations and have important ramifications for 'real' foreign affairs.[49] Henceforth, in this shifting world, high politics may eventually blend or be very much affected by low politics. In that equation, semi-automated spill-overs driven by the power conferred to supranational institutions occur in areas of 'low' politics but the spill-over to high politics is not impossible. Should it happen though, it will be a rational choice of member states prompted by public opinion and/or a response to some exogenic trigger, such as war, due to the importance of certain low politics, namely energy, trade and climate. The EU reflexes at the recent dreadful Russian invasion of Ukraine is quite exemplary for this view since it puts under the spotlight the blend and interplay between war, diplomacy, world finance, trade and energy, not to mention humanitarian aid.

The concept of actorness

The vision of a united, powerful and peaceful Europe has been in the heart and minds of the EU 'founding fathers' since World War II. Ever since the early days of the Community, leaders realised the simple premise that 'in matters of external relations, a united posture would maximize the power of the individual units'.[50] Despite the even misleading principle of 'one country-one vote' in international organisations which is meant to equalize all states,[51] European leaders were aware that concerted

[48] Lina Papadopoulou, '"All good things come in threes": from a double to a triple democratic legitimacy of the European Union' in Lina Papadopoulou, Ingolf Pernice and Joseph H.H. Weiler (eds), *Legitimacy Issues of the European Union in the Face of Crisis, Dimitris Tsatsos in memoriam* (Nomos 2017) 66.
[49] Stephen Woolcock (n 2) 10.
[50] M.Cappelletti and others (n 18) 53.
[51] Frank R. Pfetsch, 'Power in International Negotiations: Symmetry and Asymmetry' (2011) 2 Négociations 39.

action would offer more negotiating power and have been striving to reach a goal that has proven particularly hard: Europe to speak in one voice in the world. As declared ever since 1973, united Europe intended 'to play an active role in world affairs [and] progressively define common positions in the sphere of foreign policy'.[52] And although most theories of European integration focused on purely internal integration, with some exceptions relating to conflict resolutions and peace,[53] member states never abandoned the idea of a united front in international relations. The ambition of 'EU actorness' has been omnipresent and constant throughout the history of European integration.[54] If one wonders why this is important, external EU activity and the EU as a powerful driver in the world arena is believed to contribute to the legitimacy and consolidation of European construction internally or even to the search of a 'European identity'.[55]

The most commonly accepted definition of EU actorness formulated by Gunnar Sjöstedt in the 1970s refers to the capacity of an autonomous 'unit' to 'behave actively and deliberately in relation to other actors in the international system'.[56] Discussing about a 'unit' instead of a 'state' as an actor in the international arena is most appropriate since it resolves the quandary of the comparison of a very singular entity such as the EU with fully-fledged sovereign states.[57] The concept encompasses EU's decision-making powers and overall practical ability to act on a global scale ('actor capability') through legal competences and autonomy,[58] but also actual

[52] 'Declaration on European Identity (Copenhagen, 14 December 1973)' (1973) 12 Bulletin of the European Communities 118.
[53] For an analysis of propositions of Haas, Deutsch and Lindberg see indicatively, Alfred E. Pijpers, 'European Political Cooperation and the Realist Paradigm' in Martin Holland (ed), *The Future of European Political Cooperation: Essays on Theory and Practice* (St. Martin's Press 1991).
[54] Neil Winn and Christopher Lord, *EU Foreign Policy beyond the Nation-State* (Palgrave 2001).
[55] Michael Smith, 'Still Rooted in Maastricht: EU External Relations as a Third-generation Hybrid' 34 (2012) 699.
[56] Gunnar Sjöstedt, 'The External Role of the European Community' (Saxon House 1977).
[57] In 2001, Professor Mike Smith denotied that the views of 'those who can discern a progression in the EU towards full-fledged international 'actorness', comparable to that of the national states that comprise the major concentrations of power in world politics […] have to wrestle with the inconvenient fact that the EU is not a 'state' in the accepted international meaning of the term, although it undoubtedly demonstrates some 'state-like' features'. Michael Smith, 'The EU as an International Actor' in Jeremy Richardson (ed), *European Union: Power and Policy*-making (3rd edn, Routledge 2001) 280.
[58] i.e. authority and independence from the member states. See Tom Delreux (n 4).

behaviour in formulating common positions ('actor behaviour')[59] which can be assessed together with consistency (by Brattberg and Rhinard), coherence, presence and opportunity (by Bretherton and Vogler) as well as recognition (by Jupille and Caporaso)[60] and a degree of influence.[61] In evaluating EU's actorness today, it is suggested that 'actor performance', meaning EU's actual performance and effectiveness *vis-à-vis* international addressees is also very important.[62]

Low politics as the appropriate arena for the development of EU actorness

The evolutive pathway to what we now call Common Foreign and Security Policy (CFSP) has been long, choppy and with questionable tangible results. Even at the current post-Lisbon stage, it is seen as a *sui generis*[63], 'hybrid' and 'ambiguous'[64] process, one of the most important halts in the process of European integration,[65] where no spill-over has been truly possible. Amidst power-struggles, diverging perspectives and segregated interests of member states, the materialization of a truly common foreign policy has always been to a large extent a good but utopian idea.[66] Consideration of the most enthusiastic approaches suggesting an increased

---

[59] Mark Rhinard and Gunnar Sjöstedt, 'The EU as a Global Actor: A new conceptualization four decades after 'actorness' (2019) UI Paper No.6 <https://www.ui.se/english/publications/ui-publications/2019/the-eu-as-a-global-actor-a-new-conceptualisation-five-decades-after-actorness/> accessed 25 November 2020.

[60] For a comprehensive analysis of the development of the notion of actorness, see Edith Drieskens, 'Golden or Gilded Jubilee? A Research Agenda for Actorness' (2017) 24(10) Journal of European Public Policy 1534; M.Rhinard and G.Sjöstedt (n 59).

[61] Yann Richard and Gilles Van Hamme, 'L'Union européenne, un acteur des relations internationales' (2013) 42(1) L'espace Géographique 15 <https://www.cairn-int.info/journal-espace-geographique-2013-1-page-15.htm?WT.tsrc=cairnPdf> accessed 15 December 2020.

[62] For a comprehensive literature review on the notion and the debate about EU actorness see, Susanne Lütz, Tobias Leeg, Daniel Otto, and Vincent Woyames Dreher, *The European Union as a Global Actor: Trade, Finance and Climate Policy* (Springer 2021) 1-17.

[63] Jakob C. Øhrgaard, 'International Relations or European Integration: Is the CFSP sui generis?' in Ben Tonra and Thomas Christiansen (eds), *Rethinking European Union Foreign Policy* (Manchester University Press 2018) <https://www.manchesteropenhive.com/view/9781526137647/9781526137647.00001.xml> accessed 27 April 2022.

[64] Michael Smith, 'Still Rooted in Maastricht' (n 55).

[65] Ben Tonra, 'Constructing the Common Foreign and Security Policy: The Utility of a Cognitive Approach' (2003) 42 Journal of Common Market Studies 731.

[66] Jonathan Kallmer, 'CFSP – a Good Idea that's Destined to Fail' *Politico* (Brussels, 26 March 2003) <https://www.politico.eu/article/cfsp-a-good-idea-thats-destined-to-fail/> accessed 25 January 2021.

relationship between CFSP and national foreign policies[67] or to a certain extent the 'Europeanisation' of national foreign policies[68] are not sufficiently convincing, especially in contemplation of recent records of CFSP actions.[69] Despite the (significant?) institutional advances of the Lisbon Treaty, the CFSP remains largely intergovernmental, occasional, and segregated from EU competences in a sophisticated mode of 'rationalised intergovernmentalism'.[70]

The reasons for this impotence are extensively analysed in bibliography and are quite understandable. A united stance in foreign policy has historically been a hallmark for federations and hence has always been 'a potent potion, maybe even poison, for the Member States' which are aware that by conceding foreign policy to the Union 'they would not only lose their much cherished international personality, but would also be impeded from autonomously conducting national policy in areas which at first sight might appear to be wholly within domestic jurisdiction'.[71] As aforementioned, we may also epitomize the reluctance in the division between 'low' and 'high politics' and the importance of the unyielding attachment of nation states to their sovereignty in certain policy areas whereby foreign relations powers have been historically considered 'to be the hard core of the ageing concept of national sovereignty'.[72]

---

[67] Smith suggested there was 'almost revolutionary change in member state commitments', Michael Smith, 'The Framing of European Foreign and Security Policy: towards a Postmodern Policy Framework?' (2003) 10 Journal of Public Policy 556.

[68] B.Tonra, 'Constructing the Common Foreign and Security Policy' (n 65).

[69] The most recent resolution of the European Parliament on CFSP's annual report notes for example that 'the need for a stronger, more ambitious, credible and united common foreign policy has become crucial, as the EU is facing multiple geopolitical challenges in the wider region which directly or indirectly affect all its Member States and its citizens', European Parliament, *Implementation of the Common Foreign and Security Policy – Annual Report 2020* (20 January 2021) 2020/2206(INI) <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0012_EN.html> accessed 3 December 2023

[70] Wolfgang Wessels and Franziska Bopp, 'The Institutional Architecture of CFSP after the Lisbon Treaty – Constitutional Breakthrough or Challenges Ahead?' (2008) CHALLENGE Research Paper No.10 <https://www.ceps.eu/ceps-publications/institutional-architecture-cfsp-after-lisbon-treaty-constitutional-breakthrough-or/> accessed 6 January 2021.

[71] M.Cappelletti and others (n 18) 55.

[72] Meinhard Hilf, 'ECJ's Opinion 1/94 on the WTO - No Surprise, but Wise? ' (1995) 6 EJIL 245.

'High politics' consist of delicate matters such as foreign policy within the classic scope of 'the power to decide over war and peace',[73] which EU states are reluctant to concede to a collective decision-making body. A truly common foreign and defence policy is perceived as a threat to sovereignty 'in a way that many of the economic policies in the Union never had'.[74] As Hoffman had predicted, integration would proceed in welfare issues, but would not spill-over into foreign and security policy since -as pretended by his theoretical rival Ernst Haas, who explicitly excluded foreign and security policy from his neofunctional logic[75]- in the absence of supranationalism, intergovernmental cooperation would be out of the scope of integration.[76] Concerns over national sovereignty would prevail and hence disallow political cooperation on foreign affairs. The desire for an influential role of the Community/Union in the international arena hence turned into the rather weary illustration of a 'European Sisyphus'[77] with EU policymakers still trying today to convince member states in despair about more common foreign action, explaining that 'no single […] member state can respond effectively to […] global challenges on its own'.[78]

This does not depict the entire picture. On the contrary, as professor Mike Smith has put it, it 'blinds us to important elements of the development of the EU's actorness'.[79] Gehring, Oberthür and Mühleck, based on Coleman's and Sjöstedt's theoretical underpinnings, contend that an organisation may become an international actor in its own right only if it has control over governance resources. Otherwise,

---

[73] Robert Schütze, *European Constitutional Law* (CUP 2018) 301.
[74] Michael Smith, 'Conforming to Europe: The Domestic Impact of EU Foreign Policy Coordination' (2000) 7 Journal of European Public Policy 613.
[75] Roy Ginsberg and Michael Smith, 'Understanding the European Union as a Global Actor: Theory, Practice and Impact' in Sophie Meunier and Kathleen McNamara (eds), *Making History: European Integration and Institutional Change at Fifty (The State of the European Union)* (vol 8, OUP 2007) 267.
[76] J.Øhrgaard 'Less than Supranational, more than Intergovernmental (n 31).
[77] Borrowing Stanley Hoffmann's book title, see: Stanley Hoffmann, *The European Sisyphus: Essays on Europe* (Westview Press 1995).
[78] David McAllister, 'Speech on the CFSP report' (European Parliament plenary session, Strasbourg 19 January 2021) <https://www.david-mcallister.de/david-mcallister-plenary-speech-on-the-cfsp-report/> accessed 6 April 2021
[79] M.Smith, 'Does the Flag Follow Trade?' (n 2) 80.

without control, decisions are irrelevant externally,[80] and -if I may add- internally too. Besides, as many scholars underline, although the notion of 'actorness' itself concerns the external positioning of an actor, it is heavily dependent on internal conditions.[81] Before belittling the EU's role as a global actor, the virtues of alternative forms of power, including both economic power and so-called 'soft', 'civilian', 'ethical', or 'normative' power' should not be ignored.[82] Besides, the EU's considerable economic or commercial weight is often linked to its foreign policy actorness.[83]

Based on the above, and given its unique institutional architecture, the EU is 'a peculiar actor whose ability to maintain coherence in role performance seems to depend on the degree of integration reached in each specific area of policy, something which clearly does not happen in traditional political systems (i.e. states)'.[84] Since the EU holds wide decision-making powers for binding measures in various 'areas of action' -exclusive or shared competences as per Articles 3 and 4 TFEU- where member states have conferred sovereignty to the Union, it would be expected to hold there a role also as an international actor. Besides, isn't this what the 'ERTA doctrine' of implied external powers (now Article 216 TFEU, as aforementioned) is all about? The Union's international role in these areas is also legally consolidated in article 47 TEU which recognises the Union's legal personality, meaning it is an autonomous entity, able to conclude international agreements, become a member of international organisations and join international conventions in its areas of competence in its own right.

As international relations evolve, openings for the assertion of a specifically 'European' form of actorness are created.[85] There is henceforth a vast space for the

[80] Thomas Gehring, Sebastian Oberthür and Marc Mühleck (n 5).
[81] M.Rhinard and G.Sjöstedt (n 59).
[82] R.Ginsberg and M.Smith (n 75) 267, 270.
[83] Paul James Cardwell, 'The Legalisation of European Union Foreign Policy and the Use of Sanctions' (2015) 17 Cambridge Yearbook of European Legal Studies 287.
[84] Sonia Lucarelli, 'Interpreted Values: A Normative Reading of EU Role Conceptions and Performance' in Ole Elgström and Michael Smith (eds), *The European Union's Roles in International Politics* (Routledge 2006) 47
[85] M.Smith. 'Still rooted in Maastricht' (n 55).

EU to express its actorness in the international arena as a 'market'[86] or a 'sustainability actor' in areas such as energy, climate, environment and trade. Although disparate from the 'traditional', 'classical' (or so-called 'real') foreign affairs of diplomacy, defence and security,[87] and contrary to the most frequent and widespread idea about the essence of foreign policy, these areas play an affirmed, incrementally important role in international relations and get the place they deserve. Besides, we should not disregard that interstate trade, for example, has been extremely closely linked with the course of war and peace and the construction of international order from Thucydides to Paul Kennedy.[88] As an independent subject in international relations, the EU portrays itself as an exemplary individual. Aiming to create a level playing field for European companies, the EU creates interdependencies and equally becomes an exporter of regulatory standards.[89]

The EU as a global actor has long aspired to work on the basis of the values inscribed in its *telos* with a view to developing such values worldwide[90] even before Lisbon, exactly as is now provided for in Article 3(5) TEU as well as Article 21(1) TEU, whereby in its relations with the wider world, the Union shall uphold and promote its values and the well-being of its peoples.

Defining sustainable development

As contemporary as it sounds, and despite common understanding about its emergence,[91] the notion of sustainable development is in fact recognised since the ancient times.[92] Nonetheless, it is over the last five decades that that sustainable

[86] ibid.
[87] M.Smith, 'The EU as an International Actor' (n 57) 283.
[88] Deborah Z. Cass, The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System (OUP 2005) 5.
[89] S.Lütz and others (n 62) 2.
[90] S.Lucarelli (n 84) 51.
[91] Jorge E. Viñuales, 'Sustainable Development' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd edn, OUP 2021) 286.
[92] Marie-Claire Cordonier Segger, 'Commitments to Sustainable Development through International Law and Policy' in Marie-Claire Cordonier Segger and H.E. Judge C.G. Weeramantry (eds), *Sustainable Development Principles in the Decisions of International Courts and Tribunals* (Routledge 2017) 35.

development has become 'the' catchline dominating international economic relations and law. Present not only in soft-law***93*** but also in a large number of binding international legal instruments, it concerns most human actions; state and non-state actors are under an obligation to pursue and safeguard sustainable development.***94*** With its extensive penetration of modern democratic legal systems, one would expect its definition to be clear-cut. And yet, this is far from being the case: the pervasive nature of sustainable development is coupled with its vagueness.***95***

The first comprehensive definition of sustainable development came by the report of the Bruntdtland Commission in 1987, which was endorsed by UN Resolution 42/187. The concept as presented by the report has been embraced, and is still widely accepted.[96] It identifies sustainable development as 'development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs'.[97] Equally, the 1992 Rio Declaration on Environment and Development defined sustainable development in Principles 3 and 4 as follows: 'The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations' and '[i]n order to achieve sustainable development, environmental protection shall constitute

---

[93] UN Conference on Environment and Development, 'Report of the United Nations Conference on Environment and Development' (Rio de Janeiro, 3-14 June 1992)' (14 June 1992) UN DOC A/CONF.151/26/Rev.l (Vol. l), Annex I: Rio Declaration on Environment and Development (Rio Declaration) <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> and Agenda 21: Programme of Action for Sustainable Development <https://sdgs.un.org/sites/default/files/publications/Agenda21.pdf> both accessed 5 March 2023; UN World Summit on Sustainable Development, 'Report of the World Summit on Sustainable Development (Johannesburg, South Africa, 26 August-4 September 2002)' UN Doc A/CONF.199/20 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N02/636/93/PDF/N0263693.pdf?OpenElement> accessed 5 March 2023; Millennium Development Goals (MDGs) <https://www.un.org/millenniumgoals/> accessed 27 April 2022; UN Conference on Sustainable Development (Rio+20), 'Report of the United Nations Conference on Sustainable Development (Rio de Janeiro, Brazil, 20-22 June 2012)' UN Doc A/CONF.216/16 and UNGA, 'The Future we Want' (11 September 2012) UN Doc A/RES/66/288 <https://sustainabledevelopment.un.org/rio20> accessed 27 April 2022.

[94] Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23 The European Journal of International Law 378.

[95] J.Viñuales, 'Sustainable Development' (n 91) 285.

[96] Jessica O'Neil 'People, Planet, Profits' and Perception Politics: A Necessary Fourth (and Fifth) Bottom Line? Critiquing the Current Triple Bottom Line in the Australian Context' in David Crowther, Shahla Seifi and Abdul Moyeen (eds), *The Goals of Sustainable Development Responsibility and Governance* (Springer 2019) 24.

[97] World Commission on Environment and Development, Our Common Future (1987), Ch 1 paras 43, 49 < https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> accessed 5 March 2023.

an integral part of the development process and cannot be considered in isolation from it'. The gist of the idea is the symmetry between three interdependent and mutually reinforcing[98] basic objectives: environmental, social and economic development with consideration of their impact on future generations. Whereas for some years the environmental impacts had largely monopolised the concept,[99] today it is clear that its meaning is (at least) three-fold and we often discuss sustainable development by reference to its three interconnected pillars: environmental, social and economic.

Sustainable development and the rule of law

No special analysis is required for the importance of environmental protection and the safeguard of labour, social rights, the rights of children and other vulnerable groups in the law governing international investments. Notwithstanding, respect for and application of the rule of law plays a very central role in advancing the goals of sustainable development. The rule of law as a principle dictates that all 'persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards'.[100] There are various dimensions and indexes formulated to describe the elements which compose the systems of laws and institutions embracing the rule of law.[101] The discernible foundational principles encompassing the complex concept of the rule of law can be distinguished into: accountability, certainty, fairness, transparency and accessibility to justice, all generating trust of the subjects of law to the system.

---

[98] Aggarin Viriyo, 'Principle of Sustainable Development in International Environmental Law' (2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2133771> accessed 27 April 2022.
[99] Nico Schrijver and Friedl Weiss (eds), International Law and Sustainable Development: Principles and Practice (Brill 2004).
[100] UN, 'United Nations and the Rule of Law' <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> accessed 5 September 2022.
[101] For an overview of the rule of law elements and indexes see, James Michel, 'A Report of the CSIS Program on Prosperity and Development: The Rule of Law and Sustainable Development' (2020) CSIS Program on Prosperity and Development <https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/200626_Michel_RuleOfLaw_Web.pdf> accessed 12 September 2022.

There is a direct causal link between rules-based processes, and stable and trustworthy legal regimes that can ensure equity, fairness and transparency that are basic components in all three dimensions of sustainable development. Due application of the rule of law is not only a sustainable development goal in itself under SDG 16, but also ensures the promotion of any other aspect of sustainable development. Application of the rule of law which, as aforementioned, is translated into steady, reliable, transparent, fair, and strong democratic regimes, is the only way towards equal opportunities and healthy economic and social development as well as sound environmental management.[102]

Moreover, 'fair, stable and predictable legal frameworks are essential for generating inclusive, sustainable and equitable development, economic growth and employment and investment and facilitating entrepreneurship. [I]t is important for sustainable development that the global trading system and its institutions are open, rule-based and fair'." Legal certainty -or legal *saphêneia-*[103] and transparency in the application of the law have an undisputed value since they can vouch for the protection against arbitrariness.[104] Legal certainty, which is inherent to legal systems of democracies, is in modern terms considered a significant scrutiny of arbitrary exercise of public power.[105] Notwithstanding, legal certainty does not only favour individuals, but is an objective doctrine equally protecting the state. Besides, this is the logic of the principle since its inception by ancient Greeks till the Middle Ages: legal certainty aimed at ensuring effectiveness of rules and stability of the political order, finding expression at times in the City, the Prince, the King, or the Emperor.[106]

---

[102] Irene Khan, 'How Can the Rule of Law Advance Sustainable Development in a Troubled and Turbulent World?' (2017) 13(2) McGill International Journal of sustainable Development Law and Policy 211.

[103] Aristoteles' term implying clarity constituted of various factors that can serve either to enhance or inhibit 'sapheia' (i.e. clear and undisputed, hence certain) perception: James H. Lesher, 'Saphêneia in Aristotle: 'Clarity', 'Precision', and 'Knowledge'' (2010) 43 Apeiron 143.

[104] Yundini Husni Djamaluddin, 'The Concept of the Principles of Legal Certainty, Benefit and Justice in Environmental Management' (2021) 5 IJRISS 632.

[105] Marc Fenwick and Stefan Wrbka (eds), *Legal Certainty in a Contemporary Context* (Springer 2016).

[106] Jérémie Van Meerbeeck, 'The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust' (2016) 41 European Law Review 275.

A norm in the making

Sustainable development as a term is omnipresent in legally binding instruments worldwide, soft-law with strong legal language[107] as well as in a surge of international disputes and adjudication.[108] And yet it is not decided whether we have entered an era of a 'sustainable development law'[109] and the establishment of a proper legal principle.[110] [111] The International Law Association's New Delhi Declaration of Principles of International Law Relating to Sustainable Development (the 'New Delhi Declaration') of 2002 reads that sustainable development is now widely accepted as a global objective and that the concept has been amply recognized in various international and national legal instruments, including treaty law and jurisprudence at international and national levels.[112] Setting out seven principles of sustainable development[113] found in hard and soft law instruments, it assumes sustainable development gains persuasive legal force.[114]

---

[107] For example, the Rio Declaration (n 93); V.Barral (n 94).
[108] Marie-Claire Cordonier Segger, Alexandra Harrington and Francesse Joy Cordon, 'Judicial Deliberations and Progress on Sustainable Development' in Cordonier Segger and H.E. Judge C.G. Weeramantry (eds) (n 92) 811.
[109] J William Futrell, 'Defining Sustainable Development Law' (2004) 19 Natural Resources & Environment 9.
[110] Maria Kenig-Witkowska, 'The Concept of Sustainable Development in the European Union Policy and Law' (2017) 1 Journal of Comparative Urban Law and Policy 1.
[111] As outlined by Cordonier-Segger, '[S]ustainable development has been the topic of a World Summit and the subject matter of at least a dozen international treaties. Sustainable development has also been part of the arguments before nearly all prominent international tribunals to date. In certain treaties and decisions, sustainable development has been characterized as an emerging principle of international law. In others, it can be described as a policy objective of international law, as the object and purpose of international treaties rather than a norm in itself.' *Cordonier-Segger*, 'Commitments to Sustainable Development through International Law and Policy' (n 92) 59.
[112] Marie-Claire Cordonier Segger, 'Inspiration for Integration: Interpreting International Trade and Investment Accords for Sustainable Development' (2017) 3 Canadian Journal of Comparative and Contemporary Law 159.
[113] The seven principles identified are: (1) sustainable use of natural resources whereby States have sovereign rights over their natural resources, and a corresponding duty not to cause (or allow) undue damage to the environment of other States in the use of these resources; (2) inter- and intra-generational equity and the eradication of poverty; (3) common but differentiated responsibilities and respective capabilities; (4) the precautionary approach to human health, natural resources and ecosystems, transferring the burden of proving lack of significant harm from an undertaking to the proponent, in cases of scientific uncertainty; (5) public participation, backed by access to information and justice; (6) good governance, with measures to support rule of law, coherence and anti-corruption; and perhaps most telling (7) integration and interrelationship of human rights and social, economic and environmental objectives. See: Marie-Claire Cordonier Segger, Ashfaq Khalfan and Salim Nakjavani, 'Weaving the rules for our Common Future: Principles, Practices and Prospects for International Sustainable Development Law' (Centre for International Sustainable Development Law 2002) <http://www.cisdl.org/wtr/pdf/WeavingtheRulesOct2002.pdf> accessed 7 January 2021.
[114] Cordonier Segger and H.E. Judge C.G. Weeramantry (eds) (n 92) 11.

The conundrum of sustainable development's legal status keeps on perplexing academia and practitioners; albeit its aforementioned abundant use in legal texts, case-law and decisions of quasi-judicial bodies,[115] legal professionals tend to consider it an inherently philosophical and political aim or moral duty[116] rather than a legal concept.[117] Besides, it has been even argued that its significant overuse without a proper legal definition has turned it into a 'politically sounded slogan'.[118] The International Court of justice for example has repeatedly treated it as a basis for obligating state conduct, leaving the normative content of specific obligations, practices, and measures to be taken to the states.[119] Nonetheless, its significance over legal implementation should not be disregarded. It has been argued that sustainable development is a 'general principle' although vague.[120] But also -and more importantly- considering the doctrine of good faith in international law and the extensively supported soft law,[121] international legislators show willingness to create 'a legitimate international expectation'[122] or even an intention to be legally bound by it, leading to a debate of whether sustainable development is in the process of interstitial norm[123] or even if it has attained the status of a customary law principle in international law. While the customary status of sustainable development as first proposed in the well-vetted opinion of the late Judge C. G. Weeramantry[124] is still unresolved, all the above considerations suggest that sustainable development is 'clearly legal in scope'.[125]

---

[115] For a detailed analysis see ibid.
[116] Jorge E. Viñuales, 'Sustainable Development' (n 91) 286
[117] V.Barral (n 94)
[118] Maria Kenig-Witkowska (n 110).
[119] A.Viriyo (n 98)
[120] Freya Baetens, 'The Iron Rhine case: On the right track to sustainable development?' in Cordonier Segger and H.E. Judge C.G. Weeramantry (eds) (n 92) 308-309.
[121] MC.Cordonier Segger, 'Inspiration for Integration' (n 112)
[122] A.Viriyo (n 98)
[123] Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) EJIL 23
[124] *Opinio juris* and state practice still remain ambiguous on whether it may be classified as custom. For arguments in favour of SD constituting a customary principle invoking obligations for states see for example David Luff, 'An Overview of International Law of Sustainable Development and a Confrontation between WTO Rules and Sustainable Development' (1996) 29 Belgium Review of International Law 90 and Judge Weeramantry's separate opinion in *Gabčikovo – Nagymaros Project (Hungary/ Slovakia)* [1997] ICJ 7 <https://www.icj-cij.org/public/files/case-related/92/092-19970925-JUD-01-03-EN.pdf> accessed 27 April 2022.
[125] V.Barral (n 94)

At the same time, the main open question deriving from the lack of a solid definition of sustainable development is how one can create legally binding obligations, or how one can make actors (including sovereign states and decision-makers themselves) liable for not pursuing sustainable development[126] if the exact results to be achieved and a specific conduct are not defined. Indeed, this is a challenge to which the response is that enforcement is sought and achieved through sectoral implementing actions. Notwithstanding, the vagueness of the concept is arguably 'a deliberate choice driven by its function, which is to rally rather than to divide'.[127]

The meaning of sustainable development in the EU legal order

In the ambit of EU law, sustainable development has for long gained acknowledgement as one of the Union's universal objectives.[128] It has been at the epicentre of the EU's political context since its inclusion as one of the Union's and Community's objectives in the treaty of Amsterdam[129] and its recognition as an overarching goal of the EU with the adoption of the EU Sustainable Strategy at the Gothenburg European Council.[130]And since the Lisbon Treaty sustainable development constitutes a fundamental long-term aim of the Union [Article 3(3) TEU] and the all-encompassing policy framework covering the entire spectrum of Union policies (Article 11 TFEU as well as Article 37 of the Charter of Fundamental Rights). Therefore, it is clear that sustainable development is mainstreamed into all EU policies,[131] including external action as stipulated in Article 3(3) TEU. In fact,

[126] Sander R.W. van Hees, 'Sustainable Development in the EU: Redefining and Operationalizing the Concept' (2014) 10(2) Utrecht Law Review 60.
[127] J.Viñuales, 'Sustainable Development' (n 91) 285.
[128] Sander R.W. van Hees (n 126).
[129] Present in the preamble of TEU as well as one of the Union's objectives set out in Article2 TEU ('to achieve balanced and sustainable development' as well as in the Community goals under Article2 TEC stating that the Community should promote 'balanced and sustainable development of economic activities'), Consolidated Version of the Treaty on European Union [1997] OJ C340/02
[130] Commission, 'A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development' (Communication) COM (2001) 264 final.
[131] Commission, 'Mainstreaming sustainable development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development' (Communication) COM(2009) 400 final.

sustainable development in the EU is said to being twofold: a union-centric view for Europe's viable growth and an extrovert perspective -as stipulated in Article 3(5) TEU- for the contribution of the EU to the sustainable development of the Earth.[132] Particularly within the framework of EU's external action, sustainable development takes a prominent part in the commitments set out in Title V TEU, and more specifically Article 21(2)(f) stipulating that '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 [inter alia] in order to: (…) (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'.

EU leaders constantly reiterate how important sustainable development is for the EU. The Commission under the presidency of von der Leyen has effectively proclaimed sustainable development an 'overriding political priority'[133] and has mandated each Commissioner to streamline their portfolios with sustainable development compliance. Indeed, sustainable development is the relentless protagonist of all legislative and non-legislative work programs of EU decision-makers, and it would be fair to say that the entire EU agenda is steered by the UN 2030 Agenda and its SDGs[134] both internally and externally.[135] It is noteworthy that the EU agenda has not been downplayed even in times of the COVID-19 pandemic.

---

[132] M.Kenig-Witkowska (n 110)

[133] European Commission, '6 Commission Priorities for 2019-2024' (*European Commission)* <https://ec.europa.eu/info/strategy/priorities-2019-2024_en> accessed 4 April 2021

[134] Adopted in September 2015 the '2030 Agenda for Sustainable Development' agreed by world leaders sets 'the world on a path of sustainable development'. The Agenda includes 17 Sustainable Development Goals (SDGs) accompanied by 169 targets 'which set out quantitative objectives across the social, economic, and environmental dimensions of sustainable development – all to be achieved by 2030. The goals provide a framework for shared action 'on people, planet and prosperity', to be implemented by 'all countries and all stakeholders, acting in collaborative partnership'. Sustainable Development Solutions Network, 'Getting Started with the Sustainable Development Goals: A Guide for Stakeholders' (2015) <https://sustainabledevelopment.un.org/content/documents/2217Getting%20started.pdf> accessed 27 April 2022; UNGA, 'Transforming Our World: the 2030 Agenda for Sustainable Development' (21 October 2015) UN Doc A/RES/70/1 (Agenda 2030).

[135] Commission, 'Work Program 2021: A Union of vitality in a world of fragility.' (Communication) COM(2020) 690 final

Examples of EU's determination over this perspective include -to name a few- the predominance of the so-called 'EU Green Deal'[136] in its entire work as a crosscutting growth strategy which aims at a socially just green transition far beyond CO_2 emission cuts; measures for fair and sustainable digital economy; revenue and fiscal sustainability; life-long learning opportunities as well as development investments or humanitarian aid in third countries on the basis of EU's common value, and the creation of the Sustainable Europe Investment Plan. According to the most updated Eurostat sustainable development indicators published in 2022 the EU is making steadily progress to towards almost all of 17 SDGs, in some very positive and even impressive ways.[137]

Albeit the political importance, in the context of EU law too, sustainable development is not (yet?) a clear normative principle but (still) an undefined policy objective, and as such it is quoted by the Court in various rulings. Even in cases when member states have put forward a more normative approach the Court has not taken the leap to analyze it in its judgement. For example, at the fairly recent 'PM10 limit values' case filed in 2018, Italy submitted that national air quality plans required to be drafted by the ambient air quality directive of 2008 'should be applied, according to a systematic interpretation of EU law, in the light of the principle of proportionality and the 'sustainability' of the process leading to compliance with the limit values'.[138] In its judgement, the Court partly overlooks the need for interpretation of EU law also under the principle of sustainability, but it does reiterate the need of 'balance between the aim of minimizing the risk of pollution and the various opposing public and private interests',[139] subtly and implicitly making a reference to the idea of sustainable development.

---

[136] Commission, 'The European Green Deal' (Communication) COM(2019) 640 final.
[137] Blumers Miriam (ed), 'Sustainable development in the European Union: Monitoring Report on Progress towards the SDGs in an EU Context' (Eurostat, Publications Office of the European Union 2022) <https://ec.europa.eu/eurostat/documents/15234730/15242025/KS-09-22-019-EN-N.pdf/a2be16e4-b925-f109-563c-f94ae09f5436?t=1667397761499> accessed 2 March 2023
[138] Case 644/18 *European Commission v Italian Republic*, Judgment of the Court (Grand Chamber) of 10 November 2020, ECLI:EU:C:2020:895 para 120.
[139] ibid, para 153

However, overall, while it is purported that sustainable development is a complex matter but a simple idea[140] we still find somewhat diversified definitions ranging from 'the need to pursue in a balanced way economic growth, social improvements and environmental protection'[141] to 'making sure that our economic growth allows us to maintain a model that produces fair outcomes for all of humanity; and about ensuring that humans don't consume more resources than the Earth has to offer', or even that 'development [that] meets the needs of present generations without compromising the ability of future generations to meet their needs'.[142] In a nutshell, there is no comprehensive EU definition of sustainable development.[143] EU legislation is conveniently mute over a definition in a sense that we can in fact speak of a very broad notion which makes it even more challenging to implement it.[144]

Still, sustainable development is omnipresent in EU-practice, in the language of numerous pieces of secondary legislation covering an array of policies and strategies, including -as aforementioned- external action initiatives. The challenge of the enforceability of an effectively undefined goal persists also in the ambit of EU law and is purportedly even more significant taking into account that the Court has the power to hold both member states and EU institutions accountable for not fulfilling their obligations under the treaty. Of course, the EU is bound by the pursuit for sustainable development in a long-term perspective. Individual shorter-term

[140] Commission, 'Towards a Sustainable Europe by 2030' (Reflection paper) COM (2019) 22 final.
[141] Commission, '2003 Environment Policy Review - Consolidating the Environmental Pillar of Sustainable Development' (Communication) COM (2003) 745 final.
[142] Commission, 'Towards a Sustainable Europe by 2030' (n 140).
[143] Two repealed EU Regulations (namely Regulation (EC) No 2493/2000/EC and (EC) No 2494/2000 include a definition of SD which is determined as 'the improvement of the standard 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'. Despite the fact that these acts are no longer in force, they also concern very specific issues hence the definition thereby included cannot be considered as final or comprehensive. Besides, we do not meet the same definition in more recent EU legal acts.
[144] Kamphof, Ries, 'EU and Member State Implementation of the UN Agenda 2030 and Sustainable Development Goals' (2018) UN University, Working Paper W-2018/1 < https://cris.unu.edu/sites/cris.unu.edu/files/W-2018-1.pdf> accessed 3 March 2023

objectives necessary to reach the long-term objective are incorporated and strictly defined in separate legislative acts. Using the general broad concept as well as the guidelines offered by the 17 SDGs, EU decision-makers draft legislation which responds to the long-term goal, and develop tools to monitor progress and implementation.[145] Besides, as it is noted about the SDGs, they 'are not an objective in themselves, but they serve as our compass and map [which] offer the necessary long-term perspective, which transcends the electoral periods and short-term quick-win considerations'.[146] In that sense, the need to come up with a solid legal definition of sustainable development seems somewhat subordinate. While I still believe it should not be ignored, the importance for this thesis is to be clear on how it is used within the EU, i.e. as a 'longstanding overriding priority' of the EU and a broad 'bridging'[147] concept creating singular legal obligations which are further defined by secondary acts, addressing the need for a reconciliation between economic growth, social development, and environmental protection.

International business responsibility in the era of SDGs

The impacts of global business activities on welfare have been in the spotlight of international law and international relations for the last 30 years. Triggered by 'perilous' activities in the extractive, mining, clothing and footwear industries in developing countries as a result of increased foreign investment and offshore production, the international community engaged into a debate about business responsibilities. Attempts for binding international measures such as the 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (the 'Norms') proposed by the UN Sub-Committee on Human Rights failed; however, a path for business responsibility did open up. The reconciliation between economic and social interests triggered the

[145] Council, 'Brussels European Council 14 December 2007' (Presidency Conclusions) 16616/1/07 REV 1 CONCL 3
[146] Commission, 'Towards a Sustainable Europe by 2030' (n 140)
[147] MC.Cordonier Segger, 'Commitments to Sustainable Development through International Law and Policy' (n 92) 30.

movement of voluntary engagement on Corporate Social Responsibility (CSR) (or simply Corporate Responsibility) and Responsible Business Conduct (RBC) with notable initiatives such as the UN Global Compact[148] and relevant soft-law, the 'Protect, Respect and Remedy Framework' (the 'Framework')[149] and its implementing 'Guiding Principles on Business and Human Rights' (UNGPs)[150], and the OECD 'Guidelines for Multinational Enterprises'.[151]

Voluntary business commitment has proven to be an essential part of the movement. During the last three decades, all serious corporations wanting not only to thrive, but even to survive in the modern global markets, have been compelled to engage in some form of corporate responsibility.[152] Extensive social pressure for corporate responsibility actions means that companies' value increases when they offer something back to society but also that without corporate responsibility engagements, they become largely unwelcome to customers, clients, investors and

[148] The UN Global Compact is a voluntary pact for CSR designed to promote 'responsible corporate citizenship' and to improve through mutual learning and promulgation of best practices. Participating corporations are committed 'to align their strategies and operations with universal principles of human rights, labour, environmental and anti-corruption standards, and take actions that advance societal goals', as represented in the 10 principles of the Global Compact, *UN Global Compact* <www.unglobalcompact.org> accessed 11 December 2020 .

[149] The 'Protect, Respect and Remedy' Framework lies on three pillars: (a) the state duty to protect against human rights abuses by third parties through appropriate policies, regulation, and adjudication; (b) corporate responsibility, including the appropriate due diligence and to address adverse impacts that occur; and (c) greater access by victims to effective remedy, both judicial and non-judicial. UNGA, 'Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (7 April 2007) A/HRC/8/5.

[150] OHCHR, Guiding Principles on Business and Human Rights: Implementing the 'Respect, Protect, and Remedy' Framework (2011) HR/PUB/11/4 <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 11 December 2020.

[151] 'The OECD Guidelines for Multinational Enterprises are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. The Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting'. OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2011) <https://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 10 December 2020; John Gerard Ruggie and Tamaryn Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges' (2015) 22 The Brown Journal of World Affairs 99.

[152] For example, it is literally impossible to locate a Fortune 500 company with no CR strategy in place. See C.B. Bhattachary, Sankar Sen and Daniel Korschun 'Leveraging Corporate Responsibility: The Stakeholder Route to Maximizing Business and Social Value' (CUP 2011) 8.

employees. What is more, 'irresponsible' businesses involved in fallacious acts, conducts or omissions can be targeted by stakeholders and lose much of their reputation, ergo wealth.[153]

Industry has -not unexpectedly- favoured voluntary action instead of binding measures. Voluntary action is welcome, but an obvious question arises right away: is it enough? Examples such as that of Volkswagen (VW) prove that it has its limits; this German automotive giant is a historic member of the UN Global Compact and has been boasting about its high ratings in CSR internationally. Still, in 2015 VW committed the notorious car emissions fraud which shook the world.[154]

When carrots fail, sticks come in place. During the last years it has become crystal clear that state involvement and regulation are necessary[155] to a certain extent. In the area of international law this is not a simple matter. It is well-known that International Human Rights Law (IHRL) instruments apply only to states and have no binding force directly on private entities.[156] That said, one of the fundamental pillars for responsible corporate conduct of the UN Framework is the state duty to regulate business activities and to adjudicate relevant infringements, as part of the state's positive duty to protect.[157] IHRL adjudication fora such as the European Court of Human Rights (ECtHR) -and not exclusively- have a rich case-law on the matter of the so-called 'indirect obligations' of states for human rights violations by non-state actors (including businesses)[158] as an offset against the discrepancy in international

[153] Marta Riera and María Iborra, 'Corporate Social Irresponsibility: Review and Conceptual Boundaries' (2017) 26 European Journal of Management and Business Economics 146.
[154] ibid.
[155] Jorge E. Viñuales, 'Foreign Investment and the Environment in International Law: Current Trends' in Kate Miles (ed), *Research Handbook on Environment and Investment Law* (Edward Elgar 2019) 12-37.
[156] Claire Methven O'Brien, Business and Human Rights: A Handbook for Legal Practitioners (Council of Europe 2018) 17.
[157] Under international human rights law states must protect against human rights abuses by third parties, including businesses. They are responsible *inter alia* to take appropriate measures to prevent, investigate, punish and redress private actors' (including businesses') abuses. See UNGP (n 150).
[158] In the Council of Europe system, we also observe actions for the duties of states over business-related human rights abuses as well as implicit duties of businesses themselves, such as Recommendation CM/Rec(2016)3 of the Committee of Ministers to member states on human rights and business. See Methven O'Brien (n 157) 18.

legal instruments for business accountability. To quote the ECtHR '(…) the state's responsibility (…) may arise from a failure to regulate private industry',[159] which extends till the duty to duly investigate.[160]

The proven constraints of the voluntary corporate responsibility duties have also prompted domestic legislation such as the UK Modern Slavery Act[161] and the pioneering French law on corporate duty of vigilance (DoV)[162] as well as the subsequent Dutch child labour due diligence bill,[163] the German supply chain due diligence act (SDDA)[164] and the Norwegian Transparency Act.[165] This wider legislative

[159] *Fadeyeva v Russia* ECHR 2005-IV 21, para 89

[160] See indicatively *Öneryıldız v. Turkey* App no 48939/99 (ECtHR, 30 November 2004)*; Ergi v Turkey* (1998) 32 EHRR 388*; M.C. v Bulgaria* App no 39272/98 (ECtHR, 4 December 2003).

[161] The Modern Slavery Act 2015 c. 30 (Chapter 30) makes 'provision about slavery, servitude and forced or compulsory labour and about human trafficking, including provision for the protection of victims […]' <www.legislation.gov.uk/ukpga/2015/30/contents/enacted> accessed 16 December 2020.

[162] France's Duty of Vigilance Law' loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre', places a due diligence onus on large (over 5.000 employees) French undertakings (headquarted in France). This law establishes the companies' duty of care while performing any acts that could foreseeably harm human rights or the environment. Those harmed can bring civil actions (tort) and claim damages. Companies have also a duty to draft annual vigilance plans. The scope of the law includes parent companies' responsibility for acts and omissions of their subsidiaries or dependent companies. Since enactment of the law, seven lawsuits have been filed against alleged infringements of Total in Uganda and France, EDF and Casino. For a detailed analysis on the law, see: Almut Schilling-Vacaflor, 'Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?' (2021) 22 Human Rights Review 109.

[163] Adopted on 24 October 2019 the Dutch act introducing a duty of care to prevent the supply of goods and services that have been created using child labor. 'Wet Zorgplicht Kinderarbeid' requires companies to identify, prevent and address the issue of child labour in their supply chains. The law provides for fines in case of breach of duties, but business' failure to comply does not give rise to a direct civil cause of action, *Staatsblad van het Koninkrijk der Nederlanden* (24 October 2019) <https://zoek.officielebekendmakingen.nl/stb-2019-401.html> accessed 17 November 2021.

[164] The German Federal Act on Corporate Due Diligence to Prevent Human Rights Violations in Supply Chains (original title: "Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechts¬verletzungen in Lieferketten" or "Sorgfaltspflichtengesetz") (BGBl I 2021, 2959) applies to companies headquartered in Germany and foreign companies with a domestic branch in Germany of over 3.000 employees (to be reduced to 1.000 employees as of 2024). Companies must adopt a policy statement, conduct risk analyses, and establish a risk management system, preventive and remedial measures, as well as a complaints procedure, documentation and reporting. The German Federal Office for Economic Affairs and Export Control (BAFA) of the Federal Ministry of Economics and Energy monitors implementation of the law and has the power to adopt necessary measures to detect, end and prevent violations as well impose administrative fines and/or exclude liable companies from public procurement. For an analysis of the SDDA, Markus Krajewski, Kristel Tonstad and Franziska Wohltmann, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?' (2021) 6 Business and Human Rights Journal 550.

[165] The Norwegian 'Act relating to enterprises' transparency and work with fundamental human rights and decent working conditions' (*Lov om virksomheters arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold*) Prop 150 L (2020–2021) requires human rights and decent work due diligence by large undertakings resident in Norway, operating in or outside Norway. For an analysis of the Transparency Act, M.Krajewski and others (n 165).

trend is being followed by the EU. Recognizing that voluntary standards have not led to the required level of protection against human rights violations, environmental harms and appropriate access to justice, the European Commission presented on 23 February 2022 a proposal for a Directive on Corporate Sustainability Due Diligence (CSDDD).[166]

At the same time, the UN is working on a 'legally binding instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises'. The open-ended working group mandated under the auspices of the UNHRC to prepare the proposal, published the third revised draft version of the agreement at its 7th session last August.[167]

The issue is not straightforward. There are various complexities over the matter, an important one being to determine the nationality of the multinational corporation. Indeed, complicated corporate structures, such as the existence of parent or controlling companies with subsidiaries, branches or even dependent companies with own legal personalities (often boosted by 'round tripping' further mentioned below under 'Sustainable development and international investment law: two worlds apart?') have proven to hinder allocation of liability. The doctrine of *forum non conveniens*, rules on corporate structure, corporate limited liability, and separate legal personality, have all been regularly invoked to prevent claims by foreign

[166] Commission, Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 (Proposal for a Directive), COM(2022). According to Parliament's initiative, the new directive should impose on undertakings to make public their due diligence strategy and provide a grievance mechanism responding to stakeholders' warnings and concerns. The proposal requires Member States to provide for sanctions and to put in place a liability regime for liability of companies for any harm arising out of potential or actual adverse impacts on human rights, the environment or good governance. European Parliament, 'Report with recommendations to the Commission on Corporate Due Diligence and Corporate Accountability 2020/2129(INL)' (11 February 2021) A9-0018/2021 <https://www.europarl.europa.eu/doceo/document/A-9-2021-0018_EN.pdf> accessed 9 December 2021. The draft Directive is already debated in Parliament -the rapporteur submitted the draft report on 7 November 2022- and in Council -general approach adopted on the 1st of December 2022. The co-legislators should reach an agreement in the following months; the Directive is expected to be adopted by the end of 2023.

[167] OHCHR, 'Legally Binding instrument ro regulate, In International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' , OEIGWG Chairmanship Thrird Revised Draft (17 August 2021) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf> accessed 28 April 2022.

plaintiffs against multinational corporations in their home state.[168] But this is not an unsurmountable obstacle. Various suggestions have been made to solve this: overlook and reporting obligations, or other requirements to control the conduct of subsidiaries by the parent corporations.[169] Based on the current legislative environment it seems that the time is ripe to address the issue.

[168] Kate Miles, The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital (CUP 2013) 137.

[169] This has been referred to 'as parent-based extraterritorial regulation'. Olivier De Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations', (Background paper to the seminar organized in collaboration with the Office of the UN High Commissioner for Human Rights within the mandate of prof. J. Ruggie, the Special Representative to the UN Secretary General on the issue of human rights and transnational corporations and other enterprises, Brussels, 3-4 November 2006 <https://media.business-humanrights.org/media/documents/df31ea6e492084e26ac4c08affcf51389695fead.pdf> accessed 9 December 2020

Chapter 1 | International investment law in the era of SDGs

1.1 The nuts and bolts of international investment law

Historically speaking, regulation over foreign investment evolved as a custom in the 19th century[170] as a means of Western capital-exporting colonial states to further their political and commercial aspirations[171] by protecting the interests of their investors abroad. Custom dictated that no 'host' government - receiver of an investment would be 'entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefore'.[172] The big boost for the foreign investment regime as we know it, came eventually in the 20th century when custom was substituted by written agreements. Late post-war needs, the New International Economic Order (NIEO) in the 1970s pushing for fairness in trade with developing countries, and the push by leaders like Ronald Reagan and Margaret Thatcher for a liberalization of foreign investment regimes are all considerable milestones in the making of international investment law. The decisive impetus however is considered the end of the Cold War in the early 1990s. After the dissolution of the Soviet Union, new states emerged which were committed to a free market and were "thirsty" for FDI, giving a new platform for its regulation and governance.[173]

In spite of this thrust for foreign investment and of the general demand for market-supporting regulating institutions that served globalized economic relations and trade,[174] no multilateral rules have ever been developed for foreign investment,

---

[170] Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011).
[171] K.Miles, The Origins of International Investment Law (n 169).
[172] See Cordell Hull's note to the Mexican Minister of Foreign Affairs during a 1938 dispute over land expropriations, quoted in Zachary Elkins, Andrew T Guzman, and Beth A Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960 – 2000' (2006) 60 International Organization 811.
[173] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd edn, CUP 2017) 211 – 217.
[174] Several proposals and attempts for such a multilateral treaty regime had been made; from the negotiations of the International Trade Organization in 1948 by the International Chamber of Commerce to the 1967 Draft

primarily due to recalcitrant differences between capital-exporting and developing countries.[175] Although it is persuasively argued 'the international order has developed a supranational framework governing the conduct of states in treating foreign investments',[176] the shift between customary and treaty law is not represented by the enactment of a universal covenant regulating foreign investment but by instruments of international law agreed between nation states, which debatably still include some commonly accepted principles of customary international law[177] or, for others, which create a *lex specialis* between contracting states.[178] When speaking about 'international investment law', we are in the sphere of bilateral relations and private international law[179] and we basically refer to the notorious bilateral investment treaties (BITs) or better currently, international investment agreements (IIAs).[180] IIAs, which first appeared in 1959,[181] flourished since the 1990s and which have fashioned the legal framework of foreign investment, are *ad hoc* agreements freely concluded between contracting states which may choose between a wide range of model agreements developed by different

Convention on the Protection of Foreign Property put forward by the Organization for Economic Cooperation and Development (OECD) but they were all dismissed, mainly due to the unresolved differences between home and host states. See K.Miles *The Origins of International Investment Law* (n 169) 85. The latest known attempt for a Multilateral Agreement on Investment (MAI) was the proposal put forward by the OECD in 1995, the negotiations of which finally failed in 1999. OECD, 'Multilateral Agreement on Investment' (*OECD)* <https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm> accessed 20 October 2020.

[175] Z.Elkins, A.Guzman, A.Simmons (n 173).

[176] Dessislav Dobrev, 'Reforming International Investment Law: is it Time for a New International Social Contract to Rebalance the Investor-State Regulatory Dichotomy?' in Andrea K. Bjorklund (ed), *Yearbook in International Investment Law and Policy 2014 -2015* (OUP 2016) 283.

[177] Jeswald W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 The International Lawyer 655.

[178] Muthucumaraswamy Sornarajah, The International Law on Foreign Investment (n 174) 206.

[179] Cordonier Segger, Khalfan and Nakjavani (n 113) 123.

[180] We prefer the use of the all-encompassing term IIAs, comprising all three forms of such agreements existing today:

- BITs signed by two states;
- regional investment treaties signed by groups of states within a single region; and
- chapters of integrated trade and investment agreements that can be signed at bilateral or regional level.

See: Howard Mann, 'International Investment Agreements, Business and Human Rights: Key Issues and Opportunities' (International Institute for Sustainable Development 2008) <www.iisd.org/index.php/system/files/publications/iia_business_human_rights.pdf> accessed 6 December 2020

[181] The first BIT ever was concluded between Federal Republic of Germany and Pakistan. Treaty for the Promotion and Protection of Investments, (25 November 1959) 457 UNTS 23.

international organizations and obviously shape them according to their will. These are the cornerstone of international investment law.

Presumably, the law governing foreign investment is of such a unique character that it is undecided whether IIAs give rise to any significant rule of international law or if there is a well-established international law on foreign investment *per se.*[182] Still, as Andrew Guzman argues, treaties are '[t]he most formal and reliable international commitment' since they 'represent clear and well-defined obligations of states';[183] and one thing is sure: the international order has placed the 'rules of the game' for investors outside the jurisdiction of the host-state, in the international realm.[184]

The core purposes of IIAs in practice and in law[185] stayed largely the same as those of customary practices of older times. Standard language summarizes them in the following statement: IIAs 'intend to contribute to economic development by creating favourable conditions for investment'.[186] Pragmatically, capital exporting countries[187] wish to protect the interests of their investors by providing an enhanced safeguarded environment in even unsound host states, where their nationals are likely to be treated with lower standards than the 'international minimum standard'.[188] For the host state -capital importing/investment recipients- IIAs serve as means to attract foreign investment.

Parties of the IIAs are the two contracting states and the agreement binds only them;[189] but the rights and obligations stemming from the agreements primarily

---

[182] Sornarajah, *The International Law on Foreign Investment* (n 174) 206
[183] Andrew T. Guzman quoted in Jason Webb Yackee, 'Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties' (2008) 33 Brooklyn Journal of International Law 405.
[184] D.Dobrev (n 177) 270.
[185] J.Salacuse (n 178).
[186] Antony Crockett, 'The Integration Principle in ICSID Awards' in Cordonier Segger and H.E. Judge C.G. Weeramantry (eds) (n 92) 539.
[187] or the capital-exporting state.
[188] M.Sornarajah (n 174) 140.
[189] J.Salacuse (n 178).

apply to the private investors and the host state, should the said IIA be opted to govern the investment in question. In other words, IIAs devise commitments of the host states towards the private investor.[190] Treaty practice differs from state to state.[191] Still, modern IIAs share certain common traits. Firstly, they define which investments are covered, usually broadly to include as many categories as possible and respond to the constantly evolving nature of the term. They typically refer to 'every kind of asset' 'in accordance with host State law'[192] -a standard definition in IIAs. This includes a non-exclusive list of covered assets and covers both direct and portfolio investment.[193] But indeed, in the spirit of freedom of contract, the details and specific terms of each BIT shall vary and be shaped following each agreement's negotiation. Secondly, IIAs contain standard guarantees granted to investors. These are embodied into:

a) protection from unlawful, discriminatory, and uncompensated expropriation of property which may be-
    i. either formal and direct, consisting of the forcible taking by a State of private property which is allowed only if adequately compensated,
    ii. or indirect, 'creeping' or *de facto*, consisted of measures of equivalent effect, which are tantamount to expropriation.[194]
b) general standards of treatment and more specifically

---

[190] Mary Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit ... and They Could Bite' (2003) World Bank Policy Research Working Paper No.3121 <https://openknowledge.worldbank.org/handle/10986/18118> accessed 28 April 2022.

[191] Luke Eric Peterson, 'Bilateral Investment Treaties and Development Policy-Making' (International Institute for Sustainable Development 2004) <www.iisd.org/system/files/publications/trade_bits.pdf> accessed 25 November 2020.

[192] Christoph Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2014) 1(1) McGill Journal of Dispute Resolution <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2520501> accessed 28 April 2022. Also, over 60% of IIAs contain an express clause requiring investments to comply with the domestic law of the host State as part of the very definition of what constitutes an investment. Rumiana Yotova, 'Compliance with Domestic Law: An Implied Condition in Treaties Conferring Rights and Protections on Foreign Nationals and Their Property?' (2018) University of Cambridge Faculty of Law Research Paper No.43/2018 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3199812> accessed 28 April 2022.

[193] Catherine Yannaca-Small and Lahra Liberti, 'Definition of Investor and Investment in International Investment Agreements' in *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD Publishing 2008) 46.

[194] See *Tecmed v Mexico* ICSID Case No. ARB(AF)/00/2 (Award date 29 May 2003) para 113 and Case C-284/16 *Slovak Republic v Achmea* OJ C161/8, paras 220-223.

i. the fair and equitable treatment of foreign investors (FET),[195] i.e. that investors shall not be treated less favourably than that required by law[196] or/and the minimum standard of treatment (MST) according to customary international law,[197]

ii. the most-favoured-nation (MFN), i.e. that investments of one contracting party are entitled to treatment by the other contracting party that is no less favourable than the treatment the latter grants to investments or investors of any other third country treatment,[198] and

iii. the national treatment, i.e. that the obligation of contracting parties to grant investors of the other contracting party treatment no less favourable than the treatment they grant to investments of their own investors,[199];

c) free transfer of funds;

d) umbrella clauses (i.e. broadly written provisions with catch-all obligations for host states to comply with obligations related to covered investments);

e) an offer to consent to the recourse to arbitration to resolve investor-state disputes, the so-called investor-state dispute settlement (ISDS), 'loosely

---

[195] The meaning and normative value of the FET standard is not the same in every treaty. Other agreements include specific wording linking it to the minimum standard of international customary law and other treaties link it to international law in general, or even leave it vague, without any specification and link to international law. The OECD usually links it to the minimum standard required by international law and general principles of international law, while most of the arbitral opinions in the present survey mention two elements, due diligence and due process (including non-denial of justice and lack of arbitrariness). For a complete analysis on the FET standard see: OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (2004) OECD Working Papers on International Investment 2004/03 <http://dx.doi.org/10.1787/675702255435> accessed 2 September 2022.

[196] Jean Kalicki and Suzana Medeiros, 'Fair, Equitable and Ambiguous: What Is Fair and Equitable Treatment in International Investment Law?' (2007) 22 ICSID Review - Foreign Investment Law Journal 24.

[197] The obligation to grant foreign investors FET is at times synonymous with the obligation to treat the investment in accordance with the minimum standard in international law, as part of customary international law itself. UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (United Nations Publication 2007) 28 – 33 <https://unctad.org/system/files/official-document/iteiia20065_en.pdf> accessed 6 March 2023.

[198] ibid, 38 – 43.

[199] ibid, 33.

institutionalised'[200] under various available sets of procedural rules and fora, such as of the World Bank's Center for the Settlement of Investment Disputes (ICSID), the United Nations Commission for International Trade Law (UNCITRAL), the International Chamber of Commerce (ICC), or the Stockholm Chamber of Commerce (SCC) and venues, as the Permanent Court of Arbitration (PCA), at the Hague, the ICC International Court of Arbitration in Paris, the London Court of International Arbitration (LCIA), Arbitration Institute of the Stockholm Chamber of Commerce (SCC) etc..[201] Jurisdiction for international arbitration is upon consent (of the host state). Whether originally ISDS was set up to be contract-based or not, does concern us in this thesis.[202] Since the award in *AAPL v. Sri Lanka*[203] it is commonplace for arbitration to be 'without privity,'[204] or beyond contractual consent, grounded on violations of the IIA itself. Notwithstanding 'fork-in-the-road' clauses in some (limited) investment treaties,[205] the ordinary way is for IIAs to include provisions for binding appeal to arbitration and them being construed as an open-ended *ex ante* unilateral offer by the host state to foreign investors of the treaty partner for arbitration, giving standing to the investor to generate arbitration for alleged breaches of the treaty itself.[206]

[200] Sara Dezalay and Yves Dezalay, 'Professionals of International Justice: From the Shadow of State Diplomacy to the Pull of the Market for Commercial Arbitration' in Jean d'Aspremont, Tarcisio Gazzini, André Nollkaemper and Wouter Werner (eds), *International Law as a Profession* (CUP 2017) 312.
[201] For an overview of the ISDS 'system' or 'regime' see *inter alia* A.Crockett (n 187) 540 – 542.
[202] Paulsson and Sornarajah disagree on the basis of jurisdiction for investment arbitration. See in that respect Jan Paulsson, 'Arbitration without Privity' (1995) 10 Foreign Investment Law Journal 232; M.Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015) 141.
[203] *Asian Agricultural Products Ltd (AAPL) v. Sri Lanka*, ICSID Case No.ARB/87/3 (1990) ICSID Review-Foreign Investment Law Journal 526 <https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf> Accessed 3 March 2023
[204] J.Paulsson (n 202).
[205] R. Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 267.
[206] M.Sornarajah , Resistance and Change in the International Law on Foreign Investment (n 203) 3.

1.2 Sustainable development and international investment law: an odd couple

The interplay between investments and sustainable development is self-evident[207] and thus early recognised as part of the wider discussion on the linkages between international economic relations (trade, investment and competition) and fundamental rights and values.[208] To attain sustainable development, economic growth is not only desirable[209] but a *sine qua non* condition as well as a key factor in attaining the SDGs.[210] Sustainable development should not be seen as a moratorium on economic development. Rather the opposite.[211] At the same time, unregulated growth which does not reconcile economic interests with social and environmental concerns, is likely to bring about negative impacts and lead to unsustainable growth patterns. Albeit the rise of CSR both as a 'carrot' and a 'stick' for sustainable business activity, as analysed in the introduction of the present essay, private international investment law has been long considered unsympathetic or simply alien to environmental and human rights concerns.[212] In that framework, worries have been expressed about the negative impact of FDI by MNCs in developing countries, carried out without any social and environmental considerations.[213]

---

[207] See in that respect UNCTAD, 'Making FDI Work for Sustainable Development' (2004) UNCTAD/DITC/TED/9 <https://unctad.org/system/files/official-document/ditcted9_en.pdf> accessed 15 November 2020. Also, Chapter 2 (b) of *Agenda 21* (n 93) is devoted in the need for the mutual support between international trade and SD, 'investment is critical to the ability of developing countries to achieve needed economic growth to improve the welfare of their populations and to meet their basic needs in a sustainable manner, all without deteriorating or depleting the resource base that underpins development. Sustainable development requires increased investment […]'

[208] Indicatively, it is observed that the international community began to recognise the potential for conflicts between the trade and environment regimes, and to reinforce the role that trade could play as an instrument in sustainable development since 1992. Agenda 21 also suggests ways to promote sustainable development through trade. Also, the WTO Doha Development Agenda Declaration encouraged efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations. See: *Cordonier Segger, Khalfan and Nakjavani* (n 105) 120

[209] J.Viñuales 'Foreign investment and the environment in International Law (n 149) 41

[210] Marie-Claire Cordonier Segger, 'Commitments to sustainable development through international law and policy' (n 92) 33

[211] J.Viñuales 'Foreign investment and the environment in International Law (n 149) 41

[212] Cordonier Segger, Khalfan and Nakjavani (n 113)

[213] For example, see oil industry's reported complicity for human rights and environmental abuses in Nigeria. Adefolake O. Adeyeye, *Corporate Social Responsibility of Multinational Corporations in Developing* Countries (CUP 2012) 22 – 24.

Corporate accountability for unsustainable conduct is 'one of the thorniest issues' in international sustainable development regulation.[214] The advent of the Covid-19 pandemic convoluted the situation far more. It has caused an initial dramatic fall in global foreign investments, with MNCs from developed economies dropping their FDI in 2020 by 56 per cent compared to 2019.[215] Just when the world was about to recover from the 2008 financial crisis, the sanitary crisis hit. Although according to the OECD, in 2021 global FDI flows took an upward trajectory, exceeding pre-pandemic levels, the long-term consequences of the situation are still unknown[216] and some predict that the economic and social impact of the COVID-19-induced recession will be 'profound'.[217] At times of economic downturns, it is customary to leave other public interest concerns a bit behind and prioritize financial redress at all costs.

Historically, balancing investment with sustainability requirements has proven to be one of the most important tensions in implementing investment law,[218] 'an essentially polarizing matter' between capital exporting countries and host states.[219]

The place of IIAs in this predicament has been rather unhelpful. It is commonly accepted that early BITs -concluded till the beginning of the 2000s- created various complications in the interplay between investors' interests and public interests such as the protection of the environment, human health, labour and children's rights. Given the considerable volume of investment treaties globally -about 3.000- the

[214] Marie-Claire Cordonier Segger, 'Sustainability and Corporate Accountability Regimes: Implementing the Johannesburg Summit Agenda' (2003) 12(3) *RECIEL* 295.
[215] UNCTAD, *World Investment Report 2021: Investing in Sustainable Recovery* (UN Publications 2021) <https://unctad.org/system/files/official-document/wir2021_en.pdf> accessed 8 January 2022.
[216] OECD, 'FDI in Figures: Global FDI Flows Rebound to Exceed Pre-Pandemic Levels' (October 2021) <https://www.oecd.org/investment/investment-policy/FDI-in-Figures-October-2021.pdf> accessed 20 January 2022
[217] David Gaukrodger, 'The Future of Investment Treaties – Possible Directions' (2021) OECD Working Papers on International Investment 2021/03 <https://www.oecd-ilibrary.org/finance-and-investment/the-future-of-investment-treaties-possible-directions_946c3970-en> accessed 28 April 2022.
[218] K.Miles, *Research Handbook on Environment and Investment Law* (n 156)124
[219] Sands quoted in K.Miles, ibid 298.

question of their connection with progress in attaining the SDGs is crucial and hence, under the spotlight of academia and decision-makers already for a while.[220] Early attempts of host states to include socio-political concerns in agreements were continuously being blocked. This is reportedly the reason for the failure of OECD's Multilateral Investment Agreement (MIA) in 1999, which had been proposed *inter alia* as the most effective solution for the inclusion of social and environmental concerns in IIAs.[221]

As seen in the previous section, apparently, common traits of IIAs are mostly to the benefit of investors and -consequently- to the detriment of governments.[222] States are burdened with obligations, while investors enjoy rights! The epitome of international investment law -or, for that matter, 'foreign investment protection law'[223] - is that investors enjoy a preferential treatment compared to other social and/or economic actors or the interests of the state itself. As Sornarajah notes 'it would not be far-fetched to argue that [IIAs] were manipulated in order to secure the protection of foreign investments made by multinational corporations' leaving no margin for provisions covering other protections especially for host states'.[224]

Traditionally, because agreements were concluded between 'unequal partners',[225].namely a developed, capital-exporting country and a developing, capital-recipient country (the former being the strong party which would lead and the latter wishing to entice investments of MNCs), the host country would surrender to most, if not all, of the capital-exporting country's demands. The historical colonial context of

---

[220] Indicatively Kate Miles, 'Investment' in L.Rajamani and J.Peel (eds) (n 91) 768-783; Lise Johnson, Lisa Sachs and Nathan Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (2019) 1 Columbian Journal of Transnational Law 58.
[221] Pia Acconci, 'The Integration of Non-investment Concerns as an Opportunity for the Modernization of International Investment Law: Is a Multilateral Approach Desirable?' in Giorgio Sacerdoti, Pia Acconci, Mara Valenti and Anna de Luca (eds), *General Interests of Host States in International Investment Law* (CUP 2014)187.
[222] Adefolake O. Adeyeye (n 214).
[223] K.Miles, *The Origins of International Investment Law* (n 169) or K.Miles, Research Handbook on Environment and Investment Law (n 156).
[224] M.Sornarajah, The International Law on Foreign Investment (n 174) 68.
[225] ibid, 177.

international investment law backs-up the troublesome truth of this unequal relationship. It also explains why the role of IIAs has been unhelpful in finding equilibrium between the rights of investors and public interests of the host states since their *raison d'être* has not been to protect host states from adverse effects of investor operations, but to shield the investors from arbitrary injurious decisions of the host states.

Take for example the so-called stabilization or otherwise 'freezing' clauses which are often included in contracts between a host state and an investor. Such clauses are intended to protect investors from posterior political risk and adversely affecting legislation. They basically guarantee legislative stagnation and profitability of FDI against subsequent law-making which might adversely affect investments' profitability.[226] They are portrayed as an extra incentive to lure FDI. For many years the World Bank promoted them as an essential feature of an attractive investment environment, especially in certain regions such as Africa, where extra assurances for stability were deemed necessary.[227] Reportedly nonetheless, they have been often agreed by developing countries upon duress, if foreign investors insist upon their existence as a condition for their investment.[228]

Times have changed. The old purported 'asymmetry' between the capital-exporting country and the host state is now obsolete. The distinction between capital-exporting and capital-importing states has been vanishing over the years and the most developed countries have eventually become the largest recipients of foreign investments.[229] IIAs do not concern only unequal contracting parties, but are

[226] Sotonye Frank, 'Stabilization Clauses in long-term Investment Contracts in the Energy Sector in Africa' in K.Miles (ed), *Research Handbook on Environment and Investment Law* (n 156) 351.
[227] See indicatively World Bank, 'Strategy for African Mining' (1992) Technical Paper Number 18 <https://documents1.worldbank.org/curated/en/722101468204567891/pdf/multi-page.pdf> accessed 7 March 2023;,Gary McMahon, 'The World Bank's Evolutionary Approach to Mining Sector Reform' (2010) Extractive Industries and Development Series No.19 <https://openknowledge.worldbank.org/handle/10986/18288> accessed 7 March 2023.
[228] Moon Gillian, 'Submission on Stabilization Clauses, Developing Countries and Human Rights' (Human Rights-Compatible International Investment Agreements, Virtual Consultation for Asia and the Pacific, 14 June 2021)
[229] M.Sornarajh, The International Law on Foreign Investment (n 174) 24.

commonly concluded between states on a comparable footing. Moreover, fundamental values, principles and objectives such as environmentalism, human rights, sustainable development and CSR, have become part of the 'mainstream socio-political culture.'[230] The amount that sustainable development occupies in modern international relations and law indicates that no international economic agreement should be a 'sword' resulting into curbing legitimate environmental, health and human rights measures or shall spur (or even allow) investment flows perpetuating unsustainable growth. On the contrary, they should 'mutually support environment and development priorities in a balanced and integrated way for [sustainable development]'.[231] The 2006 *Pulp Mills* case before the ICJ where the court underlined 'the importance of the need to ensure environmental protection of shared natural resources, while allowing for sustainable economic development' is noteworthy.[232] In the context of soft law too, the goal of a 'green economy (…) and poverty eradication' are core objectives.[233]

In that framework, international economic law, including external trade in the ambit of WTO- has been itself undergoing a 'greening' and 'valuing' process since the beginning of the 1990s. Issues of public interest such as sustainable development have been recognised as 'mutually supportive' with trade as early as the Earth Summit in 1992 and the finally updated GATT 1994.[234] Investment law, although resistant at first, was inevitably fated to eventually succumb to new trends and incorporate principles from non-investment areas of international law. As eloquently put by Miles, it would be highly problematic for 'a seventeenth to nineteenth-century imperialist conceptual framework [to still inform] the modern relationship between

[230] K.Miles, *Research Handbook on Environment and Investment Law* (n 156) 106.
[231] MC.Cordonier Segger, 'Inspiration for Integration' (n 112).
[232] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 13 July 2006 [2006] ICJ Reports 113, 133,para 80.
[233] UNGA, The Future We Want (n 93).
[234] Michael M. Bechtel, Thomas Bernauer and Reto Meyer, 'The Green Side of Protectionism: Environmental Concerns and three Facets of Trade Policy Preferences' (2011) 19(5) Review of International Political Economy 837.

foreign investors and the environments within which they operate'[235]. As such, a proposition of a purely investment law without any interference of other areas, and above all without due consideration of horizontal, all-encompassing values and objectives of public interest, such as the protection of the environment, human health, labour and children's rights, would not only be unrealistic, but it would also audaciously dismiss international policy shifts and continue to ignore important legal principles. One of law's basic characteristics is that it is constantly evolving, like a living organism. Fresh areas, emerging concepts and new actors in this discipline have been brought into investment law.[236]

In that context, due respect must be given to the states' right to regulate. Foreign protection investment law was initially regarded purely as a means to protect the investors' rights without taking into consideration environmental protection measures. It is noteworthy that many of the disputes between investors and the host states are based on measures taken by the latter which allegedly restrict the enjoyment of one's investment. In investors' claims, this constitutes an outright breach of the states' obligations as per the relevant IIA, and therefore they are entitled to compensation without further contemplations. Put it bluntly, in the eyes of investors, it is irrelevant whether a state measure is ordained by reasons of public interest. What matters is only their loss as a result of the state's breach of its contractual commitment. This situation has been notoriously criticized as impinging upon the state's capacity to regulate in the public interest in areas affecting foreign investors' rights for fear that it (the state) will be severely punished and even lower its standards to attract investments. This perception of unlimited freedom of contract which undermines the state's policy space, is nonetheless against general principles of contract law, which not only protects the facilitation of choice, but is equally widely wary of a protective regulatory framework that guarantees a level playing field and a balance between parties' freedom of contract and the rule of law. National contract

[235] K.Miles, *Research Handbook on Environment and Investment Law* (n 156) 139.
[236] K.Miles, ibid (n 156).

law traditionally places strict limitations to contractual freedom, especially for policy grounds.[237] For instance, in the English legal system, ever since the early 19th century case *Stilk v Myrick* and Espinasse's report thereof,[238] it is admitted that policy grounds can be a valid justification for not upholding a contractual promise. The latest trend in international investment law however is that it would be insensible to determine overriding interests in purely investment terms; modern IIAs incorporate non-investment principles such as environment, human rights or the all-encompassing sustainability principle, in a way to appease concerns over a lessened state right to regulate and a confined policy space.

Older investment agreements included no relevant provisions whatsoever but now the most contemporary forms of agreements spell out these trends regarding host states' regulatory rights to protect overriding public interests, and increasingly reflect the importance of sustainable development by incorporating related provisions. Inclusion of such provisions has become even mainstream in recent treaty practice.[239] A decade-old OECD survey which categorized these trends is quite interesting to note as it demonstrates that generally inclusion of environmental and sustainable development language is becoming more common.

Preambular language on the need to promote and protect sustainable development is quite common. For example, India's new model BIT includes references to the importance of investment for inclusive growth and SD in the preamble as well as in the core body text.[240] Equally, in the 2003 FTA between the

---

[237] Julian Arato, 'The Private Law Critique of International Investment Law' (2019) 113 The American Journal of International Law 1.
[238] *Stilk v Myrick* (1809) 2 Camp 31 7, 6 ESP 129.
[239] Indicatively, nearly all investment treaties concluded in 2012 and 2013 include such language. See: Kathryn Gordon, Joachim Pohl and Marie Bouchard, 'Investment Treaty Law, Sustainable Development and Responsible Business Conduct: a Fact Finding Survey' (2014) OECD Working Papers on International Investment 2014/1 <https://www.oecd-ilibrary.org/docserver/5jz0xvgx1zlt-en.pdf?expires=1619691238&id=id&accname=guest&checksum=32B1F079ABDA7D83D147D4A014A5ECC1> accessed 20 February 2021
[240] Lise Johnson, Lisa Sachs, Jesse Coleman, 'International Investment Agreements 2014: a Review of Trends and New Approaches' in Andrea K. Bjorklund (ed) (n 177*)* 25.

European Free Trade Association (EFTA) states and Singapore, states reaffirm the parties' 'commitment to the principles of the UN Charter and the Universal Declaration of Human Rights'[241] Less often, language discouraging the loosening of environmental or labour regulations is evident. Similarly, provisions establishing that environmental and/or social measures taken in order to protect public policy objectives, preserving policy space for regulating in the public interest, and implementing internationally recognized standards are allowed and it is expressly provided that such regulatory action shall not constitute indirect expropriation.[242] The 2012 US model BIT for instance dedicates an entire article (Article 12) to 'Investment and Environment' including positive obligations for the host state[243] not to 'encourage investment by weakening or reducing the protections afforded in domestic environmental laws' and it expressly provides in article 8(3) that measures 'c) (ii) necessary to protect human, animal, or plant life or health; or (iii) related to the conservation of living or non-living exhaustible natural resources' may be taken by the host state.[244] Similar terms are encountered in the BIT between Tanzania and Canada which in article 15 recognizes 'that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures and therefore under the BIT, neither Canada nor Tanzania shall waive or otherwise derogate from health, safety or environmental measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor'.[245] Provisions allowing legitimate *ex post* regulation to protect prevailing public interests and progress in arbitral interpretation are positive developments but are still at embryonic stage and not solid enough. More recently, the United States–

[241] D.Dobrev (n 177) 278.
[242] G.Gordon, J.Pohl and M.Bouchard (n 240).
[243] D.Dobrev (n 177) 278.
[244] '2012 US Model Bilateral Investment Treaty' <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> accessed 2 February 2021
[245] Robert Kibugi, D Andrew Wardell, Marie-Claire Cordonier Segger, Caroline Haywood and Renée Gift, 'Enabling Legal Frameworks for Sustainable Land-use Investments in Tanzania: Legal Assessment Report' (2015) Center for International Forestry Research Working Paper <https://www.idlo.int/sites/default/files/pdfs/publications/Enabling%20legal%20frameworks%20for%20sustainable%20land-use%20investments%20in%20Tanzania-%20Legal%20assessment%20report.pdf> accessed 12 January 2021

Mexico–Canada Agreement (USMCA) as modified by the Protocol of Amendment replacing the NAFTA dedicates Chapter 24 to the protection of the environment and lists seven Multilateral Environmental Agreements (MEAs) mirroring the list approved by the US Congress,[246] which in case of conflict with the USMCA they will prevail.[247]

Equally common ever since the beginning of the 2000s is the inclusion of provisions of corporate responsibility. First appearing in the USA-Singapore trade agreement of 2003, today most newly concluded IIAs or FTAs with investment chapters include express business responsibility-related provisions encouraging the parties to engage into sustainable and responsible behaviour for the protection of the environment, human health and labour rights.[248]

These are extremely important developments, primarily considering proof that such provisions in IIAs are effectively encouraging contracting parties to enhance and reform their national sustainable development legislation, mainly *ex ante*, before the entry into negotiations for an agreement. Based on the assumption that most developed countries, which are at the same time large sources of foreign investment, will be reluctant to enter into an agreement with countries not respecting environmental and human rights requirements, certain host states voluntarily abide by with the national legal order of the capital exporting developed states. They do so based on a cost and benefit estimation: denying alignment with demands of the most

[246] Montreal Protocol on Substances that Deplete the Ozone Layer (entered into force 1 January 1989) 26 ILM 1541; Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (adopted 3 March 1973, entered in force 1 July 1975) 993 UNTS 243; UN Law of the Sea, various Food and Agriculture Organization codes related to fish stocks and other agreements and measures adopted by the United States. Scott Vaughan, 'USMCA Versus NAFTA on the Environment' (*International Institute for Sustainable Development*, 3 October 2018) <https://www.iisd.org/articles/usmca-nafta-environment> accessed 10 January 2021

[247] David A. Gantz and Sergio Puig, 'The Scorecard of the USMCA Protocol of Amendment' (*EJIL talk*, 23 December 2019) <https://www.ejiltalk.org/the-scorecard-of-the-usmca-protocol-of-amendment/> accessed 28 April 2022.

[248] José-Antonio Monteiro, 'Buena Vista: Social Corporate Responsibility Provisions in Regional Trade Agreements' (2021) WTO Staff Working Paper No.ERSD-2021-11 <https://www.econstor.eu/bitstream/10419/232954/1/1753158680.pdf> accessed 5 December 2022.

powerful counterpart will result into higher costs than benefits.[249] It is also empirically proven that diffusion of sustainability standards continues even *ex post*, i.e. after ratification of a treaty, albeit at a lesser extent.[250]

Notwithstanding the understanding for the need to provide coherence and convergence between the interests of investors and the public in investment law, and in spite of the grand steps towards that direction, a complete shift of paradigm has not yet materialised. Some even speak about a period of 'new obscurity' (*neue Unübersichtlichkeit*).[251] To a large extent, these novelties are deemed more symbolic than substantial, and the current regime of IIL is believed to continue to offer an inadequate context for the protection of host states' public interests.[252] That said, 'some' space has been definitely carved out for public policy to be taken into account in investment disputes.[253] The delineations of such considerations however are still not clear and important open questions relating to ISDS' impingement upon the states' regulatory space are lingering. These are of course matters which are inextricably linked with investment arbitration's nature itself, the consistency and clarity it provides.

There are various problematic elements in the picture, which may result into illegitimate and yet lawful avoidance of obligations of investors to the public interests[254] such as the practice of 'treaty shopping' and corporate structuring[255] as

[249] Francesca Martines, EU Political Conditionality as a Tool for the Promotion and Protection of Non-Trade Values in Non-EU Countries' in Samantha Velluti (ed), *The Role of the EU in the Promotion of Human Rights and International Labour Standards in its External Trade Relations* (Springer 2020) 98.
[250] Clara Brandi, Dominique Blümer and Jean-Frédéric Morin, 'When Do International Treaties Matter for Domestic Environmental Legislation?' (2019) 4 Global Environmental Politics 14; Ida Bastiaens and Evgeny Postnikov, 'Greening Up: The Effects of Environmental Standards in EU and US' (2017) 26 Trade Agreements Environmental Politics 847.
[251] Steffen Hindelang and Markus Krajewski (eds), Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified (OUP 2016) 378.
[252] Qiang Ren, Public Interests in International Investment Law: Balancing Protection for Investor and Environment (Cambridge Scholars Publishing 2018).
[253] J.*Viñuales* (n 7) 292
[254] Jorun Baumgartner, Treaty Shopping in International Investment Law (OUP 2016) 10.
[255] Bianca Böhme, 'Recent Efforts to Curb Investment Treaty Shopping: How Effective Are They? (2021) 38 Journal of International Arbitration 511.

well as other 'obscure' methods such as 'round-tripping'.[256] But these are only expressions of the problem and not its essence and reason.

It all boils down to effective implementation and interpretation.

The irrefutable interplay and impact of FDI on fundamental public interests, such as human rights and the environment, which also leads to a wider political and economic impact of arbitral decisions, did not influence arbitrators at first. Their long-preferred formula in the earlier days of international investment law's encounters with international human rights law and sustainable development has been to merely ignore their relevance for the purpose of the application of investment law.[257] Giving right to their imperialist roots, international norms of foreign investment and IIAs were back in the days intrinsically estranged to any non-investment principle.

ISDS has escaped from developing a comprehensive balanced approach on the matter and the aforementioned interlinks were only sporadically addressed.[258] In the ambit of international trade, the WTO Appellate Body had long considered 'mutual supportiveness' of trade and environment as an underlying principle of interpretation, and refuses to separate the rules of GATT from other rules of interpretation in public international law, by stating that 'the General Agreement is not to be read in clinical isolation from public international law'.[259] As recalled in the widely quoted 1998 *US-Shrimp Dispute* '[t]he preamble of the WTO Agreement -

---

[256] '*Round-tripping* exists when an investor national of the host State owns or controls a corporate entity incorporated in another country that has concluded an IIA with the host State', J.Baumgartner (n 255) 102.
[257] Attila Tanzi, International Law and Foreign Investment in Hydroelectric Industry: a Multidimensional Analysis' in Eric De Brabandere and Tarcisio Gazzini (eds), *Foreign Investment in the Energy Sector Balancing Private and Public Interests* (Brill 2014) 72.
[258] Fabrizio Marrella, 'On the Changing Structure of International Investment Law: The Human Right to Water and ICSID Arbitration, International Community Law Review (2010) 12 335
[259] WTO Appellate Body, Standards for Reformulated and Conventional Gasoline (29 April 1996) WT/DS2/AB/R, 17; ILC, Report of the International Law Commission on the Work of its 72nd Session (26 April–4 June and 5 July–6 August 2021) UN Doc A/76/10, para 47.

which informs not only the GATT 1994, but also the other covered agreements - explicitly acknowledges "the objective of sustainable development"'.[260]

Still, the nexus and the rest of the aforementioned developments, dictated that investment disputes automatically regard fundamental issues of public interest to which tribunals would be bound to refer to inevitably.[261] Investment disputes which are intrinsically connected to issues of public interest, given the wider political and economic impact of arbitral decisions, not only allude inevitably to fundamental issues of public interest, but can also have an important impact on host states' legal and political orders. In that sense national law is central to arbitration, not only as an enabler of arbitration, but in a much wider perspective.[262]

Henceforth, tribunals have been, maybe slowly but steadily, embracing the intrinsic connection of investment disputes to issues of public interest for about three decades. The times when arbitral tribunals would disregard such values are long gone. Nowadays, regard to environmental protection and sustainable development in investment and development is been considered as customary or general international law.[263] For example, in the 2005 *Iron Rhine Railway* arbitration, the tribunal was of the opinion that emerging principles within the field of environmental law like sustainable development have contributed to the development of customary and general international law. The tribunal further noted that integration of such concepts into the development process renders '[e]nvironmental law and the law on

[260] WTO, United States: Import Prohibition of Certain Shrimp and Shrimp Products - Report of the Appellate Body (6 November 1998) WT/DS58/AB/R, para 131.
[261] ibid
[262] Tony Cole, Ilias Bantekas, Federico Ferrett Christine Riefa, Barbara Alicja Warwas, Pietro Ortolani, 'Legal Instruments and Practice of Arbitration in the EU' (2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2637305>.
[263] 'There is no doubt that States are required under contemporary customary international law to take environmental protection into consideration when planning and developing projects that may cause injury to a bordering State. Since the time of *Trail Smelter*, a series of international conventions, declarations and judicial and arbitral decisions have addressed the need to manage natural resources in a sustainable manner. In particular, the International Court of Justice expounded upon the principle of 'sustainable development' in *Gabcikovo-Nagymaros* referring to the "need to reconcile economic development with protection of the environment'. *Indus Waters Kishenganga Arbitration (Pakistan v. India)* PCA Case No. 2011-01 (Partial Award, 2013), para 449.

development [to] stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate such harm' and 'this duty (…) has now become a principle of general international law'.[264] Moreover, increasingly ISDS awards emphasise that investment treaties 'cannot be read and interpreted in isolation from public international law'.[265] This is why we will not engage here into a discussion about whether ISDS tribunals consider the symmetry between the investors' private interests and the public interests of the host state from the outset. The questions we will address is how, under what rules and with what actual consequences, especially given the large potential of ISDS decisions to impact host states' legal and political orders due to the profound connection of investments with matters of public policy arbitration panels reason their awards especially regarding states' regulation.[266]

1.2.1 Arbitration and arbitrariness

In international investment law, a host state basically binds itself by a contract with a private party from another country that the private entity may invest in a certain domain in the host state's territory. As such, the host state takes upon certain obligations towards the said investor that it has to abide by. Otherwise, it may have to bear consequences under private law. This is not a peculiar proposition; the general principles governing expropriation in most legal systems are a good example. If the State seizes private property it needs to do so for a legitimate reason and with adequate compensation; or for instance, if I buy land along the Greek coastline in order to construct my house and at the time of purchase the law allowed me to build on that plot, but later on, a new law forbids the construction in order to protect the

[264] Award in the Arbitration regarding the Iron Rhine Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, Decision of 24 May 2005 (2008) XXVII RIAA 35, paras 58-59.
[265] *Phoenix Action Ltd. v. the Czech Republic*, ICSID Case No. ARB/06/5, Award (2009), para 78; ILC, Report of the International Law Commission 72nd session (n 260), para 47.
[266] Guillermo Aguilar Alvarez and Michael Reisman, 'How well are investment awards reasoned?' in G.Aguilar Alvarez and W.M,Reisman (eds), *The Reasons Requirement in International Investment Arbitration. Critical Case Studies* (2008) 2.

natural surroundings, I would most probably have a justiciable case to claim damages for my loss. Of course, whether I would be eligible or not for compensation and if I would be compensated after all, would depend on various factors prescribed by legislation. That said, following general principles of law, the national constitution and Union law, it can be inferred from the available scattered hypothetical facts that I would be entitled to 'adequate' damages for my loss.

The protection of public interests -like in our example above, the natural environment- is a legitimate interest and a superior normative right, which involves not merely bilateral but universal obligations.[267] These may justify intervening with certain other rights, such as the peaceful enjoyment of one's possessions. But these restrictions need to be lawful, proportionate to the legitimate aim pursued, and strike a fair balance between the interests involved.[268] Having and enjoying private property is definitely a fundamental right which requires to be protected. In Europe for example, it is guaranteed by the first protocol of the European Convention on Human Rights (ECHR) and in Union law by article 17 of the Charter of Fundamental Rights (the Charter). That said, in most legal systems and situations, it can be legally to interfere in the protection of fundamental rights in order to protect other public interests. In the context of the ECHR for example, the ECtHR has repeatedly held that for restrictions on the right to the enjoyment of property to be allowed they must be in pursuit of a legitimate aim and in accordance with the law.[269] The relevant law must also be accessible and its effects foreseeable while at the same time 'there must be a reasonable relationship of proportionality between the means employed and the aim pursued', i.e. 'interference must achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the

[267] M.Sornarajah, *Resistance and Change* in the International Law on Foreign Investment(n 203) 316.
[268] *Pine Valley Developments Ltd and Others v. Ireland* App no 12742/87 (ECtHR, 29 November 1991), para 57; *Fredin v. Sweden* [1991] 13 EHRR 784, para 51; *Z.A.N.T.E. – Marathonisi A.E. v. Greece* App no 14216/03 (ECtHR, 6 December 2007) (in French only), para 50; *Brosset-Triboulet and Others v. France* App no 34078/02 (ECtHR [GC], 29 March 2010), paras 81, 86; *Depalle v. France* App no 34044/02 (ECtHR [GC], 29 March 2010), para 83; *Chapman v. UK* App no 27238/95 (ECtHR [GC], 18 January 2001), para 120; *Brosset-Triboulet and Others v. France* App no 34078/02 (ECtHR [GC], 29 March 2010), para 86.
[269] Manual on Human Rights and the Environment (Council of Europe, 2nd edn, 2012) <https://www.echr.coe.int/Documents/Pub_coe_Environment_2012_ENG.pdf> accessed 8 September 2022.

individual's fundamental rights'.[270] As the Court of Justice of the EU has also held, the right to property 'is not absolute and (…) its exercise may be subject to restrictions justified by objectives of general interest pursued by the European Union'. Restrictions to the right are allowed, provided that they genuinely meet the objectives of the general interest pursued and do not constitute a disproportionate and intolerable interference in relation to the aim pursued, thus impairing the very substance of the right guaranteed.[271] In addition, deprivation of one's possessions not only needs to be in the public interest, under the conditions provided for by law but also subject to fair compensation, which -as it flows from the Charter itself- is not required to be prescribed by any further secondary legislation and can be applied even if not explicitly imposed by it.[272] That said, the Court has also held that lack or a reduction of compensation to individuals partially deprived of their possessions if done to reach an objective of general interest, can under certain conditions be lawful, proportionate, and tolerable, not impairing the very substance of the right to property.[273]

With that in mind, many will agree with the premise that guaranteeing a certain level of protection of investors over the State's breach of contractual obligations adversely affecting an investment -even if done for legitimate grounds- is not a bad idea. And hardly anyone would disagree with the proposition that protection of investors over arbitrary action by the host state is a genuine purpose in the light of a reasonable fear, especially since there are past cases of host states' arbitrariness – for example in Cuba, Iran or Zimbabwe.[274]

'Arbitrary action' is a practice that is not allowed in any expression of power in democratic societies. It is also the tipping point in the equation between investors

[270] *Depalle v. France* App no 34044/02 (ECtHR [GC], 29 March 2010), para 83.
[271] Case C-238/20, *'Sātiņi-S' SIA* [2022] ECLI:EU:C:2022:57, paras 32-33.
[272] Joined cases C-78/16 and C-79/1 Giovanni Pesce and Others, and Cesare Serinelli and Others v Presidenza del Consiglio dei Ministri and others [2016] ECLI:EU:C:2016:428, paras 85-86.
[273] Case C-238/20 *'Sātiņi-S' SIA* (n 272), paras 34-37.
[274] ibid.

rights and public policy interests, since it concerns both parties: it is as crucial to avoid arbitrary government action which may adversely affect investments as it is necessary to impede arbitrary and uncontrolled investment practices which may harm overriding public interests such as human rights, the environment, and sustainable development as a whole. To use the widely accepted definition of arbitrariness in the ICJ's judgment in *ELSI,* '[A]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the ICJ in the Asylum case, when it spoke of 'arbitrary action' being 'substituted for the rule of law' […]. It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety'.[275] Democracies should assume obligations over fair treatment of any subjects of law, including investors. Prominent examples would be the freedom of establishment, which is one of the four EU fundamental freedoms, or WTO's protection of services.[276]. Protection however must be fair and above all respectful of the rule of law.

As mentioned in the previous section, many of the disputes between investors and the host states originate from measures taken by the latter that may potentially restrict the enjoyment of one's investment. Investors claim damages (compensation) either for outright direct expropriations or for suspected breaches of the states' obligations under the IIA in question. These claims may include alleged violations of the Fair and Equitable Treatment (FET), the minimum standard of treatment (MST), stabilization, non-discrimination and umbrella clauses or even purport that the states' restrictive measures amount to indirect expropriations, creating hurdles in rewarding, for example, environmentally friendly practices or/and penalizing investors not following such practices.[277]

[275] Case concerning *Elettronica Sicula S.P.A.* (ELSI) (*USA v Italy*) [1989] ICJ Rep 15, para 128.
[276] Armand de Mestral (ed), Second Thoughts: Investor State Arbitration between Developed Democracies (McGill-Queen's University Press 2017) 4.
[277] Makane Moïse Mbengue and Deepak Raju, 'Energy, Environment and Foreign Investment' in *De Brabandere* and *Gazzini* (eds), *Foreign Investment in the Energy Sector Balancing Private and Public Interests* (n 258) 177.

The problem with these clauses is that they lack unequivocal definitions;[278] hence they are open to extremely vast interpretations. Arbitral tribunals have established a number of criteria to determine the forbidden levels of interference with the right of ownership and with the enjoyment of an investment. Sometimes tribunals consider if the State operates within its police powers, if it restricts investors in good faith to promote the general welfare, or if a measure is discriminatory. The proportionality test is also increasingly employed[279] while tampering with the investors' reasonable expectations has been equally considered.[280] Henceforth, it has been rightly argued that the critique about the insufficient consideration of State interests by ISDS tribunals is often unfounded, not based on the substance and the merits of a case[281] since in most instances nowadays, arbitral tribunals accept the legitimacy of public interest justifications.

For example, in the *Santa Elena v Costa Rica*[282] arbitration -a case of direct expropriation- the tribunal accepted that it was justified on the grounds of environmental protection, which is a legitimate public interest. Although the panel clearly stated that this justification renders the expropriation legitimate, it also decided that it does not affect the right of the owners to be compensated. However, compensation was not at stake in that specific instance. The respondent State had *ab initio* decided to compensate the claimants. The apple of discord regarded the quantum/the amount of compensation and whether it would be with interest, simple or compound. Therefore, it is not accurate to argue that the tribunal disregarded the

[278] *Tecmed v Mexico* (n 195), para 114.
[279] See for example *Tecmed v Mexico* (n 195), paras 122 and 162, *Saluka v Czech Republic*, UNCITRAL (Partial Award, 17 March 2006) <https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf> accessed 8 March 2023, *Eco Oro Minerals Corp. v Colombia*, ICSID Case No.ARB/16/41 (Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021), paras 654-655 < https://www.italaw.com/sites/default/files/case-documents/italaw16212.pdf> accessed 8 March 2023
[280] For a comprehensive overview of the different criteria developed by ISDS tribunals see Katia Yannaca- Small, 'Indirect Expropriation and the Right to Regulate: Has the Line Been Drawn?' in K.Yannaca-Small (ed), *Arbitration under International Investment Agreements: a Guide to the Key Issues* (2nd edn, OUP 2018) 576-593.
[281] Giovanni Zarra, 'The relevance of State interests in Recent ICSID practice' (2016) 16 Italian Yearbook of International Law 487.
[282] Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1 (Award date, 17 February 2000).

public interest and the state's intent.[283] A way was found to resolve the relevant open questions regarding the quantum of the awarded compensation and the legal basis for its calculation to the benefit of the claimants. The sum of the final award deviated from both parties' claims; it was given neither with simple interest nor with full compound. That said, it was clearly a compensation with compound interest, to the benefit of the claimants. The solution thus was not exactly Solomonic,[284] but leaned more towards the claimant's demands.

It is not the place here to examine if the final sum awarded as a compensation for the disputed expropriation was actually fair, but it is important to examine if there was a reasonable legal basis supporting it. In its decision the arbitral tribunal argued that '[n]o uniform rule of law has emerged from the practice in international arbitration as regards the determination of whether compound or simple interest is appropriate in any given case' and added that 'the determination of interest is a product of the exercise of judgment, taking into account all of the circumstances of the case at hand and especially considerations of fairness which must form part of the law to be applied by [the] tribunal'. The 'fairness' element the tribunal considers regards solely the case when the owner of property lost the value of his asset and considers that 'the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest'. Additionally, the tribunal emphasizes that compound interest is not punitive but a mechanism to ensure that the awarded compensation is 'appropriate in the circumstances'. The tribunal finally concludes that '[i]n the instant case, an award of simple interest would not be justified' and therefore compound interest was necessary to ensure full compensation.[285]

[283] Azernoosh Bazrafkan and Alexia Herwig, Reinterpreting the Fair and Equitable Treatment Provision in International Investment Agreements as a New and more Legitimate Way to Manage Risks
[284] Kenneth I. Juster, 'The Santa Elena Case: Two Steps Forward, Three Steps Back (1999) 3 The American Review of International Arbitration (2016) 7(2) European Journal of Risk Regulation 439.
[285] Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica (n 283), paras 103 -105.

Based on the above, it is unsure whether the panel's determination of the award was based on a principled and systematic approach. It is noteworthy in that respect to quote the U.S. District Court of Columbia in the *McKesson v Iran* saga which deducted from the material evidence and relevant law that it was 'not persuaded that *Santa Elena'*s view of international law [over the award of compounded interest] is the correct one'. According to the first relevant decision by that U.S. court, 'international courts have over a period of decades followed the custom of granting only simple interest' and 'generally reject' the method of compound interest. Even though, there are very rare cases where compound interest has been found rightful by arbitral tribunals, 'in enforcing customary international law, the [U.S. District court] is constrained to follow the custom, not the rare exception'.[286] It is interesting that the U.S. Court in that instance did not apply compound interest although there were strong policy reasons to believe that this should have been ruled this time, to the benefit of the investor. In other words, the U.S. court could not decide arbitrarily only because it thought that in that case it could be some fairness in the application of compound interest. It rather abided by the rule of law. Such an approach by the U.S. court, automatically casts doubts about the rightness of the decision of the tribunal in *Santa Elena* and creates suspicions of arbitrariness.

The matter is even less clear when it comes to allegedly indirect expropriations. In the recent ICSID arbitration *Eco Oro Minerals Corp. v Colombia*,[287] the respondent host state prohibited mining in the *páramo* ecosystem in Santurbán, a concession area to the Canadian mining corporation Eco Oro. The claimant argued that this prohibition deprived it of its mining rights under the concession contract which was concluded under the Canada-Columbia FTA of 2011.[288] The claimant

[286] *McKesson Corp. v. Iran*, 116 F.Supp.2d 13 (D.D.C 2000), 41.
[287] Eco Oro Minerals Corp. v Republic of Colombia (n 280).
[288] Free Trade Agreement between Canada and the Republic of Colombia (signed on 21 November 2008, entered into force on 15 August 2011), *(Government of Canada) <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/background-contexte.aspx?lang=eng>.*

applied to arbitration for breach of Colombia's obligations under the Canada-Colombia FTA on the grounds of unlawful, creeping, and indirect expropriation of its investment as well as failure to accord Eco Oro's investment the minimum standard of treatment (MST). The tribunal recognised that the prohibition on mining was a legitimate manifestation of the State's power to legislate in the public interest. The tribunal was of the opinion that the challenged measures 'were motivated both by a genuine belief in the importance of protecting the *páramo* ecosystem and pursuant to Colombia's longstanding legal obligation to protect it (…) adopted in good faith, (…) non-discriminatory and designed and applied to protect the environment.'[289] Notwithstanding, it was also decided that despite the high threshold of the protection of the environment as an overriding principle, which dictated that Colombia should not have served Eco Oro's interests as per the concession contract in question unconditionally and above its constitutional obligation to protect the *páramo*, the respondent should have done so 'in parallel and in a coordinated manner with respect to the [concession contract to Eco Oro]'. Despite the recognition of Columbia's good faith and legitimate exercise of police powers, the tribunal also decided that 'viewed as a whole, (…) Colombia's approach to the delimitation of the Santurbán *Páramo* was one of arbitrary vacillation and inaction which inflicted damage on Eco Oro without serving any apparent legitimate purpose'.[290] It is rather questionable -if not utterly preposterous- for a legitimate measure, taken in good faith to be at the same time arbitrary and not serving a legitimate purpose. As Professor Sands points out in his partial dissenting opinion, the majority's conclusion is difficult to comprehend. At the heart of the majority opinion lies the view that the respondent acted in good faith. Therefore, even if the respondent did not act 'perfectly" in the *páramo* management, this does not mean that it crossed the line 'departing from the rule of law,' therefore acting arbitrarily. Even so, the majority takes evidence of this imperfect management as proof of it not being 'truly motivated by the aim of environmental protection. Still, this is how the tribunal's majority justified its decision: although the challenged

[289] *Eco Oro v Columbia* (n 280) para 699.
[290] *Eco Oro v Columbia* (n 280) para 821.

measures adopted by Colombia were a legitimate exercise of Colombia's police powers and therefore do not constitute indirect expropriation, Columbia was still liable for having violated the most favoured nation (MST) and fair and equitable (FET) standards.[291]

In addition to the absurdity in the majority's line of thinking, this decision is very instructive for another reason: it is based on a 'new generation' trade and investment agreement, which includes provisions on the protection of the state's right to regulate for the public interest such as the environment. It presents therefore a good opportunity to check how a tribunal treats and construes these provisions, and if they finally play any role in its decision.

Pursuant to Article 2201(3) of the Canada-Columbia FTA:

(3) For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investment or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

(a) To protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health;

(b) To ensure compliance with laws and regulations that are not inconsistent with this Agreement; or

(c) For the conservation of living or non-living exhaustible natural resources.

Firstly, according to the tribunal, nothing in this provision permits the adoption of legitimate restrictive measures without compensation of injured

[291] ibid.

investors. The tribunal bases its thinking on the fact that the FTA is equally supportive of environmental as well as investment protection, and that if the intention of the contracting parties was for a measure to be taken without any liability for compensation, this would have been drafted in the article explicitly, stating that taking such a measure would not give rise to any right to seek compensation. 'The Tribunal therefore construes Article 2201(3) in such way that whilst a State may adopt or enforce a measure pursuant to the stated objectives in Article 2201(3) without finding itself in breach of the FTA, this does not prevent an investor claiming under Chapter Eight that such a measure entitles it to compensation'.[292] The tribunal hence agrees with both contracting parties' positions, i.e. Colombia as the respondent[293] and Canada as a non-disputing party,[294] that Article 2201(3) provides for exceptions which operate as a "safety net." It does not see however the exceptions as a "safety net" which precludes violation of the FTA. Whereas the majority of the panel highlights that the host states are free to legislate to protect human, animal and plant life as well as natural resources as they think fit, provided that the adopted measures are non-discriminatory and non-arbitrary or disguised restrictions of trade and investment, it disagrees that this means there is no breach of the FTA, and therefore no liability to pay compensation is generated.[295] Two questions arise as per this construal:

(a) Since the majority found there was a violation of the FTA, why go into the exact interpretation and applicability of article 2201(3)?
(b) If the tribunal's interpretation is correct, what is the actual legal value and effect of article 2201(3)?

As per the first question, the interpretation of the said article is redundant; the majority's analysis can be said to constitute *obiter dictum* -to be clear, a quite

[292] ibid, para 830.
[293] ibid, paras 362 et seq.
[294] ibid, paras 373-378.
[295] ibid, para 378.

dangerous one- that may effectively nullify the meaning and value of such provisions in FTAs. In a nutshell, despite the existence of provisions safeguarding the policy space and the affirmations of the contracting parties over their significance, the tribunal found a leeway to interpret the agreement in such way so as to sanction the respondent for taking measures addressed to protect environment. This decision confirms therefore the doubts on the actual effectiveness of new generation IIAs, and accentuates the position that nothing has essentially changed and that these provisions are merely symbolic.

Regarding retroactive application of measures negatively affecting investments too, ISDS' position is not always the same: tribunals at times allow deviations from the principle of 'non-retroactivity' and at others they do not. Admittedly, non-retroactive application of laws is a well-established legal principle in accordance with national constitutions of many democracies around the globe. But it commonly concerns criminal law. In other areas -like general administrative, environmental, health and human rights' law- the story is not so straightforward. In those fields most jurisdictions uphold the lawfulness of retroactivity, at least at some level. In the EU legal order, proportionality, necessity, and foreseeability are all present in judicial reasoning to legitimize retroactive effect of anti-dumping duties, environmental levies, energy taxes or even the 'almost punitive' removal of subsidies for renewable energy sources.[296] In accordance with the principle of proportionality the Court of Justice of the EU has applied a 'cost-benefit' analysis to establish if the benefits of retroactivity for the general interest outweigh its costs.[297] Or else, as the Court has underlined ever since the 1980s, in situations where the investor may reasonably foresee the legislative change, there can be an exception for a lawful retroactive application.[298] ISDS tribunals sometimes do not allow deviations at all,

[296] Y.Kryvoi and S.Matos, 'Non-Retroactivity as a General Principle of Law' (2021) 17 Utrecht Law Review 46..
[297] ibid.
[298] See for example Case C-258/80, Metallurgica Rumi v Commission [1981] ECR-251 paras 11-12, joined cases C-798/18 and C-799/18, Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others and Athesia Energy Srl and Others v Ministero dello Sviluppo Economico and Gestore dei servizi energetici (GSE) SpA

merely characterizing it as a 'well established legal principle' as for example in the *RREEF Infrastructure v Spain* arbitration.[299]

That said, acceptance of retroactivity is not absent from ISDS awards. Despite a preference for respecting the principle in light of the requirement to interpret each agreement as per the principle of systemic integration embodied by Articles 31(3)(c) and 36 of the Vienna Convention on the Law of Treaties (VCLT) as well as Article 38 ICJ Statute, retroactive application of laws posterior to the said investment treaty should not be treated as strictly prohibited. As reiterated in the partial dissenting opinion of Professor Philippe Sands in the *Eco Oro* decision and in final award at the *Cairn Energy* arbitration[300], retroactive measures can be permissible if taken for the public interest and in accordance with the principle of proportionality.[301] Besides, any businessman or investor anticipates laws to evolve over time. Such was the approach in *Parkenings v. Lithunia* where the tribunal specified that investors should expect legislative and regulatory changes to affect their investments, and must exercise due diligence and structure their investments to ensure that they can adapt thereof.[302] '[W]hat is prohibited however is for a state to act unfairly, unreasonably or inequitably in the exercise of its legislative power';[303] or, as underlined in *Saluka*, 'A foreign investor protected by the [investment treaty] may in any case properly expect that the [host country] implements its policies *bona fide* by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency,

[299] Yarik Kryvoi and Shaun Matos (n 297).
[300] 'The Claimants rightly concede that a "**recognized justification for retroactive tax measures is the need to combat tax abuses**." Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India, PCA Case No.2016-7 (Award date, 21 December 2020) para 1812 (*emphasis added*) < https://jusmundi.com/fr/document/decision/en-cairn-energy-plc-and-cairn-uk-holdings-limited-v-the-republic-of-india-final-award-wednesday-23rd-december-2020> accessed 3 March 2023
In Cain Energy see also the analysis on the distintion between retroactivity and retrospectivity in paras 1068 - 1092
[301] *Eco Oro v Colombia* (n 280), Partial Dissent of Professor Philippe Sands QC, para 39 and decisions cited <https://jusmundi.com/en/document/opinion/en-eco-oro-minerals-corp-v-republic-of-colombia-partial-dissent-by-arbitrator-philippe-sands-thursday-9th-september-2021> accessed 8 March 2023.
[302] *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8 (Date of Award, 2007), para 333
[303] ibid, paras 332,337.

transparency, even-handedness and non-discrimination'.[304] That said, even when tribunals allow retroactive application of laws, the result is not always in favour of the respondent. In the above-cited arbitrations with comparable facts for example, results differ: in *Parkenings* all claims were dismissed on the merits whereas in *Saluka*, although the respondent's actions were not deemed to be tantamount to indirect expropriations, the tribunal decided there was a breach of the FET standard.

Stabilisation clauses can be also very problematic. The example of the *Texaco* arbitration in 1977 relating to the oil company's investment in Libya is often quoted to portray the problem. In that situation Texaco's contract with Libya contained a stabilisation clause which precluded Libya from altering the investor's rights created therein. After Colonel Qadhafií came into power, Libya nationalised Texaco's property in the period 1973-1974. Although this arbitration regarded a very specific situation -that of nationalizing property after the rise into power of a non-democratic regime which is now obsolete- it is still useful to show that stabilisation terms are treated by arbitrators as entrenchment clauses. In *Texaco* it was concluded that an earlier Libyan government may validly undertake obligations that bind future governments in the long run, limiting in a way the State's sovereign powers and freedoms.[305] In that context, stabilisation clauses are inherently problematic since they may result into host countries constraining themselves to amend legislation which will negatively affect covered investors.[306] It has even been argued that such clauses would for that reason probably be unconstitutional in many democracies.[307] That said, their polemic must be treated with caution; they are not an outright aggregate prohibition of legislation or of State sovereignty. They often have different nuances, ranging from freezing any legislative change that may affect the investment to clauses subjecting the State to extra compensation if posterior legislation severely affects adversely the

[304] Saluka Investment BV v. Czech Republic (n 280), para 307.
[305] Gus van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims against the State (2007) 56 International and Comparative Corporate Law Quarterly 371.
[306] J.Brown, 'International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?' (2013) 3 Western Journal of Legal Studies 1.
[307] H.Mann (n181)

investment. Even in *Texaco*, it was not found that the relevant clauses had the power to affect the legislative and regulatory sovereignty of Libya. Rather that Libya as a sovereign country had within the context of its sovereignty the right to undertake international contractual obligations entrenching its commitment not to nationalise the conceded property, and it could not disregard these obligations.[308] As also held by the Court of Justice of the EU, a contracting state cannot modify the terms of the signed contract by legislation, and deprive that contract of legal effects. Legislation declaring contracts on concessions, privileged access and so on void and/or null would be tantamount to indirect expropriations of investors' rights.[309]

Finally, legitimate expectations of investors play a very central role in adjudicatory interpretation; often tribunals claim that stabilisation clauses or/and the FET standard create legitimate expectations to investors and hence render FDI practically resistant to regulatory changes. Investors are deemed to be protected at some level if the law is unforeseeably or unreasonably changed to their detriment, ergo state liability is generated. As the tribunal decided in *Tecmed*: '[B]asic expectations [are taken] into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations […]'.[310]

To conclude, undoubtedly ISDS practice respects to some degree the trend in international law to allow policy space for justified state action. Arbitral panels are taking public policy considerations into account. Moreover, only in a handful of cases

[308] Texaco Overseas Petroleum Company v The Government of the Libyan Arab Republic (1978) ILM 1 et seq.
[309] Case C-264/09 *European Commission v Slovak Republic* [2011] ECLI:EU:C:2011:580, para 50.
[310] Tecmed v Mexico (n 195) and Saluka Investments BV v The Czech Republic (n 280), para 154.

tribunals found that indirect expropriation had actually taken place. That said, arbitral tribunals are still providing expansive interpretations and claimants win their cases, if not on the basis of existing indirect expropriations, at least on the basis of violations of other clauses such as the fair and equitable treatment standard, which has a lower threshold.[311] Moreover, considering or not the public interest, it seems that ISDS tribunals find a way to give right to the claimant. The overall result of this practice is the aforementioned bias in favour of the investor, perpetuating unsustainable practices. There is various proof that FDI, especially in developing countries promotes the unsustainable use of resources and a certain 'social dumping', turning developing countries into supply depots.[312]

The gist of the problem persists: exact delineations between the state's normal use of regulatory power and the breach of investors' reasonable expectations as to the economic performance of the investment, as well as the interference with the right of ownership and the aim/context of the State measures in question are yet to be defined.[313] This means that the question about the 'state's right to regulate' as opposed to its contractual obligations towards investors under IIAs continues to be one of the most awkward and bewildering open questions regarding IIL and ISDS, with effective implications over the scope of the states' available policy space in areas which could affect investors' rights.[314]

Clearly, arbitral awards cannot compel governments to amend or overturn legislation, as has been misleadingly argued.[315] However, a 'chilling effect' on regulation may be generated for legislation which could be deemed against investors'

---

[311] Katia Yannaca-Small, 'Indirect expropriation and the right to regulate. Has the Line Been Drawn?' in K.Yannaca-Small (ed), *Arbitration under International Investment Agreements: a Guide to the Key Issues* (2nd edn, OUP 2018) 592-593.
[312] Michael A. Long, Paul B. Stretesky, Michale J. Lynch, 'Foreign Direct Investment, Ecological Withdrawals, and Natural-Resource-Dependent Economies' (2017) 10 Society & Natural Resources 1261.
[313] Case C-284/16 *Slovak Republic v Achmea* (n 195), paras 220-223.
[314] Policy space refers to how international agreements affect the flexibility of municipal governments to enact domestic measures.
[315] Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7 Transnational Environmental Law 229.

interests. Even this can sound as a hyperbole since there is no such thing -and there could not be- as a *de jure* requirement for governments to overturn their laws should they breach an IIA condition; it is nonetheless a *de facto* outcome mainly induced by the significant financial costs of arbitration itself and the frequently immense scale of potential awards, driving governments to settle in order to avoid litigation.[316] UNCITRAL has confirmed that developing states are particularly affected by the high cost of proceedings, often leading to the risk of regulatory chill.[317] Even in developed states though, taking the old NAFTA as a 'bar setter', it has been manifested that many of NAFTA's dispute settlement provisions allowed firms to challenge environmental regulations. Under NAFTA, domestic environmental laws should not discriminate against trade. Relying on Chapter 11.B (rules for investor protection), governments have been repeatedly obliged to compensate investors due to their regulations which were found to indirectly expropriate their properties. Thus, reportedly fearing such consequences, states refrained from imposing tough environmental regulations[318] or even resorting to dubious techniques, such as disguised treaty amendments in the form of "fake" authentic interpretations departing from the spirit of articles 31 to 33 VCLT.[319]

1.2.2 Questions of impartiality and independence of arbitrators in ISDS

'Caesar's wife must be above suspicion.' Binding appeal to private arbitration to seek redress for damages in case of an alleged breach of the relevant IIA by the host state holds a special place in this discussion since it largely reflects the 'inequality'

[316]Benjamin Hawkins and Chris Holden, 'A Corporate Veto on Health Policy? Global Constitutionalism and Investor-State Dispute Settlement' (2016) 41 Journal of Health Politics, Policy and Law 969.
[317] Yarik Kryvoi, 'Three Dimensions of Inequality in International Investment Law' (BIICL 2020) <https://www.biicl.org/documents/117_tackling-inequalities-international-investment_law.pdf> accessed 28 April 2022.
[318] Stephen P. Mumme, 'NAFTA and Environment: The North American Free Trade Agreement's Impact on the Trinational Environment Remains Controversial' (*Foreign Policy in Focus,* 1 October 1999) <https://fpif.org/nafta_and_environment/> accessed 28 April 2022.
[319] Tarcision Gazzini, 'Authentic (or Authoritative) Interpretation of Investment Treaties by the Treaty Parties' (*EJIL: Talk!*, 17 August 2020) <https://www.ejiltalk.org/authentic-or-authoritative-interpretation-of-investment-treaties-by-the-treaty-parties/> accessed 8 March 2023.

and colonial legacy of international investment law and is largely considered the root of all evil. This alternative 'form of recourse' which 'deviates from the traditional avenue (…) of diplomatic protection from [the] home state to address wrongs committed by the host state',[320] primarily means that 'states and corporations occupy very different positions within the dispute resolution regime'.[321] A glimpse back in history is once again quite informative: initially, arbitration was included in investment agreements only between developed and developing countries to offer foreign investors a venue of 'private courts' against developing host countries. It started concerning developed countries too only after its (controversial) inclusion in the 1993 NAFTA.[322]

Investors most often dislike bringing a case before municipal courts due to suspected delays in case adjudication,[323] publicity, and alleged fears of politicization and subjectivity.[324] Thanks to the common ISDS exclusivity clause they can avoid national courts and solve disputes in arbitral tribunals.[325] On top of that, it has been also argued that at least in some countries, judges would be prone to bias, favouring the respondent state, in an attempt to relieve the latter from potential financial burden.[326] Some also claim that national courts of developing countries (especially) suffer from corruption and/or subjectivity. That said, many -if not most of-

[320] Rachim Moloo and Alex Khachaturian, 'The Compliance with the Law Requirement in International Investment Law' (2011) 34 Fordham International Law Journal 1473.
[321] B.Hawkins and C.Holden, (n 317).
[322] Armand de Mestral (ed.) (n 277) 3.
[323] Hallward-Driemeier (n 191).
[324] Stephan W. Schill, 'Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward' (*The E15 Initiative,* July 2015 <https://e15initiative.org/publications/reforming-investor-state-dispute-settlement-isds-conceptual-framework-and-options-for-the-way-forward/> accessed 12 October 2020.
[325] The scope of ISDS jurisdiction is not absolute; it is however quite wide. It involves personal jurisdiction (*ratione personae*), territorial jurisdiction (*ratione loci*), temporal jurisdiction (*ratione temporis*) and subject-matter jurisdiction (*ratione materiae*). The latter is often limited to disputes 'arising directly out of an investment' under ICISD or even wider, dependent only on the agreement of the parties, under UNCTAD. Zia Ullah Ranjah, Andrew Willcocks, 'Jurisdiction of Arbitral Tribunals' (*Jus Mundi*, 25 January 2022) <https://jusmundi.com/en/document/wiki/en-jurisdiction-of-arbitral-tribunals> accessed 18 January 2021
[326] Nicolas Angelet, 'CETA and the Debate on the Reform of the Investment Regime' in Makane Moïse Mbengue and Stefanie Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer 2019) 7.

developing countries nowadays work hard and possess sophisticated judicial systems.[327]

Setting aside the outdated concepts and oxymora in these seemingly 'noble' motives for recourse to private arbitral tribunals, it has extensively been argued in literature that the ISDS regime is preferred by investors for less 'honest' causes, which are epitomized to the idea that arbitral tribunals apply increased bias towards a business-friendly agenda.[328] Indeed, in an era where IIAs are also concluded between countries on equivalent footing, one may wonder why investors insist on ISDS.

One of the main suspected reasons is that in these fora of private adjudication, as analysed in the previous section, investment protection usually prevails over policy considerations, and tribunals apply their own contentious hierarchy of norms.[329] Take for instance the *Eco Oro* arbitration, already examined: the majority of the panel decided upon the respondent's liability in an absurd line of thinking, whereby on the one hand the respondent had restricted the claimant's investment in good faith, over a legitimate policy objective and in a non-discriminatory manner, and on the other hand the respondent was liable because its action was arbitrary and therefore violated the MST standards protected by the challenged investment agreement.

Others argue -albeit less- that states also tend to prefer recourse to arbitration instead of national courts: host states wish to avoid national jurisdictions of the home or any other third state[330] and home states want to avoid escalation of interstate conflicts with the host state should they take on claims of investors of their

[327] Yarik Kryvoi, 'Three Dimensions of Inequality in International Investment Law' (n 318)
[328] Howard Mann, *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights*, (International Institute for Sustainable Development and World Wildlife Fund 2001) <https://www.iisd.org/system/files/publications/trade_citizensguide.pdf> accessed 20 September 2022
[329] J.Viñuales, 'Sustainable Development' (n 91) 280.
[330] Philippe Sands, Jacqueline Peel, Adriana Fabra, and Ruth MacKenzie, *Principles of International Environmental Law* (4th edn, CUP 2018) 904.

nationality.[331] Notwithstanding, after having conducted a series of informal interviews with government officials involved in investment and commercial arbitrations, I seriously doubt the accuracy of that conclusion. Personally, as proven also in the above section, I tend to agree with the opinion that overall ISDS constitutes a favourable venue predominantly for investors' interests[332] and hence preferred by them.

The problems of the current investment law regime and ISDS stem from the inherent nature of arbitration's structure itself. A fabrication of private international law and a sort of alternative/private venue for dispute resolution, investment arbitration is bereft of all the guarantees of public independent judiciaries due to its 'hybrid' nature.[333] There is no assurance of the impartiality of arbitrators,[334] their code of conduct lies most often upon voluntary private rules such as the International Bar Association's (IBA) guidelines,[335] and hearings are not public. Arbitrators are appointed and remunerated on an *ad hoc* basis by the parties. Lack of transparency, public supervision and -to a large extent- of judicial review, as well as astronomical costs that are difficult to be supported by governments with scarce resources are some of the most prevailing issues regarding ISDS.[336]

It would be interesting to juxtapose the main features of arbitral tribunals with the requirements under soft law instruments on the moral obligations and code of conduct of the judiciary, such as the Council of Europe's European Charter on the

[331] Armand de Mestral (ed) (n 277) 4.
[332] B.Hawkins and C.Holden (n 317).
[333] Tarcisio Gazzini, 'Authentic (or Authoritative) Interpretation of Investment Treaties by the Treaty Parties' (*EJIL Talk,* 17 August 2020) <https://www.ejiltalk.org/authentic-or-authoritative-interpretation-of-investment-treaties-by-the-treaty-parties/> accessed 9 December 2021
[334] For instance, the vast majority of legal professionals appointed as arbitrators are nationals or practitioners of Western European or North American countries, whereas the largest share of respondents in cases administered by the ICSID comprises of states from Eastern Europe, Central Asia and South America. See ibid;. Y.Kryvoi 'Three Dimensions of Inequality in International Investment Law' (n 318).
[335] IBA, 'Practice Rules and Guidelines: Alternative Dispute Resolution' (*IBA)* <https://www.ibanet.org/resources> accessed 28 April 2022.
[336] Y.Kryvoi 'Three Dimensions of Inequality in International Investment Law' (n 318).

statute for judges (hereinafter 'the Statute')[337] and further opinions in that framework, such as the Council of Europe Recommendation the Independence, efficiency and role of judges.[338] With Article 6 of the ECHR as a contextual pillar, the Statute attaches considerable importance on judicial independence as *sine qua non* prerequisite for the rule of law and a fundamental guarantee of a fair trial. As further analysed, judicial independence presupposes total impartiality; it should be free from any inclination to bias which may even remotely affect judges' ability to adjudicate independently.[339] The European Court of Human Rights has repeatedly held that independence and objective impartiality are two sides of the same token and therefore need to be examined jointly.[340]

This is a strictly construed prerequisite which goes further the possible affiliation of a judge with a specific dispute, but concerns society as a whole. According to the case-law of the European Court of Human Rights, the key point to decide over the lack of impartiality of a particular body is not the fear of the concerned parties but the objective consideration of the neutral third party. This covers any link between the adjudicator and protagonists in the proceedings. As held, 'justice must not only be done, it must also be seen to be done'.[341] 'What is at stake is the confidence which the courts in a democratic society must inspire'.[342] Judges must therefore not only be reasonable observers of the society, but also be perceived as such by it.

---

[337] Council of Europe, European Charter on the Statute for Judges and Explanatory Memorandum (1998) DAJ/DOC (98) 23 < https://rm.coe.int/090000168092934f> accessed 5 September 2022

[338] Council of Europe, 'Opinion of the Consultative Council of European Judges (CCEJ) on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges (Recommendation No. R (94) 12 on the Independence, Efficiency and Role of Judges and the Relevance of its Standards and any other International standards to the current Problems in these fields) (23 November 2001) CCJE (2001) OP N°1 <https://www.legal-tools.org/doc/ca5224/pdf/> accessed 9 September 2022. Other international soft-law instruments on the judicial code of judges are: the Magna Carta of Judges, (<https://www.coe.int/en/web/ccje/magna-carta> accessed 3 March 2023), the Judges Charter in Europe (<https://rm.coe.int/16807473ef> accessed 3 March 2023), and the Venice Commission's Recommendations (<https://www.venice.coe.int/webforms/events/> accessed 3 March 2023), all three under the auspices of the Council of Europe, as well as the Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia under the auspices of the OSCE (<https://www.osce.org/odihr/KyivRec> accessed 3 March 2023).

[339] CCJE (2001) OP N°1.

[340] *Case Findlay v the United Kingdom* App no 22107/93 (ECtHR, 25 February 1997), para 73.

[341] De Cubber v Belgium [1984] ECHR 14, para 26.

[342] *Ramos Nunas de Carvalho e Sa v Portugal* App nos 55391/13, 57728/13 and 74041/13 (ECtHR, 6 Nivember 2018), para 149.

The Court of Justice of the EU has also repeatedly held that the requirement for the courts' independence, which is external in nature and means that the exercise of adjudication is protected against external interventions or pressure that may impair the independent judgment of adjudicators and influence decisions, requires that the judiciary works wholly autonomously, without taking orders or instructions from any source whatsoever. Moreover, the internal component of independence, viz impartiality, seeks to ensure that judges shall hold equal distance from the parties of any dispute and their respective interests, hence requiring objectivity and absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. Only by abiding by the rules which guarantee independence and impartiality, particularly as regards the composition of the adjudicative body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members can there be no reasonable doubt in the eyes of the subjects of the law about the imperviousness of that body to external factors and its neutrality with respect to the interests before it.[343]

Another important matter relates to the practical impossibility to appeal against arbitral awards. Arbitral awards are final and legally binding. They are rendered in first and last instance; the possibility for their review by courts is restricted only to procedural matters and cannot regard the merits of the case. Notwithstanding the fact that involvement of any domestic courts is completely ruled out in arbitral awards conducted under the ICSID convention where annulment applications can be addressed only to *ad hoc* committees within the ICSID system, in other instances review of awards by courts shall depend on the domestic law of the country whose law was applicable to each dispute (i.e. the seat of arbitration). Most of the times domestic legislation allows only for limited review, for example regarding the jurisdiction of the tribunals[344] and/or other procedural matters. Many countries have adopted Article 34 UNCITRAL Model Law for commercial arbitration as a basis

[343] Joined cases C-585/18, C-624/18C, and C-625/18, *K. v KRS* and *CP, DO v Sąd Najwyższy* [2019] ECLI:EU:C:2019:982, paras 120-125.
[344] Case C-741/19, *Republic of Moldova v Komstroy LLC* [2021] ECLI:EU:C:2021:655, para 57.

for review, according to which arbitral awards may be set aside by domestic courts for very limited and strictly defined grounds. Article 34 thereof, designed on the basis of Article V of the New York Arbitration Convention ('Convention on the Recognition and Enforcement of Foreign Arbitral Awards'), names as grounds for annulment lack of capacity of the parties, invalidity of the arbitration agreement, excess of jurisdiction, non-arbitrability and -last but not least- under Article 34(2)(b)(ii), conflict with the public policy of the defendant state.

As appealing as it may seem, the latter provision needs to be applied with extreme caution. Its applicability is subject to quite specific conditions. It first needs to be ascertained that the Model Law has an arbitration-friendly approach, necessary to make it work. The considerations of 'public policy' raised in Article 34(2)(b)(ii) cannot be enforced as a disguised tool for appeal to correct possible errors of law in circumstances that involve public policy issues. The reviewing court shall only consider if, based on the findings of law and fact decided in the award, there is any conflict between the award and public policy. As explained by the Court of Appeal of Singapore in *AJU* 'where an arbitral tribunal has jurisdiction to decide any issue of fact and/or law, it may decide the issue correctly or incorrectly. Unless its decision or decision-making process is tainted by fraud, breach of natural justice or any other vitiating factor, any errors made by an arbitral tribunal are not per se contrary to public policy'.[345] The UK Privy Council in its recent judgement in *Betanex,* referred by the Supreme Court of Mauritius, also interpreted the said provision as not meant 'to be used as a means of reviewing any decision of an arbitral tribunal in an award on an issue of interpretation of the contract or of legislative provisions where, in one of the alternative interpretations of the contract or the legislative provisions, the result was that the agreement was illegal. (…) The acceptance of this premise would involve a significant expansion of [said provision]. It would result in there being in effect an appeal on an issue of law one wherever one party had alleged illegality in the arbitration but the arbitral tribunal had rejected the contention, despite the clear

[345] *AJU v AJT* [2011] 4 SLR 739, para 66.

provisions of the [said legal] provisions'.[346] Equally, as the Australian implementing laws prescribe, the concept of 'public policy' is quite vague especially in common law jurisdictions. Therefore, it is advisable to specify that in the context of Article 34 thereof the term is intended to cover issues of procedural justice as well as substantive principles that embrace and are limited to instances of corruption, bribery, fraud, and breaches of natural justice.[347] To conclude, although recourse against an arbitral award is not impossible, it is nonetheless quite rare, and its ramifications are very different than those of an appeal. An annulment of an award shall usually lead to a retrial before another arbitral tribunal.[348]

The consistency and legitimacy of *ad hoc*/non-permanent arbitral tribunals has been also evaluated by the Court of Justice of the EU for a number of issues: (a) in terms of their qualification as courts or tribunals capable of referring preliminary questions to the Court under Article 267 TFEU, and especially for ISDS; (b) regarding their lawfulness for intra-EU disputes, and (c) concerning their lawfulness for disputes between the EU and EU investors and third parties. More specifically:

(a) In terms of their qualification as courts or tribunals within the meaning of Article 267 TFUE: For a court or a tribunal to qualify as such in order to be able to refer preliminary questions under Article 267 TFEU, it needs to fulfill certain criteria set by the Court, *inter alia* whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes* (adversary procedure), whether it applies rules of law and finally whether it is independent.[349] Failure to meet some of these criteria is the reason why several arbitral

[346] *Betamax Ltd v State Trading Corporation*, appeal from the Supreme Court of Mauritius [2021] UKPC 14 Privy Council Appeal No 0109 of 2019, para 47.
[347] Commonwealth Secretariat, *UNCITRAL Model Law on International Commercial Arbitration Explanatory Documentation prepared for Commonwealth Jurisdictions'* (Commonwealth Secretariat Publications 1991), para 8.06 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/model-law-arbitration-commonwealth.pdf> accessed 9 March 2023.
[348] The CJEU has given a different and more comprehensive/expansive interpretation of the public policy justification, which is analysed in the following chapter.
[349] See for example Case C-503/15 *Margarit Panicello v Pillar Hernández Martínez* [2017] EU:C:2017:126, para 27.

bodies have been excluded from referring preliminary questions to the CJEU. In the first judgement on the matter, *Nordsee*, the Court declined to respond to a preliminary reference coming from an arbitrator since the latter could not constitute a 'court or tribunal' within the meaning of Article 267 TFEU. Scholars who are critical of the Court's stance on this matter and who believe that preliminary references should be also open to typical commercial and investment arbitration tribunals, emphatically highlight that the Court does not exclude tribunals for grounds of suspected lack of independence.[350] Indeed, in *Nordseee* for example the Court restricted itself to the fact that arbitration was only an optional venue for the resolution of the said dispute and that the public authorities of the relevant member state (i.e. Germany) were not involved in the arbitration.[351] In fact the Court stayed mute on the matter of independence. That said, the million Euro question is whether the Court silently accepts that such arbitral tribunals are independent or whether it just avoids entering into such a discussion given that it resolves the matter through other -less controversial- unfulfilled criteria. Although in *Nordsee*, the applicant arbitrator argues in his submission that the referring tribunal falls into the definition of bodies which possess the fundamental characteristics of a court or tribunal within the meaning of article 267 TFEU (then Article 177 EEC Treaty), and that although, 'on account of the absence of agreement between the parties he was appointed by the Bremen Chamber of Commerce, which is independent of the parties', the Court does not pronounce itself on the matter at all. Interestingly, in the

[350] See indicatively, Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (3rd edn, OUP 2021) 66; Morten Broberg and Niels Fenger, 'Preliminary References to the European Court of Justice by Arbitration Tribunals' (2021) 38 Journal of International Arbitration 629; Paschalis Paschalidis, 'Arbitral Tribunals and Preliminary References to the EU Court of Justice' (2017) 4 Arbitration International 663. Jürgen Basedow, 'EU Law in International Arbitration: Referrals to the European Court of Justice' (2015) 32 Journal of International Arbitration 367.

[351] Case C-102/81 Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG [1982] ECLI:EU:C:1982:107

case of *Vaasen-Göbbels*, [352] the Court found that a permanent arbitration panel, established by law, with compulsory jurisdiction is considered a tribunal within the meaning of Article 267 TFUE. In addition to the above criteria, the Court also noted that appointment of the members is done by the competent minister who also lays down rules of procedure. Furthermore, the body is bound by rules of adversary procedure similar to those used by ordinary courts of law and is bound to apply rules of law, hinting to some elements of legitimacy and independence. In general, the Court excludes from preliminary references *ad hoc*-not permanent arbitral tribunals beyond *Nordsee*, as for example in *Denuit* (C-125/04) and *Eco Swiss* (C-126/97). Interestingly however, in all these instances the Court was called to rule upon the authority of arbitral tribunals to decide on disputes in horizontal situations, i.e. individual versus individual, which were deemed not compulsory since they were contract-based. None regarded vertical situations, i.e. ISDS.

(b) Lawfulness of intra-EU ISDS: The notorious *Achmea* ruling is the first and main authority stating that arbitration is not a viable choice for investment disputes between an EU investor and an EU host country, even if there is a BIT between the two relevant countries in place. Besides, the judgement has been the trigger for the termination of all intra-EU BITs.[353] The reason is that ISDS in this instance could be called to interpret EU law; since investment arbitration tribunals are not part of the EU judicial system, and as such, cannot even refer preliminary questions to the Court. In that context, likely application or interpretation of EU law by them would not only be dangerous but also unlawful. The EU which is a unique and autonomous legal system, stemming from the Treaties, is based on

[352] Case C-61/65 Vaasen (Göbbels) v Management of the of the Beambtenfonds voor het Mijnbedrijf [1966] ECLI:EU:C:1966:39

[353] Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union [2020] OJ L 169/1,

common values and principles. Safeguard of the autonomy and primacy of EU law as well as the respect of mutual trust and sincere cooperation between member states relies on the EU's judicial system which is designed to ensure consistency and uniformity in the interpretation and application of EU law as well as judicial protection of individuals under that law.[354] Consistently with Article 344 TFEU which clearly states that Member States may not submit disputes concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein, it follows that investment arbitral tribunals cannot ensure these protections and are therefore prohibited to hear and resolve intra-EU investment disputes.

(c) Lawfulness of extra-EU ISDS: Albeit bold declarations of public interest by advocacy groups regarding the meta-meaning of *Achmea* and ISDS' incompatibility with EU rules to a larger extent[355], when it comes to agreements between the EU and third countries, ISDS provided for in that context has been deemed lawful by the Court. Unlike arbitration mechanisms in intra-EU BITs, investment arbitration between the EU and third countries is 'not liable to remove disputes from the jurisdiction of the courts of the Member States or of the European Union'.[356] There is however a very important caveat in this consideration which needs to be unwaveringly underlined: for alternative adjudication mechanisms to be compatible with EU law, need also to respect the right of access to an independent tribunal as enshrined in Article 47 of the Charter, which is

[354] Case C-284/16 *Slovak Republic v Achmea BV* (n 195), paras 33-37 and Case C-741/19, *Republic of Moldova v Komstroy LLC* (n 346), paras 39-66.
[355] ClientEarth lawyer Laurens Ankersmit had stated for example that '[*Achmea*] marks the beginning of the end' of the ISDS system in Europe (…) ISDS is not only an unwelcome tool that allows multinational corporations to put pressure on public interest decision-making, it is also incompatible with EU law', reported in Niall Sargent, 'ECJ ruling may spell the end for 200 investment deals between EU Members' (*The Green News*, 7 March 2018) <https://greennews.ie/landmark-ecj-ruling-spell-end-200-investment-deals-eu-members/> accessed 6 January 2021.
[356] CJEU Opinion 2/15 (n 26), para 303.

binding on the EU. The Court therefore concludes on the legality and compatibility of ISDS with EU law in very specific contexts, namely the arbitration rules as laid down in the EU-Singapore Free Trade Agreement (ESFTA) and the ISDS mechanism under CETA. Both these instruments provide a much more coherent, transparent and structured framework than traditional ISDS, especially, as the Court highlights, 'with respect to the rules on the composition of that Tribunal and on dealing with those cases',[357] for example regarding the criteria for the appointment of members of the CETA tribunal under Articles 8.27(4) and 8.30 CETA which have significant analogies with the requirements for the appointment of judges of the General Court of the CJEU, as enshrined in Article 19(2) TEU and Article 254 TFEU. As such, members of the CETA Tribunal need to possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence with expertise in public international law and desirably also international trade and investment law. They shall be appointed by the CETA Joint Committee, be independent, not affiliated with any government, not take instructions from any organisation or government with regard to matters related to disputes, recuse themselves from any disputes that would create a conflict of interest, and finally comply with the IBA Guidelines on Conflicts of Interest in International Arbitration.[358] Finally, they shall quit any role they might have in any investment dispute proceeding. The requirements for the appointment of members of the General Court within the CJEU also include persons 'who possess the ability required for appointment to high judicial office in the member states', and who shall be also appointed 'by common accord of the governments of the member states'. Sure, it may be

[357] CJEU Opinion 1/17, Opinion of the Court (Full Court) of 30 April 2019 EU-Canada CET Agreement [2019] ECLI:EU:C:2019:341,para 194.

[358] (Adopted 23 October 2014, updated 10 August 2015) *(IBA)* <https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918 > accessed 9 March 2023.

argued that the independence threshold for judges of the General Court is even higher since they need not just to be independent, but also have independence 'beyond doubt.' What finally comes into play however, is that when the Court considers the legality of extra-EU arbitration, it does so for instruments with safeguards of independence and impartiality. In Opinion 1/17 on the lawfulness of CETA, the Court dedicates no less than 55 paragraphs to the compatibility of the said mechanism with the Charter. Any body created thereof – which is judicial in nature- needs to ensure that it will have the characteristics of an accessible and independent tribunal, even if this requirement concerns only one party to the agreement, i.e. the Union. The Court specifies as such that the CETA Tribunal guarantees the requirements of independence and impartiality. Equal distance from the parties to the proceedings and the absence of any vested interests are ensured by various provisions such as the random and varied composition of divisions as well as the abidance by the IBA Guidelines about impartiality and independence of the parties throughout the entire process.[359] The Court also considers the level of autonomy of the CETA adjudicators to freely decide, bereft of any influence or duress. Appointment, tenure, and remuneration that should be commensurate with the importance of adjudicators' duties, the Court finds, are secured by the CETA agreement.[360] Lastly, the Court has held that arbitral awards are not court judgements.[361]

There is some literature focusing on a tendency to apply the contentious maxim *in dubio mitius* which instructs treaty interpreters who have doubts about the meaning of a provision, to adopt the interpretation with the less demanding

[359] ibid, para 238.
[360] ibid, paras 223-231.
[361] Case C-700/20 London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain [2022] ECLI:EU:C:2022:488, para 78.

obligation.[362] This is being understood as a restrictive interpretation (especially for umbrella and MFN clauses) in deference to the sovereignty of states[363] and which results into an 'inherently discriminatory effect on investors'.[364] I personally find this a somehow parochial premise. It is based on a small fraction of arbitral awards only such as the widely cited *SGS v Pakistan*[365] or more recently, Kamal Hossain's quote in *Teinver v. Argentina* who argues that the maxim is a relevant consideration when interpreting a BIT.[366] I therefore disagree with the absolute veracity of this view since restrictive interpretation is denied in many other awards as obsolete and improper.[367] On the contrary, a rather 'vague' construal is applied which not only serves the investors' interests to the detriment of the states' but is also unintended by the masters of the treaties[368] and goes against the rules of interpretation under the VCLT. Investment treaties 'are exceptions to the customary rule of permanent sovereignty over national resources'.[369] As Sornarajah highlights 'the secure compliance mechanism provided through arbitration at the unilateral instance of the foreign investor (…) enabled pro-business arbitrators to articulate and shape the law under the treaties in a manner that would further entrench and expand neo-liberal principles in international investment law', [370] and 'arbitral activism' has prompted neoliberal objectives.[371] I tend to agree with the latter. At the same time, it is clear

---

[362] Johannes Hendrik Fahner, 'In Dubio Mitius: Advancing Clarity and Modesty in Treaty Interpretation' (2021) 32 European Journal of International Law 835.

[363] Christophe J. Larouer, 'In the Name of Sovereignty? The Battle Over *In Dubio Mitius* Inside and Outside the Courts' (2009) Cornell Law School Inter-University Graduate Student Conference Papers, Paper 22 <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1050&context=lps_clacp> accessed 8 September 2021.

[364] Markus Petsche, 'Restrictive Interpretation of Investment Treaties: A Critical Analysis of Arbitral Case Law' (2020) 37 Journal of International Arbitration 1.

[365] '[t]he appropriate interpretive approach [is] the prudential one summed up in the literature as *in dubio pars mitior est sequenda*, or more tersely, *in dubio mitius*.' *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 (Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003).

[366] Johannes Hendrik Fahner (n 364).

[367] See for instance the *Iron Rhine Arbitration* (n 265), para 27, where the tribunal considered that 'a too rigorous' application of the principle might be inconsistent with the purpose of a treaty and concluded that 'some authors note that the principle has not been relied upon in any recent jurisprudence of international courts and tribunals and that its contemporary relevance is to be doubted'.

[368] Trinh Hai Yen, The Interpretation of Investment Treaties (Brill 2014) 8.

[369] Georgios Dimitropoulos, 'National Sovereignty and International Investment Law: Sovereignty Reassertion and Prospects of Reform' (2020) 21 Journal of World Investment and Trade 71.

[370] Muthucumaraswamy Sornarajah, 'The Retreat of Neo-Liberalism in Investment Treaty Arbitration' in Catherine Rogers and Roger Alford (eds.) *Developments in Investment Arbitration* (OUP 2009).

[371] M.Sornarjah, *Resistance and Change* (n 203) 347

that both views are motivated and grounded on past awards; hence they are to some degree true. This brings us to an additional problem related to investment arbitration, legal uncertainty.

1.2.3 Legal 'saphêneia'[372] and consistency in International Investment Law

It has been portrayed in the previous section that interpretation holds a predominant position in international investment law.[373] IIAs are mostly short and "dry" documents,[374] filled with vaguely formulated provisions[375] open to interpretation. Hence, the bodies bestowed with the task of interpretation are very important. We have already analysed that definitions of what constitutes indirect expropriation, standards like the FET, MFN and MST, and even stabilization and umbrella clauses are most often characterized by Delphic ambiguity.[376] A certain level of vagueness of normative language is not necessarily a bad thing or to be more precise, it is inevitable; besides, a core function of the judicature in the application of the law in order to determine a legal outcome for each case, is to construe the content of the law.[377] That said, in most instances of national, regional and international law interpretation is bequeathed to courts of justice, which have to follow distinct rules for the interpretation of laws.

In international investment law interpretation is to a large extent not relied upon the judicature but on private bodies, i.e. ISDS tribunals. At this point we need to note that there is also the possibility for the so-called 'extra-arbitral joint interpretation' conducted by various government bodies which to some extent

---

[372] James H. Lesher, 'Saphêneia in Aristotle' (n 103).
[373] Kathryn Gordon and Joachim Pohl, 'Environmental Concerns in International Investment Agreements: A Survey' (2011) OECD Working Papers on International Investment 2011/1 <https://www.oecd.org/investment/investment-policy/WP-2011_1.pdf> accessed 28 April 2022.
[374] T.Hai Ye*n* (n 370) 9.
[375] Julia Brown, 'International Investment Agreements' (n 306).
[376] *Lemire v. Ukraine*, ICSID Case No. ARB/06/18 (Decision on Jurisdiction and Liability, 14 January 2010), para 246 referring to the FET clause as a rule of 'Delphic economy of language'.
[377] Scott Soames, 'Vagueness and the Law' in Andrei Marmor (ed.), *The Routledge Companion to Philosophy of Law* (Routledge 2012) 95.

provides assurances about impartiality and stability. Governments – contracting parties, as the 'masters of the treaties' not only may amend them, but they also hold the tool of authentic interpretation. At first glance, this option could be thought to bring upon comprehensive and long-term solutions to complex interpretational problems instead of *ad hoc* interpretation in specific disputes, thus applied only to singular cases,[378] and overall help to improve the accuracy and coherence of investment treaty interpretation. Yet, it entails an important risk: that of disguising amendments as interpretations.[379] On a similar footing, concerns have also been raised regarding (debatably) self-judging provisions in IIAs under which sovereign States hold the right to derogate from its commitments based on unilateral considerations,[380] including the invocation of necessity as defence for emergency measures, which otherwise would amount to expropriation.[381] Governments have attempted such an approach, likely deviating from the light of the VCLT and relevant case-law of the ICJ.[382]

Notwithstanding, the standard interpretational venues for IIAs are ISDS tribunals, which are called to give effect to IIAs' provisions in light of specific material facts and whose decisions are enforceable. Considering all the above, arbitral tribunals hold wide interpretative powers, which may have important *consequential* effects on domestic legal orders and national public policy.[383] It is noteworthy -as will be analysed in the third chapter- how the Court of Justice of the EU has invalidated

---

[378] Michael Ewing-Chow and Junianto James Losari, 'Which Is to Be the Master? Extra-Arbitral Interpretative Procedures for IIAs' in Jean E. Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill 2016) 101-102.

[379] Tarcisio Gazzini, 'Authentic (or Authoritative) Interpretation of Investment Treaties by the Treaty Parties' (n 335).

[380] Tarcisio Gazzini, 'Interpretation of (Allegedly) Self-judging Clauses in Bilateral Investment Treaties' in Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris (eds) *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhøff 2010) 239.

[381] For example, see CMS Gas Transmission Company v The Republic of Argentina, ICSID Case No. ARB/01/8 (Award, 12 May 2005), paras 349-352; *Sempra Energy International v The Argentine Republic*, ICSID Case No. ARB/02/16, para 366-368, Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9 (Award, 28 September 2007), paras 182-184

[382] T.Gazzini, 'Interpretation of (allegedly) self-judging clauses in Bilateral Investment Treaties',(n 335).

[383] See for example the analysis of *Junngam* on *Tokios Tokelés* decision on jurisdiction, *Tokios Tokelés v Ukraine*, ICSID Case No.ARB/02/18, IIC 258 (2004), paras 204-205.

arbitration clauses in disputes which may concern the application and interpretation of EU law, as this can call into question the principle of mutual trust between EU Member States, the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU as well as the preservation of the particular nature of EU law, having therefore an adverse effect on the autonomy of EU law enshrined, *inter alia*, in Article 344 TFEU.[384]

One of the main problems in this area relates to ISDS tribunals' lack of rules of interpretation which can be a source of legal uncertainty to the detriment of any party and utterly to the detriment of justice and the rule of law. As discussed in our introduction, legal certainty is a key component of the rule of law. It is also a notion which does not encompass only legal, but also adjudicatory predictability which largely depends on the rationality of adjudication.[385] As expressed by Habermas, legitimate expectations are guaranteed by the legal form as well as by rational procedures for making and applying the law.[386] Or, in the words of the CJEU '[it would] run counter to the principle of legal certainty to interpret differently two provisions worded in an essentially identical manner'.[387]

Scholars have strived over the years to identify some interpretative trends for investment tribunals -a *jurisprudence constante*- but the paradigm is that there is no consistent interpretation.[388] Tribunals have in theory or potentially[389] the duty to interpret IIAs according to Articles 31 and 32 of the VCLT. In practice however, they sometimes demonstrate a disturbing disregard for the VCLT by either not applying it or -more alarmingly- not even mentioning it at all.[390] In other instances, the

[384] Case C-109/20 *Republiken Polen v PL Holdings Sàrl* [2021] ECLI:EU:C:2021:875, para 46; Case C-284/16 (n 195), paras 58-59.
[385] Elina Paunio, *Legal Certainty in Multilingual EU Law* (Ashgate 2013) 51-52.
[386] ibid.
[387] C-401/99 *Thomsen v Amt für ländliche Räume Husum* [2002] ECR I-5775, para 35 quoted in J. Van Meerbeeck (n 106).
[388] Tienhaara for example has identified some trends. Kyla Tienhaara, The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy (CUP 2009).
[389] Michael Ewing-Chow and Junianto James Losari, 'Which Is to Be the Master?' (n 380) 101-102
[390] T.Hai Yen (n 370) 104.

inconsistent interpretation is one of the most common attacks against ISDS.[391] Outcomes of investment arbitrations are often blurry and awfully unpredictable.[392] The Spanish renewable energy saga involving about 40 claims[393] is quite illustrative. In quite similar claims, arbitral tribunals issued very dissimilar awards. Thus, in *Charanne*[394] the tribunal found that Spain's regulatory framework which used to give incentives for investments in photovoltaic panels did not create legitimate expectations to investors that these rules (i.e. incentives) would remain unchanged whereas in *NovEnergia,*[395] which regarded comparable but more stringent measures,[396] it was held that such expectations 'arise naturally from undertakings and assurances' offered by the state.[397] Quite similar is the picture with regards to the proportionality test and definition of 'reasonableness' of the Spanish amendments. In addition to other discrepancies, the tribunals in the *Eiser* and *Isolux* arbitrations differed in their conclusions as to whether the exact same amending provisions were reasonable or not.[398] And all this in the shade of rulings of the Spanish Supreme Court on parallel claims by domestic investors - whereby the court seems to 'cast a cloak of immunity on the state in its regulatory activity', essentially finding that change of the regime was foreseeable and investors should be aware of the inherent regulatory risk involved in their investments[399] - and preliminary rulings of the CJEU coming from Italian courts handling analogous appeals. There it was held that 'in the light of the principles of legal certainty and of the protection of legitimate expectations' [relevant EU law] 'must be interpreted as not precluding national legislation which provides

[391] ibid 9.
[392] B.Hawkins and C.Holden (n 317)
[393] Clifford J. Hendel and María Antonia Pérez, 'The Past, Present and Possible Future of the Spanish Renewable Energy Arbitration Saga' (2018) 31 NYBA International Law Practicum 96.
[394] *Charanne and Construction Investments v Spain*, SCC Case No. V 062/2012 (Award date, 21 January 2016).
[395] *NovEnergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain,* SCC Case No.2015/063 (Award date, 15 February 2018) <https://www.italaw.com/sites/default/files/case-documents/italaw9715.pdf> accessed 10 January 2022.
[396] C.Hendel and M.Pérez (n 395).
[397] Isabella Reynoso, 'Spain's Renewable Energy Saga: Lessons for International Investment Law and Sustainable Development' (*Investment Treaty News*, 27 June 2019) <https://www.iisd.org/itn/en/2019/06/27/spains-renewable-energy-saga-lessons-for-international-investment-law-and-sustainable-development-isabella-reynoso/> accessed 10 January 2022
[398] ibid.
[399] C.Hendel and M.Pérez (n 395).

for the reduction or delay of the payment of incentives for energy produced by solar photovoltaic installations which were previously granted by administrative decisions and confirmed by special agreements concluded between the operators of those installations and a public company, where that legislation concerns incentives for which provision has previously been made but which are not yet due'.[400]

1.2.4 Jurisdiction ratione materiæ and lack of consent

The wide discretionary powers of adjudicators in investment arbitration are also relevant with regards to compliance over domestic or international law in relation with investments protected under IIAs.[401] As aforementioned, in ISDS we are in the sphere of consent -or as ISDS tribunals sometimes call it *ratione voluntatis,*[402] meaning that arbitration is made available only upon consent, to resolve disputes related exclusively to investments of a foreign investor covered by an IIA. Most investment treaties specify that for an investment to be qualified as such, ergo for the tribunal to have jurisdiction, it needs to comply with the laws of the host country.[403] In other words, claims related to investors' conduct falling outside the scope of the protected investment or investments which are illegal, cannot be entertained by arbitral tribunals. The so-called 'in accordance with the law' provision includes 'a *renvoi* to the law of the host state', whereby investors may pursue claims in arbitration only for legitimate investments under the law of the host state.[404] If an investment does not comport with the law of the host state, arbitration tribunals lack

[400] The preliminary reference from the regional administrative court of Lazio regarded *inter alia* interpretation of Article 216(2) TFEU and Directive 2009/28/EC on the promotion of the use of energy from renewable sources, read in the light of the principles of legal certainty, the protection of legitimate expectations, sincere cooperation, and effectiveness. Italian regulation for incentivising the production of electricity from photovoltaic installations was altered -as in Spain- in 2014 and investors-beneficiaries of the relevant incentives appealed against the amendments for allegedly breaching their legitimate expectations, and legal certainty. Joined cases C-798/18 and C-799/18, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others, Athesia Energy Srl and Others v Ministero dello Sviluppo economico and Gestore dei servizi energetici (GSE) SpA*, [2021] OJ C122/07 and C122/08.

[401] Hege Elisabeth Kjos, Applicable Law in Investor–State Arbitration: The Interplay Between National and International Law (OUP 2013) 271, 295-296.

[402] See for example, *Dawood Rawat v. Republic of Mauritius*, PCA Case No. 2016-20 (Award date, 6 April 2018), paras 70 -105, 158-161.

[403] R.Yotova (n 193) and section '1.1. The nuts and bolts of international investment law' above.

[404] R.Moloo, A.Khachaturian (n 321).

jurisdiction *ratione materiæ* and cannot hear a claim, either because the subject matter is not an investment or because consent has been given for ISDS only for lawful investments.[405] Of course, whether they have jurisdiction or not is decided by the same tribunals since they rely on the doctrine of *Kompetenz-Kompetenz* (competence-competence) by virtue of which they may rule on their jurisdiction[406] and consequently if an investment is made in compliance with the law.[407] In that context, tribunals possess some -albeit limited- interpretative powers to decide upon their competence. Tribunals have regularly asserted jurisdiction when the investor commits merely a 'trivial breach of local law',[408] or have even used narrow interpretations of the legality requirement as not encompassing the entirety of the host state's laws but rather only violations of 'fundamental principles' (i.e. *bona fide*, international public policy, prohibition of fraud, corruption and deceit)[409] or only laws 'related to the very nature of investment regulation'.

In the absence of an express 'in accordance with' provision, compliance of foreign investments with domestic laws of the host state or with international law is said to constitute an implied condition.[410] '[A]ny country, has a fundamental interest

---

[405] Ursula Kriebaum, 'Investment Arbitration – Illegal Investments' in Christian Klausegger, Peter Klein, Florian Kremslehner, Alexander Petsche, Nikolaus Pitkowitz, Jenny Power, Irene Welser, Gerold Zeiler (eds), *Austrian Arbitration Yearbook 2010* (MAnzsche Verlags- unde Universitätsbuchhandlung, C.H. Beck, Stämpfli Verlag 2010) 311.

[406] H.Kjos (n 403) 112

[407] RMoloo, A.Khachaturian (n 321).

[408] For example in *Alpha Projektholding v Ukraine* a minor defect in the company's paperwork at issue did not exclude the tribunal's jurisdiction. Jarrod Hepburn, 'In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration' (*Investment Treaty News,* 19 November 2014) <https://www.iisd.org/itn/en/2014/11/19/in-accordance-with-which-host-state-laws-restoring-the-defence-of-investor-illegality-in-investment-arbitration/> accessed 4 September 2021.

[409] In *L.E.S.I* S.p.A. and ASTALDI S.p.A. v République Algérienne Démocratique et Populaire, ICSID Case No. ARB/05/3 (Award date, 12 November 2008 [in French]), paras 140 et seq, followed by Desert Line Projects LLC v The Republic of Yemen, ICSID Case No.ARB/05/17 (Award date, 6 February 2008) paras 148 et seq, and Rumeli Telecom A.S and Telsim Mobil Telekomunikasyon Hizmetleri A.S.v Republic of Kazakhstan, ICISD Case No.ARB/05/16 (Award date, 29 July 2008) paras 320 et seq. In these cases, the investor legality provisions meant that investments would lose treaty protection only when made 'in violation of fundamental principles in force', J.Hepburn (n 410)

[410] R.Yotova (n 193).

in securing respect for its law'[411] and for that reason numerous arbitral awards underline that parties could not have intended to protect illegal investments even when agreements lack an express term. In my opinion, reaching a different conclusion would be an outright absurdity against any general principle of law. The general idea is that 'illegally made investments, including those made in violation of any applicable substantive international legal obligation, should be denied protection'.[412] International and contract law principles will always apply, proviso or no proviso'[413] This has been made quite clear in arbitral litigation such as in *Hamester* where the tribunal found that an investment '(…) created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct,' as a '(…) misuse of the system of international investment protection [or] in violation of the host State's law' could not be protected; hence, in the said case all claims for alleged breaches of the joint venture agreement were dismissed.[414] Or as noted in *obiter* in *Phoenix* '(…) nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs'.[415]

There is nonetheless a noticeable difference in the attitude of tribunals against claims of investments not fully respecting the law that rely on agreements not bearing the 'in accordance with' term regarding jurisdiction. While examining *locus standi in judicio* for illegal investments related on such IIAs, tribunals most often do not make

[411] *Alasdair Ross Anderson et al. v Republic of Costa Rica,* ICSID Case No. ARB(AF)/07/3 (Award date, 19 May 2010), para 58. The tribunal found that it had no jurisdiction to decide on the claim for lack of legal merit and specifically 'on the ground that the claimants did not own or control investments in accordance with the law of Costa Rica', the host state (para 59).
[412] R.Moloo, A.Khachaturian (n 321).
[413] The general principles of good faith, legitimate expectations, 'clean hands', fraudulent misrepresentation, *nemo auditur propriam turpitudinem allegans* and *ex turpi causa non oritur actio* are all used. See for example, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No ARB/07/24 (Award date, 18 June 2010); *Hulley Enters. Ltd. (Cyprus) v. Russian Federation*, PCA Case No. AA 226 (18 July 2014), paras 1350-1352; *Plama Consortium Ltd v Bulgaria,* ICSID Case No.ARB/03/24 (Award date, 27 August 2008) para 139, *Phoenix Action Ltd. v. Czech* Republic, ICSID Case No.ARB/06/5 (Award date, 15 April 2009);R.Yotova (n 193); RMoloo, A.Khachaturian (n 321).
[414] ibid.
[415] Phoenix Action Ltd v Czech Republic (n 415), para 79.

the claim outright inadmissible but assert jurisdiction and examine the dispute on the merits.[416] As insubstantial as this may seem -especially since tribunals usually dismiss such claims- it is nonetheless a significant matter.

Firstly, this interpretation renders the 'in accordance with provision synonymous only to a barrier of admissibility for arbitration. Secondly -and more importantly- tendency to expand jurisdiction opens the path for protection of a significantly wider range of areas than the parties had intended to protect, and grants the tribunals an opportunity to express their pro-business or even neo-liberal views on the merits.[417] Last but not least, since tribunals deem they should hear any dispute relying on treaties lacking the 'in accordance with the law' requirement, this means they are entitled to interpret international as well national law in order to decide whether there was -in fact and in law- an illegal conduct by the investors which will have as an effect the loss of protection. It goes without saying that this raises several legal as well as ethical questions.[418]

Take for instance *Spyridon Roussalis* where the investor claimed *inter alia* an alleged breach of Article 6 ECHR and Article 1 of the First Additional Protocol of the ECHR. Although the tribunal rejects in this specific case jurisdiction over the ECHR, applying the maxim in *Biloune*,[419] it still '**does not exclude the possibility** that the international obligations of the Contracting States mentioned at Article 10 of the BIT [therein] **could include obligations deriving from multilateral instruments to**

[416] Gustav F W Hamester GmbH & Co KG v. Republic of Ghana (n 415).
[417] M.Sornarajah 'The Retreat of Neo-Liberalism in Investment Treaty Arbitration' (n 372).
[418] Tribunals have used several arguments to assert protection in cases where respondent States raised the defense of 'illegality' of the investment such as that it was a 'minor error' made in good faith (good faith mistakes') or estoppel of prior acceptance of the host State. R.Moloo, A.Khachaturian (n 321).
[419] Namely that 'In *Biloune v. Ghana Investments Centre* (Award of 27 October 1989 and 30 June 1990) (1994) XIX Yearbook Commercial Arbitration 11, the claimant, after being arrested and deported from Ghana, made a demand for arbitration, alleging that these actions interfered with his investment (a Ghanaian corporation in which the claimant was the principal shareholder). The claimant contended that because the deprivation of his human rights, by detention and deportation, interfered with his investment, the dispute fell within the tribunal's jurisdiction. Rejecting this argument, the tribunal made clear that more is required than an act that merely touches the investment in some indirect way and decided that it "lack[ed] jurisdiction to address, as an independent cause of action, a claim of violation of human rights". This reasoning applies with equal force here'; *Spyridon Roussalis v Romania*, ICSID Case No. ARB/06/1 (Award date, 7 December 2011), para 569..

which those states are parties, including, possibly, the European Convention of Human Rights and its Additional Protocol No.1.'[420] However, in that specific case the issue was considered 'moot' since the tribunal deemed that the BIT in question offered 'higher and more specific level of protection (…) compared to the more general protections offered' to investors by the ECHR.[421] What is more, some investment agreements provide for arbitration without privity, tribunals, explicitly offering jurisdiction for claims based on national and international law.[422] But even in arbitrations relying on IIAs with a narrow scope of ISDS clauses which limit arbitral jurisdiction to claims related to the agreement in question and exclude claims based on violation of national or international law,[423] tribunals consider that they can take into account municipal and international law, albeit indirectly and without creating separate causes of action.[424] alluding to congruence with article 31 of the VCLT. As the Court of Justice of the EU has underlined it since its landmark judgment *Achmea,* 'the arbitral tribunal (…) may be called on to interpret or indeed to apply EU law'.[425]

1.3 Sub-conclusion

Considering all the above, it does not come as a surprise that investment arbitration recently went (and still goes) through a 'legitimacy crisis' mainly revolving around:

a) the host States' questionable rights to regulate to protect overriding public interests and especially over the protection of the environment, public health and labour rights;
b) legal certainty on the interpretation of certain IIAs clauses (mainly FET standard), and

[420] ibid, para 312 (*emphasis added*).
[421] ibid.
[422] J. Paulsson (n 202) and H.Kjos (n 401) 125-126
[423] See indicatively *Loewen Group, Inc. and Raymond L. Loewen v United States*, ICSID Case No.ARB(AF)/98/3 (Award date, 26 June 2003), para 134; *Marvin Roy Feldman Karpa v United Mexican States*, Case No.ARB(AF)/99/1 (Award date, 16 December 2002), para 61; *Middle East Cement Shipping and Handling Co. S.A. v Egypt*, ICSID Case No.ARB/99/6 (Award date, 12 April 2002), para 159 in H.Kjos (n 403) 123 – 125.
[424] H.Kjos (n 401)125.
[425] Case C-284/16 *Slovak Republic v Achmea BV* (n 195), para 42.

c) doubts about ISDS' independence and impartiality.

To a large extent, with ISDS in the front run, IIAs are said to have become 'a sword' against government activity for the protection of social and environmental rights,[426] promoting dangerous neo-liberalist deregulation.[427] Past examples from arbitral decisions illustrate how investments protected under IIAs often do not give rise to ethical and legal obligations for SD, the predominant view being that international investment 'should be kept insulated from the rest of international law' and multilateral obligations in environmental and human rights protection.[428] As aforementioned, the preferred way of tribunals has long been to ignore the relevance of issues of public interest to adjudicate for the purpose of applying investment law.

Moreover, IIAs provide nothing on direct obligations of foreign investors to abide by international standards on environment and human rights.[429] They are equally silent on liability of MNCs and the extraterritorial application of the laws of the investors' home state and 'parental liability' and the presumption is against such an application outside the capital exporting states' jurisdiction, despite the contrary suggestions under the OECD Guidelines for MNEs.[430] As noted by Howard Mann, '[w]hile the labour provisions have imposed obligations on states to take certain measures, in no instance of reference to labour or environmental issues, or sustainable development more broadly, have any direct obligations been set out for foreign investors'.[431] The lack of mandatory international standards binding foreign investors is an additional important aspect, especially considering the latest policy

[426] 'Essentially, we've now seen a shift in the use of investment agreements as a shield to their use as a sword against government activity'. Howard Mann quoted in *Hallward-Driemeier* (n 191). See also, in that respect the award in *Metalclad* (below n 332) which, as reported by Crockett, has attracted criticism stating *obiter* that '(…) a finding of expropriation on the basis of the Ecological Decree is not essential to the Tribunal's finding of a violation of NAFTA Article 1110. However, the Tribunal considers that the implementation of the Ecological Decree would, in and of itself, constitute an act tantamount to expropriation'. A.Crockett (n 187) 547.
[427] M.Sornarajah, 'The Retreat of Neo-Liberalism in Investment Treaty Arbitration' (n 372)
[428] M.Sornarajah, *Resistance and Change* (n 203) 318
[429] R.Kibugi and others (n 246).
[430] K.Gordon and J.Pohl (n 239) and OECD Guidelines (n 151).
[431] H.Mann, International Investment Agreement, Business and Human Rights (n 181).

trends towards extraterritorial liability in home states, discussed in the introduction. Last but not least, instruments of international investment law continue putting forward arbitration as the optimal jurisdiction for dispute settlement.

The preceding epigrammatically outlined situation has led to a certain upheaval of investment agreements largely focused on the 'backlash'[432] or 'crisis'[433] of arbitration. In a move to reassert sovereignty, many countries have pulled out from previously concluded IIAs or have announced that they will no longer conclude investment agreements.[434] Yet, the current situation does not constitute a blanket rejection of IIAs but rather an impetus to reform investment law.[435] Several scholars call for the need to rewrite the rules of international investment law,[436] and for ISDS to address its deficiencies and reflect current international legal trends, requirements, modern geopolitical realities and ultimately the conundrum of a reciprocal lack of trust.[437] Several ideas and suggestions are on the table, revolving around the need for publicity and 'exposure to the public'[438] in open hearings. Institutional responses also follow the pace: UNCITRAL's Working Group III has been mandated to work on the reform of ISDS and -jointly with the ICSID of the World Bank- a draft code of conduct for adjudicators handling international investment disputes.[439] The draft code aims to become the uniform binding code that will ensure impartiality and independence of tribunals reflecting fundamental principles, namely the right to a fair and public trial. OECD is also a leading actor in this direction since the early days of international investment law with continuous work for transparency

[432] Michael Waibel, Asha Kaushal, Kyo-Hwa Chung, Claire Balchin (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer 2012)
[433] M.Sornarajah, *Resistance and Change* (n 203)
[434] For example Australia, Venezuela, Ecuador, Bolivia, South Africa, India and Indonesia, in G.Dimitropoulos (n 371).
[435] G.Dimitropoulos, 'Comparative and International investment law: Prospects for Reform – an Introduction' (2020) 21 Journal of World Investment and Trade 1.
[436] ibid.
[437] N.Angelet (n 326) 16.
[438] Hirsch in Zachary Douglas, Joost Pauwelyn and Jorge Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 154.
[439] UNCTAD, 'Working Group III: Investor-State Dispute Settlement Reform (45th Session, 27-31 March 2023, New Yorl)' <https://uncitral.un.org/working_groups/3/investor-state> accessed 6 January 2022.

and responsible business.[440] The strongest reaction against ISDS globally comes from the EU. Popular reaction to the failed Transatlantic Trade and Investment Partnership (TTIP), CETA and the *Vattenfall* litigation in Germany are noteworthy.[441]

On the other side of the spectrum, as pressure for a 'low-carbon, climate-resilient' (LCR) economy and sustainable development mounts, governments explore various alternatives to achieve the desired goals, which somehow bring a convergence between investment law, environmental protection and human rights.[442] They include in their policy-mix incentives for 'green investment,' which sometimes may go as far as 'green protectionism' measures.[443] Although the latter is unsought, 'green' and generally sustainable investment is deemed necessary. As we will analyse below in Chapter 3.5.2 on trade and sustainable development, when discussing the 'Open, Sustainable and Assertive Trade Policy'[443a] of the EU, sustainable growth is no longer a marginal secondary desirable result of world economic relations. It is one of the main objectives and desired results.

Such policy trends revolve around two main streams: first, policies designed to attract investments to combat climate change (mitigation), achieve low-carbon development (adaptation and climate resilience in infrastructure) as well as socially just lines of work and second, barriers to 'unsustainable' investments. For instance,

---

[440] 'The OECD is a global leader in efforts to establish internationally agreed rules and standards for policies on capital movements, international investment, investment statistics, and responsible business conduct. These rules are laid down in legally binding instruments or recommendations that enshrine a broad consensus on good policy design. The earliest instruments date back to 1961, but they are regularly reviewed, adapted and strengthened to ensure that they are effective in meeting today's and tomorrow's needs and correspond to the evolving understanding and good practice in their respective fields. Together, these instruments form the 'acquis' of OECD standards in the area of international investment that countries that seek to accede to the Organisation or adhere to individual instruments need to commit to and comply with. The most central instruments include the Codes of Liberalisation and the Declaration on International Investment and Multinational Enterprises'. 'OECD Legal Instruments on International Investment' (*OECD)* <https://www.oecd.org/investment/investmentinstruments.htm> accessed 4 February 2022

[441] A. de Mestral (n 277) 6

[442] Mbengue and Stefanie Schacherer (eds) (n 327) 178.

[443] Jan Corfee-Morlot, Virginie Marchal and others, 'Towards a Green Investment Policy Framework: The Case of Low-Carbon, Climate-Resilient Infrastructure' (2012) OECD Staff consultation draft, 18 June 2012 <https://www.oecd.org/env/cc/Towards%20a%20Green%20Investment%20Policy%20Framework_consultation%20draft%2018-06-2012.pdf> accessed 28 February 2023.

[443a] See p. 221.

public financing is being made available for renewable energy projects[444] and public procurement for green infrastructure helps the creation of new markets for innovative sustainable technologies.[445] Moreover, within the WTO since 2017 discussions are being held regarding the agreement on a multilateral framework for investment facilitation for development, believed to be the key for achieving the SDGs in developing countries.[445b] Along that line, a new strain of investment agreements is emerging on investment facilitation. Such agreements are more focused on institutional arrangements and inter-state cooperation to facilitate investment flows rather than traditional investment protection measures. As such ISDS is absent while State-to-Stade dispute settlement is foreseen.[445c]

As seen above, other performance-based regulatory measures such as compulsory due diligence and reporting with regard to environmental or human rights issues and their consideration for corporate liability in cases of environmental damage are increasingly adopted.[446] Reportedly, these measures should be 'stable enough to provide confidence to investors (…).[447] In this wider picture, a possible new pioneering role for IIAs is getting traction. As highlighted in a recent OECD report, IIAs can have a part to this end by addressing such issues through, for example, commitments for the parties to accede to multilateral environmental agreements (MEAs) or Climate framework conventions, to adhere to basic standards on the environment, health, human rights and labour, to enforce relevant domestic law, to

[444] UNCTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy* (UN Publication 2010), Chapter 3 <https://unctad.org/system/files/official-document/wir2010_en.pdf> accessed 10 March 2023.
[445] Corfee-Morlot, Virginie Marchal and others (n 445) 36.
[445b] Axel Berger, Yardenne Kagan and Karl P. Sauvant (eds), 'Investment Facilitation for Development. A toolkit for policymakers' (2nd edn, International Trade Centre 2022) <file:///C:/Users/Sofia/Downloads/SSRN-id3830031.pdf> accessed 10 March 2023
[445c] Brazil has developed first the Cooperation and Investment Facilitation Agreements (CIFA). Brazil has not had any BITs/IIAs before. See Nathalie M-P Potin and Camila Brito de Urquiza, 'The Brazilian Cooperation and Facilitation Investment Agreement: Are Foreign Investors Protected?' (Kluwer Arbitration Blog, 29 December 2021) < https://arbitrationblog.kluwerarbitration.com/2021/12/29/the-brazilian-cooperation-and-facilitation-investment-agreement-are-foreign-investors-protected/> accessed 3 March 2023
[446] David Gaukrodger (n 218).
[447] Corfee-Morlot, Virginie Marchal and others (n 445) 37.

strengthen legislation on anticorruption, anti-money laundering, and transparency as well as mutual legal assistance.[448]

[448] D.Gaukrodger (n 218).

Chapter 2 | implementing the SDGs in the EU

2.1 Framework

The concept of sustainable development as a goal of the EU first appeared in the treaty of Maastricht which wilfully coincided with the global environmental governance regime agreed at the 1992 Rio Summit and UN Agenda 21 which called for the adoption of national strategies for sustainable development.[449] As a result, the treaty of Maastricht in Article 2 of the EC treaty referred to '[the] promot[ion], throughout the Community, of a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment'. The choice of sustainable 'growth' instead of 'development' has been criticized as weakening the scope of the concept as well as purposely departing from the commonly accepted wording of sustainable development coined by the Brundtland Commission. Sustainable development was also the main focus of the fifth Environment Action Program (EAP) adopted in 1993 entitled 'Towards Sustainability'.[450]

The blunt incorporation of the concept of sustainable development instead of the tenuous term of 'growth' in the basic law came with the treaty of Amsterdam. Tallying with the 1997 Rio +5 summit, which set the deadline for completion of sustainable development strategies by 2002, new Article 2 TEC clarified the constitutional status of sustainable development in the EU legal order. Promoting a 'harmonious, balanced and sustainable development of economic activities' was ever since one of the tasks of the EU in a wording more in line with internationally accepted practice in the environmental policy. The first EU strategy on the achievement of sustainable development adopted in 2001 was quite vague and unambitious.[451] In parallel, the EU growth strategy in place at the time, the Lisbon Agenda -both its

[449] Reinhard Steurer, 'Is the EU still Committed into Developing More Sustainably?' in A.Jordan and V.Gravey (eds), *Environmental Policy in the EU: Actors, Institutions and Processes* (4th edn, Routledge 2021) 281.
[450] [1993] OJ C-138/7.
[451] R.Steurer (n 451).

original version adopted in 2000 as well as its update in 2005- essentially disregarded the protection of the environment as well as sustainable development. The EU adopted a new Strategy for Sustainable Development in 2006. The protection of the environment had a prominent place, featuring as one of its four pillars. Focus was given on preserving the planet's capacities and limits and ensuring a high level of protection and improvement of the quality of the environment through mitigating climate change, avoiding overexploitation of natural resources, recognising the value of the ecosystem services, and promoting sustainable consumption and production patterns.[452]

With the Treaty of Lisbon and the embedment of sustainable development in Articles 3(3), 3(5), 21(2)(f) TEU as one of the Union's aims as well as in Article 11 (environment integration), and Article 119(3) (monetary policy), the concept has gained a constitutional anchorage despite -as already discussed in our introduction- its indiscernible legal status and exact definition.[453] While it cannot be treated as generating clear enforceable legal obligations, its abstract nature does not preclude its definite intrinsic nature as one of the long-term objectives of the Union, even by having a 'manifesto function' only.[454] As analysed in the introduction, finding the exact legal value of the concept is currently futile and supererogatory; what is important is if the EU has found the means to find a balance in this 'tug of war' between the forces of the protection against environmental degradation against social and economic growth[455] and to what concrete actions and measurable results this is linked to.

---

[452] David Langlet and Said Mahmoudi, *EU Environmental Law and Policy* (OUP 2016) 45.
[453] Interestingly, SD has not been included as one of the purposes of EU's environmental policy in Article 191 TFEU. Gyula Bándi, 'Principles of EU Environmental Law Including (the Objective of) Sustainable Development' in Marjan Peeters and Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar Publishing 2020) 39.
[454] Armin von Bogdandy, 'The European Constitution and European Identity: Text and Subtext of the Treaty Establishing a Constitution for Europe ' (2005) 3 International Journal of Constitutional Law 295.
[455] Jesper Brandt, 'Sustainability as a Tug of War Between Ecological Optimisation and Social Conflict Solution' in Kurt Aagaard Nielsen, Bo Elling, Maria Figueroa and Erling Jelsøe (eds), *A New Agenda for Sustainability* (Routledge 2010) 43.

Title II of the TFEU comprises the 'Provisions having general application'. These horizontal 'mainstreaming' provisions are a list of protected non-economic interests which are largely consistent with the SDGs. Their prominent positioning in the beginning of the treaty does not grant them an upgrade compared to other values and principles therein; it still confers a legal obligation to the Union to take them into account in all fields of action, rendering them enforceable,[456] something that is further reflected in secondary EU legislation and case-law.[457]

TFEU	SDGs
Article 8 | eliminate inequalities and promote equality between men and women	Goal 5 | achieve gender equality and empower all women and girls
Article 9 | promotion of high level of employment; guarantee of adequate, social protection; fight against social exclusion, and high level of education, training; and protection of human health.	Goal 3 | Ensure healthy lives and promote well-being for all at all ages Goal 4 | Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all Goal 8 | Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all

[456] Marcus Klamert, 'Articles 7-13' in Manuel Kellembauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A commentary* (OUP 2019) 377.

[457] See for example Regulation No 1/2005 on the welfare of animals and case C-424/13 *Zuchtvieh-Export GmbH v Stadt Kempten* [2005] OJ C205/5, para 35; Council Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94and case C-121/15 *Association nationale des opérateurs détaillants en énergie (ANODE) v Premier minister, Ministre de l'économie, de l'industrie et du numérique, Commission de regulation de l'énergie, GDF Suez [2010] OJ C178/8*,,paras 40 and 51; Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

Article 10 | combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation	Goal 10 | Reduce inequality within and among countries
Article 11 | Environmental protection, in particular with a view to promoting sustainable development. Article 13 | pay full regard to the welfare requirements of animals	Goal 13 | Take urgent action to combat climate change and its impacts Goal 14 | Conserve and sustainably use the oceans, seas and marine resources for sustainable development Goal 15 | Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss
Article 15 | good governance and participation of civil society, EU bodies conduct work as openly as possible Article 16 | right to the protection of personal data	Goal 16 | Provide access to justice for all and build effective, accountable and inclusive institutions at all levels

These cross-cutting objectives -policy 'coherence' or 'consistency' provisions-[458] are not the only place where the treaty reflects the Union's legal obligations

[458] I use the terms coherence, consistency and coordination interchangeably. For a discussion on the terminological issues surrounding the question of consistency and the different notions of the two terms which

towards sustainable development. Rather, these are dispersed all over the treaties; for example, in Article 114(3) TFEU where the EU in adopting measures to harmonise the internal market must also seek a high level of protection with regard to health, safety, environmental protection,[459] consumer protection, and high levels of human health; Article 36 TFEU whereby the protection of health and life of humans, animals, or plants is mentioned among the legitimate interests justifying deviating from the free movement of goods, or also 147(2) TFEU which largely reiterates part of Article 9 TFEU, and requires to ensure a high level of employment in the definition and implementation of all Union policies and activities. Adding to that the set of common values upon which the EU is based and which are shared with and between Member States, as stated in Article 2 TEU and 3 TEU[460] as well as Article 6 TEU, whereby the Charter of Fundamental Rights gains status of primary law, it is evident that the Union legal order provides various safeguards for adopting, implementing and enforcing legislation that is respectful and in line with the sustainable development goals. In fact, within the EU legal system, sustainable development related values and principles are both:

- a means in their own right embracing the entire spectrum of EU law and policies, and
- legitimate overriding interests to deviate from the freedoms of the internal market.

Soon after the Lisbon treaty, the Europe 2020 strategy -EU's updated growth agenda adopted in 2010- put forward as key priorities smart, sustainable and inclusive growth (*sic.*). Generally speaking, over the past 15 years there has been an "inflation" in the use of 'sustainable development' in the EU's policies.[461] Based on the

alternate in different language versions of the treaties see Simon Duke, 'Consistency, Coherence and European Union External Action: the path to Lisbon and Beyond' in Panos Koutrakos (ed), *European Foreign Policy: Legal and Political Pperspectives* (Edward Elgar 2011) 15-19,

[459] Not only that, but also covers additional SDGs, e.g. energy Directive 2009/73/EC (n 459).

[460] CJEU, Opinion 2/ 13, Opinion of the Court (Full Court) of 18 December 2014, Accession to the European Convention of Human Rights [2014] EU:C:2014:2454, para 168.

[461] D.Langlet and S.Mahmoudi (n 454) 46.

2015 Eurostat monitoring report for the implementation of the sustainable development strategy, there have been measures adopted across the board, but results were quite mixed with both sustainable and unsustainable trends coexisting. Moderately favourable trends were identified in relation to the economic dimension of sustainable development, while an uneven and overall unfavourable picture was drawn with regard to the social dimension of sustainable development. On the environmental dimension of sustainable development, while the general picture was also uneven, the 'climate change and energy' theme had favourable results as far as the steady decrease of GHG emissions is concerned, but an unfavourable result was recorded for energy consumption.[462] The findings of the report therefore largely reflect the focus of Union policies in the area of environmental protection which centred around climate action. The 2020 report on EU's progress towards the SDGs shows faster progress on some SDGs than on others, and even some backward movement on some such as SDG 13 on climate action.[463] Even so, in 2019 the EU had already reached its 20 per cent GHG reduction target for 2020.

The labarum of the current EU administration adopted in 2019, the European Green Deal, is exemplary of the weight the EU gives to sustainable development. As its title suggests, it is focused on climate and environment but is also framed into the logic of socially just transition. The new EU's growth strategy draws inspiration from the existential threats posed by climate and environmental degradation. Its headline goals are the elimination of net GHG emissions by 2050, and economic growth to be decoupled from resource depletion in combination with regressive distributional effects.

---

[462] Eurostat, 'Sustainable Development in the European Union: 2015 Monitoring Report of the EU Sustainable Development Strategy' (2015) <https://ec.europa.eu/eurostat/documents/3217494/6975281/KS-GT-15-001-EN-N.pdf/5a20c781-e6e4-4695-b33d-9f502a30383f?t=1441801933000> accessed 8 December 2020.

[463] 'SDG 13 'Climate action' remains neutral, meaning that over the past few years, progress has been made in some areas, while negative developments occurred in others. While according to provisional estimates for 2018 the EU has already reached its 20% greenhouse gas emissions reduction target for 2020, a slight growth in emissions between 2014 and 2017 has put the EU off track towards its 40% reduction target for 2030'. Eurostat, 'Sustainable Development in the European Union: Monitoring Report On Progress Towards the SDGs in an EU Context' (2020) <https://ec.europa.eu/eurostat/documents/3217494/11011074/KS-02-20-202-EN-N.pdf/334a8cfe-636a-bb8a-294a-73a052882f7f?t=1592994779000> accessed 6 March 2022.

The Green Deal is written into law by regulation (EU) 2021/1119, alias the European Climate Law, which sets a long-term objective for climate-neutrality (i.e. zero GHG emissions for the EU by 2050) and a medium-term (intermediate) target of net GHG emissions by at least 55% by 2030. These objectives and measures seek a win-win policy mix, between social development and climate mitigation. Therefore, foreseen measures to reach these objectives such as *inter alia* cutting emissions, investing in green technologies and protecting the natural environment are also aimed at benefitting lower income households, create jobs and promote social progression.[464]

A very wide spectrum with no less than 50 legally binding and non-legally binding measures and policy initiatives are about to be proposed or adopted in this context such as:

- The EU Taxonomy regulation (EU) 2020/852, already adopted, which provides a green classification system for economic activities. It does not include any mandatory requirements of environmental performance for undertakings or activities for investors to invest in; its aim is to encourage a transition towards sustainable investments.
- A revision of a regulation for the collective achievement of climate neutrality by 2035 in the land use, forestry and agriculture sector (LULUCF).
- Review of the environment and energy State aid guidelines.
- Revision of the Non-Financial Reporting Directive (NFRD).
- The European Green Deal Investment Plan.

[464] European Environment Agency, 'How to Ensure a Socially Just Transition', interview with Jorge Cabrita, Research Manager at Eurofound (28 November 2022) <https://www.eea.europa.eu/signals/signals-2022/articles/interview-how-to-ensure-socially> accessed 2 September 2022

In the eyes of certain environmental activists the new EU Green Deal is exemplary of a restrictive approach by the EU to sustainable development, seeking an ecological modernization and a low-carbon economy through milder measures and not by more radical means, which suggest changing current modes of capitalism, and reproach it for past and present socio-environmental equity deficits.[465] This is somewhat a strict opinion and above all blinkered, as it disregards significant aspects of the essence of the EU, not to mention sustainability principles and the fundamental importance of democratic values, the rule of law, human rights, and social openness which are inherent to the Union's subsistence. For that, although EU policies are expressly labelled to drive towards sustainable growth, they are in general rather focused on environment and climate. That does not mean however that elements of democratic governance are set aside; rather that because they are a prerequisite for any action in the framework of the EU, no separate policies are required to be adopted. That said, the starting point for any discussion over EU's sustainability ranking should the essence and functioning of this Union of law.

2.2 A Union of law

The protection of the rule of law, which as discussed in our introduction plays a vital role in advancing the SDGs, is paramount in the EU legal order. Respect for the rule of law is the cornerstone of any modern constitutional democracy, and an essential prerequisite for preserving every fundamental and democratic value. No deviations can be allowed. The Union is based on the rule of law; every action taken by the EU is founded on the treaties, values, human rights and general principles of law, approved voluntarily and democratically by all EU member countries. Acts of both the Member States and the EU institutions are reviewable for their conformity with the basic constitutional charter, the Treaties.[466] With this in mind, one of the most common critiques by Eurosceptics about the infamous 'democratic deficit' of the

[465] Antonio Cardesa-Salzmann and Elisa Morgera, 'The EU's External Action After Lisbon: Competences, Policy Consistency and Participation in International Environmental Negotiations' in M.Peeters and M.Eliantonio (eds) (n 455) 84.
[466] Case C-294/83 *Les Verts* v *Parliament* [1986] ECR 1339, para 23.

EU, is principally based on misinformed and superficial considerations of the unique decision-making structure of this *sui generis* organisation. In fact, this unique 'structure' is based on rules from its inception.

Although the term 'rule of law' itself was first expressly mentioned in the treaty of Maastricht in 1992 regarding external relations, and as a principle upon which the EU itself was founded not earlier than in the Treaty of Amsterdam in 1997, for the 'founding fathers', European integration itself was conceived as a means to protect and advance the rule of law against totalitarian regimes and anarchical systems that plagued Europe and culminated in the horrors of the first and, primarily, the Second World Wars.[467] The Court has specified since the mid-1980s that the EU legal order characterized by the principles of primacy and direct effect, stemming from an autonomous source (namely, the Treaties), is based on the rule of law.[468] Besides, for this singular Union of sovereign states to be able to function, respect for the rule of law by Member States and EU institutions in the performance of their duties is necessary for an additional reason: to generate mutual trust within the Union.[469] It is historically proven that any crack to this trust and any insinuation about inequalities between member states can have detrimental effects for the Union. A good recent example is the management of Greece's debt crisis of 2009: overwhelming austerity and consecutive blow to the peoples' dignity fueled to a large extent populism and Euroscepticism.[470]

Since the Treaty of Lisbon, the rule of law is expressly enshrined in the Treaties -Article 2 TEU- and is widely quoted thereof. Scholars have been striving to locate a

[467] Amichai Magen and Laurent Pech, 'The Rule of Law and the European Union' in Christopher May and Adam Winchester (eds), *Handbook of the Rule of Law* (Edward Elgar Publishing 2018) 237.
[468] Case C-294/83 Parti écologiste 'Les Verts' v European Parliament (n 468).
[469] Michalis Chrysomallis, 'The Response of the Court of Justice of the EU on the Setback in the Application of the Rule of Law in Member States: the Judgement of *Associação Sindical dos Juízes Portugueses*' (2019) Digesta 1 <http://www.digestaonline.gr/pdfs/Digesta%202019/Chris_2019.pdf> accessed 5/09/2022 [in Greek].
[470] Efi Koutsokosta , 'EU too Severe on Greece Over Debt Crisis, former Commission President Jean-Claude Juncker Concedes' *Euronews* (15 September 2022) <https://www.euronews.com/2022/09/15/eu-too-severe-on-greece-over-debt-crisis-former-commission-president-jean-claude-juncker-c> accessed 15 September 2022.

definite meaning for the 'rule of law' in the EU legal order.[471] The Court has ruled that the concept of 'the rule of law' is to be understood as meaning 'the Union value enshrined in Article 2 TEU'.[472] Although it has been challenged as a vague and abstract principle without any real enforceable legal value, the Court has specified that the very fact that the rule of law is a general legal notion does not mean that it cannot be used as a basis for enforceable legislation. The legislators and the other institutions entrusted with its safeguard in the Union, are conferred a certain discretion to implement it, 'provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give adequate protection against arbitrary interference'.[473]

The rule of law is being defined in the EU as a founding principle with a similar definition to the UN's mentioned in our introduction, whereby 'all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.'[474] The Court has further analysed various of these principles such as legal certainty, which is defined as 'a fundamental principle of [Union] law which requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly'.[475]

---

[471] Michal Ovádek, 'The Rule of Law in the EU: Many Ways Forward but Only One Way to Stand Still?' (2018) 4 Journal of European Integration 495.
[472] Case C-156/21 *Hungary v Parliament and Council* ('annulment of Regulation 2020/2092') [2022] ECLI:EU:C:2022:97, para 228.
[473] ibid paras 222-225.
[474] Commission, 'Further strengthening the Rule of Law within the Union State of play and possible next steps' (Communication) COM(2019) 163 final.
[475] Case C-344/04 *IATA and ELFAA v Department of Transport* [2006] ECLI:EU:C:2006:10, para 68

The rule of law is part of EU's *esse* and a vital condition for EU membership under article 49 TEU. As adamantly held in *Wightman*:

As is apparent from Article 49 TEU, which provides the possibility for any European State to apply to become a member of the European Union and to which Article 50 TEU, on the right of withdrawal, is the counterpart, the European Union is composed of States which have freely and voluntarily committed themselves to those values, and EU law is thus based on the fundamental premise that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values'.[476]

The rule of law is further strictly applied within the Union, not only in theory, but also in practice, including both formal and substantive elements. As regards its legal certainty component, it is settled case-law that the EU requires rules to be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly.[477] Once a country becomes a Member State, 'it joins a legal structure that is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the Union is founded, as stated in Article 2 TEU'.[478] Safeguard of this foundational value is not a merely declaratory affirmation, but is supported by concrete measures. Abundant case-law of the Court also upholds and elaborates on the respect of the rule of law and principles thereby attached.[479]

[476] C-621/18 *Wightman and Others* v Secretary of State for Existing the European Union [2018] EU:C:2018:999, para 63.
[477] Case C-344/04,*IATA and ELFAA* (n 477).
[478] Council Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget ('the rule of law regulation') [2020] OJ L 433I/1.
[479] See for example C-496/99 P Commission v CAS Succhi di Frutta [2004] EU:C:2004:236, para 63; joined Cases C-212/80 to C-217/80 Amministrazione delle finanze dello Stato v Srl Meridionale Industria Salumi and Others; Ditta Italo Orlandi & Figlio and Ditta Vincenzo Divella v Amministrazione delle finanze dello Stato [1981] EU:C:1981:270, para 10; Cases C- 46/87 and 227/88 Hoechst AG v Commission of the European Communities [1989] EU:C:1989:337, para 19; Case C-64/16 Associação Sindical dos Juízes Portugueses [2018] EU:C:2018:117, paras 31, 40 and 41; Case C-216/18 PPU Minister for Justice and Equality (Deficiencies in the system of justice) [2018] EU:C:2018:586, paras 63 to 67; C-279/09 DEB [2010] EU:C:2010:811, para 58; C-452/16 PPU Poltorak [2016] EU:C:2016:858, para 35; C-477/16 PPU Kovalkovas [2016] EU:C:2016:861, para 36.

In that context, the treaty itself includes article 7 TEU, which outlines a detailed procedure for examining cases of suspected clear risks of serious breaches of the values enshrined in article 2 TEU by member states that may result into sanctions for the concerned member state. A set of additional instruments aiming to safeguard the application of the rule of law has been also developed by means of secondary legislation and soft-law. The quiver of arrows has dramatically expanded in the last decade, triggered by the 'EU rule of law crisis'. These encompass financial support for civil society; the European Rule of Law Mechanism;[480] the EU Justice Scoreboard;[481] the EU Framework to strengthen the Rule of Law[482] and the preventive process under article 7 TEU; and last but not least, the rule of law conditionality regulation 2020/2092.[483] Through these much-discussed available tools, the Union can scrutinise and assess the application of the rule of law, and -when necessary- penalize any 'perpetrator' member state. I will not examine the effectiveness of these instruments here, as this would be out of scope. I mention them as an illustration of the importance of the rule of law in the EU and of tangible action that is taken to safeguard it.

Till the end of the 2000s no doubt and question was harboured about EU member states' respect for and protection of the rule of law. The 'rule of law crisis' in the EU started about a decade ago, and has been increasingly inflamed due to the continuous distressing and undemocratic turns taken by the Polish nationalist Law and Justice party (PiS) and the Hungarian Orbán government. Proposing a new type of 'illiberal

---

480 European Commission, 'What is the Rule of Law Mechanism?' (*European Commission)* <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en> accessed 11 March 2023.

481 European Commission, 'EU Justice Scoreboard' *(European Commission)* <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en> accessed 11 March 2023.

482 European Commission, 'Rule of Law Framework' (*European Commission*) <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-framework_en> accessed 11 March 2023

483 (n 480).

democracy',[484] these two 'usual suspects' have been instigating national legislation which produced a unique (for the EU) democratic erosion and decline.[485] The rule of law can be attacked by illegitimate laws, and laws which do not respect the rule of law in general would be 'a hollow shell'.[486] Such laws were, for example, those that promulgated a set of measures for the reform of the judiciary in Poland, subjecting the extension of supreme judges' office to the absolute discretion and unfettered decisions of the President of the Republic; creating the new disciplinary chamber for judges which investigates and ultimately imposes sanctions on judges that range from pay cuts to complete dismissal on account of the content of their rulings as well as the absolute discretion of the Polish Justice Minister to move judges to higher courts or to end their appointment. These legally binding rules pose a serious threat to the rule of law by undermining the independence of the judiciary.

Ever since the very start of the crisis, the Commission sought the initiation of alternative intermediate instruments that would be somewhere in between mere political persuasion and the 'nuclear option' of engaging the Article 7 TEU procedure.[487] This was the rationale behind the adoption of the EU Rule of law Framework in 2014 which foresaw that when there are clear indications of a systemic threat to the rule of law in a member state and before launching the procedure under article 7 TEU, the Commission would assess the situation, engage in a dialogue with the concerned member state with a view to finding a solution and recommend actions that would avoid using article 7 TEU.[488] The other soft-law tool instigated by the

[484] Roila Mavrouli, 'The Dark Relationship Between the Rule of Law and Liberalism: The New ECJ Decision on the Conditionality Regulation' (2022) 7(1) European Papers 275 <https://www.europeanpapers.eu/en/europeanforum/dark-relationship-between-rule-of-law-and-liberalism-conditionality-regulation#_ftn1> accessed 10 September 2022.
[485] Zselyke Csaky, 'Capturing Democratic Institutions: Lessons from Hungary and Poland' (Freedom House, Speech at the Commission on Security and Cooperation in Europe, 3 November 2021) <https://freedomhouse.org/article/capturing-democratic-institutions-lessons-hungary-and-poland#footnote2_ep37fyu> accessed 11 September 2022.
[486] Dean Spielman, 'The Rule of Law Principle in the Jurisprudence of the Court of Justice of the European Union' in María Elósegui, Alina Miron and Iulia Motoc (eds), *The Rule of Law in Europe. Recent Challenges and Judicial Responses* (Springer 2021) 18.
[487] A.Magen and L.Pech (n 469) supra 241.
[488] Commission, 'A new EU Framework to strengthen the Rule of Law', (Communication) COM(2014) 158 final, Annex I).

Commission was the 2020 European rule of law mechanism, seeking to document the state of the rule of law in EU member states on an annual basis.

The 'nuclear option' of Article 7 TEU was initiated for the first time against Poland (on 20 December 2017) and Hungary (on 12 September 2017) while a new drastic regulation has been adopted to impose economic sanctions against the culprit member states. The 'crisis' triggered a series of judicial challenges, which permitted the Court to defend the reign of the rule of law and liberal democracy.[489] Two of them -the judicial challenges of Hungary and Poland before the Court to annul the regulation of rule of law conditionality because it was allegedly adopted beyond Union competences, under incorrect legal-bases and as purportedly violating the principles of legal certainty and legislative clarity- have both been dismissed. In these historic judgements, the Court explained in detail *inter alia* -as seen above- how the rule of law is a justiciable and enforceable objective legal obligation, and not discretionary in nature depending on political considerations, as purported Poland and Hungary.[490] The duty to respect the rule of law is an obligation of result to be achieved on the part of the Member States, which flows directly from their membership of the European Union.[491]

2.3 Judicial independence as a fundamental value & right

'Judicial independence is – without doubt – a key component of the principle of the 'rule of law''.[492] Article 19 TEU, gives concrete expression to the value of the rule of law contained in Article 2 TEU. In accordance with the second subparagraph of Article 19(1), Member States are required to establish a system of legal remedies and procedures ensuring that the right of individuals to effective judicial protection is observed in the fields covered by EU law.[493]

[489] D.Spielman (n 488) supra 18.
[490] Case C-157/21 *Poland v Parliament and Council* [2022] ECLI:EU:C:2022:98C, para 191
[491] ibid, para 201.
[492] Case C-132/20 *BN, DM, EN v Getin Noble Bank S.A.* [2022] OJ C 207/2, Opinion of AG Bobek, para 30.
[493] Regulation rule of law (n 480), recital 12 and C-157/21 *Poland v Parliament and Council* (n 492), para 161.

Article 19(2) TEU requires 'the Judges and the Advocates-General of the Court of Justice and the Judges of the General Court to be chosen from persons whose independence is beyond doubt'.[494] They furthermore need -under Articles 253 and 254 TFEU- to 'possess qualifications required for appointment to the highest judicial offices in their respective countries or who are juris consults of recognised competence'. Furthermore, as aforementioned, paragraph 2 of Article 47 of the Charter which concerns the 'Right to an effective remedy and to a fair trial' and ensures access to an effective remedy, at a fair and public hearing within a reasonable time, refers to access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy.[495] It is also settled case-law that Article 47 of the Charter has direct effect and the subject of the law may rely on it before national courts and tribunals.[496]

Following the Charter and the Treaty, the Court's case-law consistently highlights that the guarantee of 'independence beyond doubt' is inherent to adjudication and concerns all courts and tribunals liable to rule on the application or interpretation of EU law.[497] Article 47 of the Charter backed up and reinforced by secondary legislation, does not allow courts which are not independent and impartial to hear any cases regarding Union law and to be considered as part of the decentralised judicial system of the EU.[498] Member States have to ensure that any court of tribunal that will rule on Union law is independent. If not independent, courts or tribunals are not in a position to offer effective judicial protection to the extent required by Union law and specifically article 19(1) TEU.

---

[494] Case C-157/21 *Poland v Parliament and Council* (n 492), para 197.
[495] Case C-192/18 *European Commission v Republic of Poland* [2019] ECLI:EU:C:2019:924, para 104.
[496] Case C-414/16 Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V. [2018] EU:C:2018:257, para 78; Case C-556/17 Alekszij Torubarov v Bevándorlási és Menekültügyl Hivatal [2019] EU:C:2019:626, para 56.
[497] Case C-619/18 European Commission v Republic of Poland (Independence of the Supreme Court) [2019] EU:C:2019:531, para 55.
[498] See also above in Chapter 1.2.2'Questions of impartiality and independence of arbitrators in ISDS', considerations about the compatibility of arbitral tribunals with Union law.

2.4 Social Europe

In defiance of the traditional radical-left and communist voices about an ultra-neoliberal EU[499] protecting only the capitalists, ever since the very early days of European integration, leaders embraced principles of public interest and opted to be a Union of law and fundamental values, rather than a mere and stiff economic coalition. As we will see in the following section, the EU gradually reinforced the protection of human rights in the Union legal order. The often 'neglected sibling of the human rights family',[500] the social *acquis,* plays a relevant and complementary role which is very significant for the cradle of welfare and employment rights. With incremental admittance in the treaties, integration has had a transformative effect which aimed not only at achieving a single internal market, but also other forms of social engagement, encompassing matters of employment, general discrimination as well as wider safeguards for the protection of citizens' rights (e.g. consumer rights).

Strictly speaking, social policy is since the Treaty of Rome (Tittle III, articles 117-123 TEEC) one of the coordinating policies of the EU, without powers of harmonization and approximation of laws. But this is only half true. In fact, an important aspect of the good functioning of the internal market relates to the proper free movement of workers and services, which cannot be guaranteed without at least some minimum common requirements in social protection. In that framework, the treaty of Rome established the European Social Fund (ESF), a financial instrument still available, yet updated and reinforced (article 162-164 TFEU), in order to help improve workers mobility and employment opportunities. This interconnection has led in addition to the creation of the fund and the initiation of many voluntary initiatives, to the adoption of significant legally binding obligations.

Firstly, most relevant treaty articles have horizontal direct effect and one -i.e. the provision on equal pay, former article 119 TEEC and current article 157 TFEU- is

[499] See for example, Costas Lapavitsas, *The Left Case Against the EU* (Polity Press 2018).
[500] Gráinne de Búrca and Bruno de Witte (eds), *Social Rights in Europe* (OUP 2005).

directly applicable even vertically. Being considered by the Court as part of the Union's foundations, these articles may be relied on before national courts, which have a duty to ensure their protection, especially when discrimination emanates from national legislations or collective employment agreements.[501] The Single European Act (SEA) introduced new social policy provisions closely related to the proper functioning of free movement of workers, which allowed harmonization of minimum requirements in the area of health and safety at work. At the same time, it gave social partners the possibility to negotiate collective agreements at the community level, and established the common policy for economic and social cohesion.

The Agreement on Social Policy of 2 February 1992 annexed to the Maastricht Treaty with Protocol 14, yielded additional extensions of community competences for matters of social policy. Major legislative acts adopted since 1994, such as the part-time work directive 97/81/EC, the first parental leave directives 92/85/EC and 96/34/EC (repealed by Council directive 2010/18/EU, currently directive (EU) 2019/1158 on work-life balance for parents and carers) as well as directive 94/45/EC on the European Works Councils (repealed by directive 2009/38/EC) and directive 97/80/EC on the burden of proof in cases of discrimination based on sex (repealed by directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation), had the Agreement as their legal basis.[502] The treaty of Amsterdam incorporated the Agreement in the main body of the treaty (articles 117 – 127 EEC Treaty, now articles 151-161 TFEU), and simplified decision-making on social matters, also by extending co-decision powers to the European Social Fund (ESF), social security as well as new article 119 on combatting discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The latter

[501] Case C- 149/77 *Defrenne v Sabena III* [1978] ECR 1365, paras 43-75.
[502] The Agreement was not straight away incorporated in the treaty but was inserted in an annexed Protocol as a compromise to the UK. That way the UK was practically offered an opt-out from the Agreement and thus it was prevented from vetoing the adoption of the treaty overall. The Agreement was later fully incorporated in the main body of the treaty eventually with the treaty of Amsterdam within the 'Social Chapter' of the EC Treaty. See: Rebecca Adler-Nissen, *Opting Out of the European Union. Sovereignty and European Inetgration.* (CUP 2015) 5-6

also served as the legal basis of important legal instruments such as directive 2000/43/EC on equal treatment between persons irrespective of racial or ethnic origin and directive 2000/78/EC on a general framework for equal treatment in employment and occupation.

Secondly, the nexus and close relationship between social protection and the freedom of movement of workers and services had as an immediate corollary the adoption of legal acts which aimed to serve EU freedoms but in fact regard social rights. Legislative acts such as regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families have been adopted with the rationale to facilitate free movement of workers within the then Community. Following the legislative developments in the member states but also the Court's jurisprudence, which held that the equal treatment of benefits need be explicitly adopted and developed, the scope of such legislative acts was significantly enlarged throughout the years. For example, regulation 1408/71 included also protection of unemployed persons,[503] special and personal non-contributory cash benefits[504] and so on. In the same vein, regulation EC (No) 883/2004 on the coordination of social security systems was adopted with Articles 41 and 352 TFEU (ex Articles 42 and 301 CE Treaty) as legal basis, although it concerns a far wider scope than solely and restrictively workers.

In the Lisbon treaty, although competences conferral on the matter remain unchanged, EU's social objectives, including full employment and solidarity between generations are spelt out (Article 3 TEU). At the same time the 'cross-cutting social

[503] Following judgment in Case C-275/96 *Kuusijärvi v. Riksförsäkringsverket* [1998] ECR I-3419 the said regulation was amended by regulation (EC) No 1386/2001.

[504] Following judgements in Case C-290/00 Johann Franz Duchon v Pensionsversicherungsanstalt der Angestellten [2002] ECR I-3567; Case C-170/95 Office national de l'emploi v Calogero Spataro [1996] ECR I-2921; Case C-215/99 Friedrich Jauch v Pensionsversicherungsanstalt der Arbeiter [2001] ECR I-4265 and Case C-43/99 Ghislain Leclere, Alina Deaconescu v Caisse nationale des prestations familiales [1996] ECR I-2921 the said regulation was amended by regulation (EC) No 647/2005; Case C-215/99 [2001] ECR I-1901 and Case C-370/90 The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department [2001] ECR I-4265.

protection clause' is introduced for the first time in the Union legal order[505] amongst the principles of general application under Title II (analysed above), enshrined in Article 9 TFEU whereby the EU is required to fulfil the social objectives when defining and implementing its other policies and activities, but also under Articles 8 and 9 on the combat of discrimination. Various social rights are also recognized in the Charter of Fundamental Rights as 'solidarity rights', such as the right of workers to information and consultation as well as collective bargaining, fair and just working conditions, social security and social assistance. This brings our discussion to the next item, that of the protection of EU's respect for the rule of law and fundamental freedoms. The EU aspires to champion decent work conditions internally and externally, in line with the UN 2030 Agenda for Sustainable Development and the European Pillar of Social Rights Action Plan.[506]

2.5 The protection of fundamental rights in the EU

Any analysis on EU's sustainable development policy would be incomplete without taking into consideration the introduction of the Charter of Fundamental Rights in the EU legal order, which as per Article 6(1) TEU has the same binding force as the Treaties.

The story of the protection of human rights in the EU starts long before the proclamation of the Charter of Fundamental Rights on 7 December 2000 at the Intergovernmental Conference (IGC) of Nice.[507] The EU formally declared that it constitutes 'a Union built on the respect for fundamental rights which are common to the legal traditions of the Member States and defined in the European Convention of Human Rights (ECHR)' already in the Treaty of Maastricht (under former Article 6

[505] Case C-515/08 *dos Santos Palhota and Others* [2010] ECR I-9133, Opinion of AG Cruz Villalon, para 51.
[506] Commission, 'On Decent Work Worldwide for a Global Just Transition and a Sustainable Recovery' (Communication) COM(2022)66 final.
[507] OJ [2000] C 364/1.

TEU). This newly created entity was evolving into something much more than the original Community, which, strictly speaking and according to a literal interpretation of its mandate, had officially only economic aims - to establish a common market through harmonious development of economic activities.

Throughout the years, from the creation of the EEC in 1957 till the establishment of the EU in 1992, the Court -using its teleological interpretative method- had already expressed in various ways how the Community was not merely a stiff valueless common market, but a new legal order which conferred rights to the people.[508] In this framework, respect for fundamental rights forms an integral part of the general principles of law enshrined in Community law[509] with the ultimate goal being the accelerated increase of the living standards of Europeans.[510] To this end, the Court of Justice drew inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.[511]

The initial lack of a coherent and precise statutory framework for the protection of human rights, did not prevent protection. Case-law was clear in that respect: the protection of human rights has always been a condition for the lawfulness of Union acts and Member States' actions, and measures incompatible with respect for human rights are not acceptable in the Union.[512] Protection was then mainly 'inspired by the constitutional traditions common to the Member States' and other international instruments, primarily the European Convention of Human Rights

[508] 'The European Economic Community constitutes a new legal order of international law for the benefit of which member states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals', Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1.
[509] Case 29-69 *Stauder v City of Ulm* [1969] ECLI:EU:C:1969:57 and Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECLI:EU:C:1970:114.
[510] Case 6-72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECR I- 215, para 226.
[511] CJEU Opinion 2/13 of 18 December 2014 ECLI:EU:C:2014:2454, para 37.
[512] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659, para 73.

which has special significance,[513] but also the European Social Charter,[514] ILO Conventions,[515] the International Covenant on Civil and Political Rights (ICCPR),[516] the Convention on the Rights of the Child (CRC) and the International Covenant on Economic, Social and Cultural Rights (ICESR).[517]

Still, protection was not sufficient. Although the Maastricht Treaty echoed the case-law and the major geopolitical developments in Europe at the end of the 80s–early 90s with the insertion of then Article 6 TEU, protection of human rights kept being warranted only by the Court. Doubt and inconsistency about the status of human rights in the EU legal order still reigned, thus leaving space for the continuation of fierce judicial dialogues over conflict of the primacy of laws, as had happened already in the *Solange* saga.[518]

The effective response to the confusion which would reinforce EU's democratic legitimacy was the inclusion of the Charter of Fundamental Rights to the Treaty. The first 'Bill of Rights' designed exclusively for the EU was -as mentioned above- for the first years of its life not part of EU primary law. The change came with the Lisbon treaty, which in addition to the codification of the Court's case-law under Article 6(3) TEU, it completed further the constitutional picture of the EU, by granting to the Charter EU legally binding status - 'the same legal value as the Treaties' pursuant to the first subparagraph of Article 6(1) TEU.[519] Divided into seven chapters, the most innovative feature of the Charter is that it does not categorise rights in the typical distinction between civil and political rights and, economic and

[513] Case C-260/89 *Eliniki Radiophonia TIléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdeallas and* others [1991] ECR I-2925, para 41; joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para 283 and article 6(2) TFEU.
[514] Case C- 149/77 *Defrenne v Sabena III* (n 503).
[515] Case 6-75 *Ulrich Horst v Bundesknappschaft* [1975] ECR I-823.
[516] Case C-540/03 *European Parliament v Council of the European Union* [2006] ECR I-5769.
[517] Case C-73/08 *Bressol v Gouvernement de la Communauté française* [2010] ECR I-181.
[518] About the *Solange* cases saga see, P.Craig-G.deBurca (n43) 317-328; Petel Hilpold, '4 Legal Acts, 4.2. Solange I, BverfGE 37, 291 (29 May 1974); Solange II, BverfGE 73, 339 (22 October 1986); Solange III, BverfGE 89, 155 (12 October 1993); and Solange IV, BVerfGE 102, 147 (7 June 2000)' in Cedric Ryngaert, Ige F Dekker, Ramses A Wessel, Jan Wouters (eds), *Judicial Decision on the Law of International Organizations* (OUP 2016).
[519] Ola Zetterquist, 'The Charter of Fundamental Rights and the European Res Publica' in Giacomo Di Federico (ed), *The EU Charter of Fundamental Rights* (Springer 2011) 7-10.

social rights while it does clearly separate rights from principles, the latter to be implemented only through additional legislative acts.[520]

According to Article 50 of the Charter, its scope is limited to the field of application of Union law and does not extend the field of application of Union law beyond the powers of the Union nor does it establish any new power or task for the Union, or modifies powers and tasks as defined in the Treaties'. Following Article 51(1) of the Charter, its provisions are addressed to the member states only when they are implementing Union law. Ever since the Lisbon Treaty, there is ample case-law further delineating the application of the Charter. The Court is clear: 'requirements flowing from the protection of fundamental rights are binding on Member States whenever they implement European Union law, and they are bound, to the fullest extent possible, to apply the law in accordance with those requirements'.[521] Moreover, as specified in *Melloni* national courts, albeit being free to apply national standards of human rights, they can do so only if they do not thereby cast doubt over the level of protection offered by the Charter and do not infringe upon the principles of primacy, unity and effectiveness of EU law.[522] That said, the Court also upholds the 'limited' scope of the Charter in relation to the application of Union law, and by no means does it extend it further.[523] For example, in one of the cases on the Polish judiciary, the Court reaffirms the significance of access to justice, effective remedy and judicial independence and impartiality, enshrined in Article 47 of the Charter. At the same time however, the Court concludes that the enforcement of that right presupposes that the person invoking it is relying on rights or freedoms

---

[520] Hermann-Josef Blanke, 'The Protection of Fundamental Rights in Europe' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action* (Springer 2012) 164-165.
[521] Case C-339/10 *Krasimir Asparuhov Estov, Monika Lyusien Ivanova, Kemko International EAD v Ministerski savet na Republika Bulgaria* [2010] ECR I-11465, para 13. See also, Orders in Case C-457/09 *Claude Chartry v Belgian State* [2011] ECR I-819, paras 21, 23-26; Case C-466/11 *Gennaro Currà and Others v Bundesrepublik Deutschland* [2012] ECLI:EU:C:2012:465., paras 25-26 and Case C-92/14 *Liliana Tudoran and Others v SC Suport Colect SRL* [2014] ECLI:EU:C:2014:2051, paras 44-45.
[522] Case C-399/11 *Melloni v Ministerio Fiscal* EU:C:2013:107, paras 56-59
[523] Case C-339/10 (n 524), paras 14-15.

guaranteed by EU law.[524] And in that specific case, it was not. Finally, albeit completely separate than the ECHR, the Charter specifies under Article 52(3) thereof that insofar as the Charter contains rights which correspond to those guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR. At this point, one of the most discussed novelties of the Lisbon Treaty must be recalled: Article 6 TEU not only did it integrate the EU Charter of Fundamental Rights in the EU legal system, but in paragraph 2 it also gave opening for the EU to accede as a full party to the ECHR. The details of the accession procedure to the ECHR are expressly stipulated in the Treaty. Article 218(8) allows the Council to adopt by unanimity the decision concluding the agreement on EU accession to the ECHR after obtaining the consent of the Parliament. For the accession agreement to enter into force, Member States should ratify it in accordance with their respective constitutional requirements. At the same time, it is underlined that such accession will be made possible only if it does 'not affect the Union's competences as defined in the Treaties'. Although the Court has made clear in Opinion 2/13 that accession is not possible with the current state of affairs since accession to the ECHR could undermine the autonomy and the character of Union law, this does not mean that the ECHR is no longer relevant to the EU. According to the CJEU's settled case-law this means that fundamental rights are to be determined not only by reference to the text of the ECHR, but also to the case-law of the ECtHR.[525] That said, EU law is not precluded from granting larger protection than the ECHR.[526]

The Luxembourg Court often refers to the Strasbourg court's jurisprudence as well as to the ECHR itself when it analyses human rights. Due regard for the purposes of our study is given to the consideration of the right to property in relation to other fundamental rights. As such, in its famous *Kadi* case (tried before the entry into force of the Lisbon Treaty), the Court underlined that for restrictions of the right to

[524] Case C-824/18 *A.B. and others v Krajowa Rada Sądownictwa* [2021] ECLI:EU:C:2021:153, paras 87-89.
[525] Case C-279/09 *DEB* (n 481), para 35.
[526] ibid.

property under Protocol No 1 to the ECHR to be lawful certain procedural requirements need to be met, such as furnishing guarantees affording the person concerned a reasonable opportunity of putting his case to the competent authorities.[527]

Finally, it needs to be clarified that in this 'matrix' of protection of human rights in the EU based on the Treaties, the Charter, general principles of law, the ECHR and the constitutional traditions of the member states, review of Union measures as to their compatibility with human rights and values is to be assessed by the Court alone in light of the Treaties (e.g. specifically Articles 2 and 4 TEU) and the Charter.[528]

2.6 The progress of EU environmental law & policies

The protection of the environment holds a predominant position in the EU sustainability strategies. Driven by the need to create a level playing field within the common market,[529] ever since the first Environment Action Program where it was agreed that the 'harmonious development of economic activities and a continuous and balanced expansion' aimed by the EU 'cannot (…) be imagined in the absence of an effective campaign to combat pollution and nuisances of an improvement in the quality of life and the protection of the environment',[530] the EU strives for sustainable development through ecological optimization; hence, it has an increased interest in international environmental governance. Legislation for the protection of the environment is definitely one of the most dynamic areas in the EU polity under title XX TFEU. The EU environmental *acquis* embraces a very wide array of matters; from obvious issues such as biodiversity, natural resources, air pollution, and waste to more indirect measures such as liability and criminal sanctions for environmental

[527] *Kadi* (n 515), para 368.
[528] Case C-430-21 *RS (Effet des arrest d'une cour constitutionnelle)* [2022] ECLI:EU:C:2022:99, para 71.
[529] Christoph Knill and Duncan Liefferink, 'The Establishment of EU Environmental policy' in A.Jordan, V.Gravey (n 451) 14.
[530] Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting within the Council on 22 November 1973 on the program of action of the European Communities on the environment [1973] OJ C112/1.

damage, procedural issues on participation and information as well as chemicals, climate change (albeit under portfolios of different Commissioners). It also includes more than 200 major pieces of legislation. The EU and its member states are also the largest providers of financing for the environment and climate in the world.

The Union was conferred express competences for matters of environmental protection no less than 36 years ago by virtue of the Single European Act (SEA). In reality though, the protection of the environment had become part of the EU political agenda ever since the heads of states or governments agreed that the then Community would undertake measures to protect the environment and requested the Commission to draft an 'action programme' for the environment.[531] The first Environment Action Programme (EAP)[532] adopted in 1973, covered the period 1973 – 1976 and set out basic principles of EU environmental policy which are valid until now such as the basic principle that pollution shall be prevented at source; natural resources should be used rationally; the environmental protection costs shall be internalized; environmental information should be made publicly available,[533] and last but not least the integration principle. The second and third EAPs for periods 1977 – 1981 and 1982 – 1986 respectively, covered new areas of concern emphasizing the control of pollutants and preservation of natural resources. They also reiterated the fundamental principles in a more elaborate manner. Within this time, and despite the lack of a concrete legal basis, the EU - along with the adoption

[531] Yumiko Nakanishi, 'The Impact of the International and European Union Environmental Law on Japanese Basic Environmental Law' in Yumiko Nakanishi (ed), *Contemporary Issues in Environmental Law: The EU and Japan* (Springer 2016) 3.

[532] Ever since 1973, when the first EAP was adopted, EAPs are decisions setting out the framework for EU's long-term strategic plans on the overall development of the environmental policy. They lay down priority objectives, broad lines of EU's environmental policy for the years to come. They therefore guide Union's decision-making and give an indication of the legislative program for the years to come. They also set the conditions for the successful enforcement of environmental policy such as monitoring measures. We are now at the eighth EAP to 2030, which according to the Commission provides an enabling environment for achieving the objectives of the EU Green Deal. See Commission, 'Proposal for a decision on a General Union Environment Action Programme to 2030' (Communication) COM(2020) 652 final and European Parliament, 'European Parliament Legislative Resolution of 10 March 2022 on the Proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2030' (COM(2020)0652 – C9-0329/2020 – 2020/0300(COD) <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0067_EN.html> accessed 20 April 2022.

[533] D.Langlet and S.Mahmoudi (n 454) 28.

of the first three EAPs- also recorded an impressive output of over 200 environmental legislative measures with former articles 100 and 235 of the EEC treaty (now Article 114 and 253 TFEU) on market harmonization as legal bases.[534]

Notwithstanding, the turning point in EU environmental policy was the SEA and its new 'Environment Title' which conferred explicit competences on environmental protection and laid down its underpinning objectives and principles. With the SEA and subsequent treaty amendments, environmental policy in the EU became from purely incidental and aiming the high profile of the internal market, to one of the most important 'material' and overarching autonomous EU policies.[535] While incidental environmental measures embedded in other sectoral legislation on the basis of in trade harmonisation as per Article 114 TFEU, are still a fact,[536] the consolidation of EU's competence for the protection of the environment has been a very important step. Since the SEA, the Commission has been seeking to adopt ever more instruments about environmental protection. Emphasis was given to public participation.[537] Environmental protection became one of the Union objectives in the Maastricht Treaty, which also added 'sustainable and non-inflationary growth respecting the environment; amongst its goals. Following a fifth EAP which had the idea of SD at its core ,[538] the Treaty of Amsterdam provided a much sharper formulation of environmental protection by explicitly adding sustainable development as a Union objective and expressly mentioning the achievement of 'a high level of protection and improvement of the quality of the environment' among the tasks of the Community.[539] The 1980s and the 1990s are characterized as an

[534] Kati Kulovesi and Marise Cremona, 'The Evolution of EU Competences in the Field of External Relations and its Impact on Environmental Governance Policies' (2013) Transworld Working Paper 17 <https://www.iai.it/sites/default/files/TW_WP_17.pdf> accessed 19 February 2020.
[535] Emanuela Orlando, 'The Evolution of EU Policy and Law in the Environmental Field: Achievements and Current Challenges' (2013) 21 Transworld Working Paper 21 <https://www.iai.it/sites/default/files/TW_WP_21.pdf> accessed 19 February 2020.
[536] Helle Tegner Anker, 'Competences for EU Environmental Legislation: About Blurry Boundaries and Ample Opportunities' in Marjan Peeters and Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar Publishing 2020) 8-10.
[537] ibid.
[538] D.Langlet and S.Mahmoudi (n 454) 43.
[539] E.Orlando (n 538).

'expansionist period' of environmental policy driven forward by ambitious member states[540] such as Germany, which had already embedded environmental protection measures in its internal policies and had an increased interest in creating a level playing field for German industry while at the same time it benefitted from a fall of its national emissions after unification with the unindustrialized former DDR (Deutsche Demokratische Republik - German Democratic Republic).[541] The 1998 European Council in Cardiff, the Gothenburg EU Sustainable Development Strategy and the sixth EAP (2002-2012) reinforced the emphasis laid on SD and environmental integration[542] and at the same time identified climate change as the most important challenge of the immediate future.

The role of the Court has been pivotal in the establishment, development, and consolidation of a high level of environmental protection. Not only did it uphold the right to legislate on environmental issues in times where no explicit legal basis was provided[543] but it also established environmental protection as one of the judge-made mandatory requirements justifying otherwise illegal restrictions to the internal market. Notably, the Court reasoned in favor of a stringent rather than loose approach in this respect. In that framework, there are various cases where the Court endorsed an expansive construal of the precautionary principle.[544] At the same time, has also held that compatibility of the threshold of high environmental protection does not necessarily entail measures at the highest technical level possible.[545] The Court has

[540] Charlotte Burns, Peter Eckersley and Paul Tobin 'EU Environmental Policy in Times of Crisis' (2020) 27(1) Journal of European Public Policy <https://www.tandfonline.com/doi/full/10.1080/13501763.2018.1561741> accessed 30 April 2022.
[541] The so-called 'Falling Wall Bonus', Susanne Lütz, Tobias Leeg, Daniel Otto, and Vincent Woyames (n 62) 189.
[542] E.Orlando (n 538).
[543] See for example Case 91/79 *Commission of the European Communities v Italian Republic* (*Detergents*) [1980] ECLI:EU:C:1980:85, para 8; Case 240/83 *Procureur de la République v. Association de défense des brûleurs d'huiles usagées* (*ADBHU*) [1985] ECLI :EU:1985:59, paras 11-13 and Case C-302/86 *Commission v Denmark (Danish bottles)* [1988] ECLI:EU:C:1988:421, paras 8-9.
[544] See for example Case T-229/04 *Kingdom of Sweden v Commission of the European Communities* [2007] ECR II-2437, para 262. The General court annulled a Commission decision introducing the substance 'paraquat' as an permitted active substance according to Directive 91/414 on Plant Protection Products stating *inter alia* that the precautionary principle and the principle of a high level of protection had been infringed.
[545] Case C-284/95 *Safety Hi-Tech Srl v S. & T. Srl* [1998] ECR I-4301, para 49

also underlined that the 'environmental guarantee'[546] which allows member states to take more stringent environmental measures if they wish (now article 193 TFEU. In that context, the Court has repeatedly confirmed that EU environmental policy envisages pursuing only 'minimum harmonisation', enabling the voluntary adoption of more stringent protective measures by the member states.[547] Still, it is usually EU environmental policy that drives national environmental protection standards forward instead of representing member states' lowest denominator.[548]

Despite a surge in environmental protection law, results did not live up to expectations. There have been critiques about the high cost of measures, an uncontrolled 'wild regulatory expansion', lack of overall coordination between the various EU institutions, agencies and the Member States and hence also poor implementation.[549] Moreover, at the time of the treaty of Nice in the early 2000s, political attention had mainly turned to the EU's enlargement policy in Eastern European countries and the Union's internal institutional crisis. As a result, environment and SD were somewhat downgraded. When Environment Commissioner Stavros Dimas took office in 2004, environment was not a tier-one portfolio. Admittedly, the fight against climate change on the international plane after the adoption of the Kyoto Protocol in 1997[550] was a game changer. The early 2000s were hence widely marked by Union engagement in climate action, which quickly elevated environment at the forefront of EU priorities again. Despite the EU's serious

---

[546] Leonie Reins, 'Where Eagles Dare: How Much Further May EU Member States Go under Article 193 TFEU?' in Marjan Peeters and Mariolina Eliantonio (n 539) 22.
[547] Case C-318/98 *Criminal Proceedings against Giancarlo Fornasar and Others*, [2000] ECR I-4785, para 34 quoted in L.Reins (n 548) 26-27.
[548] Henning Deters, 'European Environmental Policy at 50: Five Decades of Escaping Decision Traps?' (2019) 29(5) Environmental Policy and Governance <https://onlinelibrary.wiley.com/doi/epdf/10.1002/eet.1855> accessed 2 September 2022
[549] Andrea Lenschow, 'Environmental Policy: Contending Dynamics of Policy Change' in Helen Wallace, Marc A. Pollack and Aladstair Young (eds), *Policy-making in the European* Union (6th edn, OUP 2010) 321-322.
Traditionally EU environmental directives are ranking high on the list of non-transposition of EU legislation compared to other sectoral legislation. For relevant statistics see the website of the European Commission on enforcement of EU environmental legislation and the yearly reports thereof <https://environment.ec.europa.eu/law-and-governance/legal-enforcement_en> accessed 5 March 2023
[550] Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 10 December 1997, entered into force in 16 February 2005) (1998) 27 ILM 22.

existential crisis after the rejection of the Constitutional treaty in 2005, progress in environmental legislation continued. In addition to climate mitigation measures, the cornerstone of which is the emblematic EU Emissions Trading Scheme (ETS), this period saw also the adoption of noteworthy measures in different areas, namely the control of chemicals with REACH[551] and CLP Regulations[552] or illegal logging.[553] EU environmental governance entered also an era of "proceduralisation" of environmental obligations, and expanded use of framework directives and horizontal measures such as the Integrated Pollution Prevention and Control (IPPC) Directive, the Air Quality Framework Directive and the Water Framework Directive. Gradual treaty amendments made specific references to the precautionary principle as one of the guiding principles of EU environmental policy, provided a clear formulation of the environmental integration principle, and overall contributed to enhancing the environmental foundations of EU environmental law and policy.[554]

The Lisbon treaty did not bring about any revolutionary changes to the EU's internal environmental policy. Still, it mentions climate change explicitly for the first time and moves up environmental objectives as general Union aims. One of the Union's overall objectives as prescribed in Article 3 TEU, is not merely to protect the environment but work towards 'a high level of protection and improvement of the quality of the environment'. The environmental policy framework and general objectives are included in Title XX TFEU (Articles 191 through 193 TFEU) which is dedicated to the 'Environment'. Article 191 TFEU is confined to defining the general objectives of the Union in the matter of the environment[555] which must be respected by EU legislators. While a shared EU competence, it is not an area where full

[551] Council Regulation (EC) 1907/2006 of 18 December 2006 on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) [2006] OJ L396/1 (now amended).
[552] Council Regulation (EC) 1272/2008 of 16 December 2008 on the Classification, Labelling and Packaging of substances and mixtures (CLP) [2008] OJ L 353/1.
[553] E.Orlando (n 538)
[554] ibid.
[555] Case C-379/92 *Criminal Proceedings Against Matteo Peralta* [1994] ECR I-3453, para 57.

harmonization is envisaged since member states are still allowed by virtue of Article 193 TFEU to introduce or maintain more stringent provisions.

The financial crisis due to the fallout of the 2008 global credit crunch was coupled with a certain draw-back (or a lesser active role) of member states that traditionally pioneer environmental protection in the Union.[556] In general a short-term decline in the amount and the ambition of EU environmental legislation was evidenced.[557] The policy was however not overshadowed for long. It is widely accepted that despite a short dip in the immediate aftermath of the crises, EU environmental policy and law continued its robust and steady progress with a constant focus on climate change all through the period 2010-2019.[558]

During half a century of EU engagement in the protection of the environment, a wide body of environmental *acquis* has been developed in a very large array of policy areas: air and water quality, pollution, waste management and circular economy, biotechnology, control of hazardous substances, conservation of natural resources and biodiversity, to name a few.[559] Environmental protection however cannot be understood in narrow ecological terms only. In its aim to protect the environment and to mitigate risks to human health, climate, and biodiversity, the EU undertakes comprehensive actions beyond the constricted margins of environment *stricto sensu*, encompassing nearly all policy areas with a horizontal application. Energy, industry and state aids policy are the obvious frontrunners in this interplay as they are intrinsically bound by and interdependent with the protection of the environment and the promotion of green technologies. From the Renewable Energy directive and the Guidelines on State aid for climate, environmental protection and

[556] Charlotte Burns, Peter Eckersley and Paul Tobin (n 543).
[557] ibid
[558] Reinhard Steurer, 'Is the EU still Committed into Developing more Sustainably?' in A.Jordan and V.Gravey (eds), (n 451) 281.
[559] Diarmuid Torney, Katja Biedenkopf, and Camilla Adelle, 'Introduction: European Union External Environmental Policy' in Camilla Adelle, Katja Biedenkopf and Diarmuid Torney (eds), *European Union External Environmental Policy Rules, Regulation and Governance Beyond Borders* (Palgrave 2018) 4.

energy (CEEAG), EU policies are largely marked with the goal to tackle environmental degradation, address climate change and attain sustainable development. In today's era of the European Green Deal (EGD) –the EU's new growth strategy for a resource efficient, competitive economy with zero GHG emissions by 2050- environmental policy integration and assimilation are at their best.

2.7 Environmental integration principle

> (…) The task of the European Economic Community is to promote throughout the Community a harmonious development of economic activities and a continuous and balanced expansion, which cannot be imagined in the absence of an effective campaign to combat pollution and nuisances or of an improvement in the quality of life and the protection of the environment.
>
> (…) Effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes.
>
> The environment cannot be considered as external surroundings by which man is harassed and assailed; it must be considered as an essential factor in the organization and promotion of human progress. It is therefore necessary to evaluate the effects on the quality of life and on the natural

As seen above, Articles 8 through 13 TFEU prescribe general policy objectives to be taken into account by the EU in all its 'policies and activities'. One of the most prominent is the protection of the environment to be 'integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development', enshrined in Article 11 TFEU. In addition to being the oldest of all cross-cutting principles under Title II, there is no notion as prevalent and omnipresent in EU primary law as the all-encompassing environmental

integration principle. The principle first appeared in the first EAP, which stated: '2. Effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes' because the environment 'must be considered an essential factor in the organization and promotion of human progress'.[560] The principle informed also the first legal basis for the EU competence in environmental protection in the SEA, which stipulated that 'environmental protection requirements shall be a component of the Community's other policies'. The principle was then reinforced in the Maastricht treaty, which stipulated in article 130r TEC that 'environmental protection requirements must be integrated into the definition and implementation of other Community's policies', and also included various Declarations which required the EU to take account and to pay full regard in the protection of the environment, the improvement of public access to information and animal welfare. More importantly, it also introduced the requirement for the Commission to conduct fully-fledged environmental impact assessments for all legislative proposals it would adopt, and for the member states to take full account of environment and sustainable growth in implementing EU/EC law.[561] Yet, the treaty of Amsterdam raised that status of the principle in a standalone article: its Article 6 TEC had a wording quite similar to the wording of Article 11 TFEU. It stipulated that '[e]nvironmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development'.

Nowadays, the treaty of Lisbon espouses the integration principle as a recognised general principle of EU law, granting it an even more comprehensive

[560] Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment [1973] OJ C112/1.

[561] Maastricht Treaty, Declaration No 20 on assessment of the environmental impact of Community measures: 'The Conference notes that the Commission undertakes in its proposals, and that the Member States undertake in implementing those proposals, to take full account of their environmental impact and of the principle of sustainable growth'.
See also: David Wilkinson, 'Maastricht and the Environment: the implications for the EC's environment policy of the Treaty on European Union' 4 (1992) Journal of Environmental Law (1992) 221

character. Article 11 TFEU, providing 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', links the principle's scope to all EU policies and activities without further specification, as the Amsterdam treaty previously did.[562]. The new legal framework includes also other safeguards with the upgrading of the Charter of Fundamental Rights (hereinafter 'Charter') to legally binding status of primary EU law. The apogee of the 'constitutionalisation' of the integration principle in the EU legal order that constitutes a substantial normative evolution for the status of environmental protection and sustainable development, is its presence in the Charter.[563] Drawing upon former articles 2, 6 and 174 of the EC Treaty (now article 3(3) TEU and articles 11 and 191 TFEU), article 37 of the Charter stipulates that '[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'. This reiteration of the integration principle is considered a 'remarkable evolution *vis-à-vis* a more classic bill of rights'.[564] Hopes for the development of a right to a safe, sound and clean environment *per se* on the basis of this provision were soon given up. The protection of the environment is not included in the Charter as a fully-fledged enforceable right but as a 'Charter principle'

[562] (under Title II 'Provisions having a general application'); Gracia Marín Durán and Elisa Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart Publishing 2012) 27.

[563] Eloise Scotford, 'Environmental Rights and Principles in the EU Context: Investigating Article 37 of the Charter of Fundamental Rights' in Sanja Bogojevic and Rosemary Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Bloomsbury 2018) <https://discovery.ucl.ac.uk/id/eprint/10047282/1/Environmental%20Rights%20and%20Principles%20in%20the%20EU%20Context%20-%20accepted%20final%20author%20version.pdf> accessed 6 April 2022

[564] Tim Corthaut and Dries Van Eeckhoutte, 'Legal Aspects of EU Participation in Global Environmental Governance under the UN Umbrella' in Jan Wouters, Hans Bruyninckx, Sudeshna Basu and Simon Schunz (eds), *The European Union and Multilateral Governance: Assessing EU Participation in United Nations Human Rights and Environmental Fora* (Palgrave McMillan 2012) 146.

to be enacted under Article52(5) of the Charter,[565] and its exact legal value is subject to extensive academic debate.[566]

Indeed, the environmental integration principle has generated vivid scientific interest since its inception and has been extensively analysed in world bibliography in depth.[566b] Questions relating to *which* environmental protection requirements need to be integrated and by *whom* as well as of the exact normative value, the legal hierarchy, the impact and justiciability of the principle remain unanswered. Nonetheless, such questions take second place to the substance of the principle. This certainly 'solemn legal requirement' enshrined in the treaties (including the Charter) has an immense impact on EU law and policy-making in various ways.[567] One of the most striking is its 'enabling function'. As endorsed by the Court, a certain 'enlargement' of the scope of other EU competences may be attained by taking into account environmental considerations.[568] Another prominent role is its so-called 'guiding function' or its use as an interpretative tool that the Court has deployed to justify other principles such as the application of the precautionary principle[569]

---

[565] Article 52, para 5 of the Charter (Scope and interpretation) reads '[t]he provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality'.

[566] ibid.

[566b] See indicatively Nicolas de Sadeleer, 'EU Environmental Law and the Internal Market' (OUP 2014) 21; Angela Liberatore, 'The integration of sustainable development objectives into EU policy-making. Barriers and prospects.' in Susan Baker, Maria Koussis et al (eds), *Politics of Sustainable Development* (Routledge 1997)107; Tony Schumacher, 'The Environmental Integration Clause in Article 6 of the EU Treaty: Prioritising Environmental Protection' 1 (2001) Environmental Law Review 29; Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart 2017) 84-95.

[567] Owen McIntyre, 'The Integration Challenge: Integrating Environmental Concerns into other EU Policies' in Suzanne Kingston (ed), *European Perspectives on Environmental Law and Governance* (Routledge 2013) 134.

[568] For example, in case C-513/99 the Court has found that on the basis of the principle of integration, it must be concluded that the possibility for a contracting authority to use criteria relating to the preservation of the environment when assessing the economically most advantageous tender in public procurement is compliant with EU law. Case C-513/99 *Concordia Bus Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikene* [2002] ECR I-7213, para 57.

[569] See for example the judgment of the court of first instance at the *Artegodan* case: '[…] although the precautionary principle is mentioned in the Treaty only in connection with environmental policy, it is broader in scope. It is intended to be applied in order to ensure a high level of protection of health, consumer safety and the environment in all the Community's spheres of activity […] the requirements relating to that high level of protection of the environment and human health are expressly integrated into the definition and implementation

whereas it has also proven decisive in the inclusion of environmental protection as one of the *Cassis de Dijon* mandatory requirements to justify barriers to the free movement of goods.[570]

The Lisbon treaty did not only reiterate the environmental integration principle but introduced requirements to integrate along EU legislation also other values and objectives, conveniently grouped in articles 8 to 13 TFEU, namely the conferral of competences and consistency between policies, activities and objectives (Article 7 TFEU), gender equality (Article 8 TFEU), social protection (Article 9 TFEU), non-discrimination (Article 10 TFEU), consumer protection (Article 12 TFEU) and animal welfare (Article 13 TFEU). The Charter in parallel includes its own mainstreaming clause in Article 51(1) which stipulates that EU institutions and the Member States when implementing Union law, shall 'promote the application' of Charter rights 'in accordance with their respective powers'.[571] In this way, the Charter somehow duplicates most of the integration clauses of the TFEU.[572] This so-called proliferation of integration principles could have resulted into weakening the environmental integration principle. There is compelling evidence, however, that the latter remains the most powerful and widely used of all. Moreover, in response to the critics of the Lisbon treaty and the proliferation of integration principles, it seems to me that the idea of a "melting pot" in which 'everything has to be taken into account with everything'[573] disregards the essence of sustainable development, the overarching global societal goal which seeks a fair balance between economic development, social justice and environmental protection. It is true, that the

---

of all Community policies and activities under Article 6 EC […] Since the Community institutions are responsible, in all their spheres of activity, for the protection of public health, safety and the environment, the precautionary principle can be regarded as an autonomous principle stemming from the abovementioned Treaty provisions'. Joined Cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan GmbH and others v Commission of the European Community*,[2002] ECR II-4945, paras 183-184

[570] *Danish Bottles* (n 546), paras 8-9.

[571] Francesca Ippolito, Maria Eugenia Bartoloni and Massimo Condinanzi, (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2019).

[572] Marcus Klamert, 'Article 11 TFEU' in Manuel Kellerbauer and Marcus Klamert (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP 2019) 386.

[573] Jan H. Jans, 'Stop the Integration Principle?' (2011) 33 Fordham International Law Journal 1533.

integration requirements in Articles 8-10 and 12-13 TFEU do not mention sustainable development; nor does Article 3 TEU state that sustainable development is based on gender equality, social protection, consumer protection or absence of discrimination. As we will see in the following section, in the EU sustainable development is indeed largely intertwined with ecological optimisation. But this does not mean that the rest of its tenets are annihilated.

On balance, what is important to note for the purposes of this treatise regarding the environmental integration principle is that the latter reflects the requirement that all Union measures satisfy the standards of environmental protection[574] and clearly constitutes 'the bridge' between environmental policy included in Title XX TFEU and all other Union policies, internal or external since the environment is connected to all aspects of our lives. Therefore, measures for environmental protection as an end in itself are not sufficient if they are compromised by opposite action in other policy areas.[575] Notwithstanding doubts, open questions and legal nuances, it is certain that the Union is under a legal obligation to ensure that a high level of protection and improvement of the quality of the environment is observed when laying down measures on any policy area. What is more, the wording of Article 11 TFEU, apparently, does not express a static situation[576] but movement towards reaching the Union's objectives set out in Article 3 TEU, and specifically sustainable development, which is also the declared aim of the integration principle itself. Article 11 TFEU is arguably closely related to sustainable development, which in turn presupposes a process of bringing environmental requirements closer to EU policies and activities, i.e. the integration of environmental requirements into other EU policies, in order to be accomplished.[577]

---

[574] Case C-62/88 *Hellenic Republic v Council* (Chernobyl) [1990] ECR I-1545, para 20.
[575] GM.Durán and E.Morgera (n 565) 26 and 28
[576] Marcus Klamert, 'Articles 7-13' in Manuel Kellembauer, Marcus Klamert and Jonathan Tomkin (eds), The EU Treaties and the Charter of Fundamental Rights. A commentary (OUP 2019) 390.
[577] Ludwig Krämer, 'Giving a Voice to the Environment by Challenging the Practice of Integrating Environmental Requirements into other EU Policies' in Suzanne Kingston (ed) (n 571) 84.

2.8 Business responsibility in the EU legal order

In the introduction we briefly described the voluntary international framework on responsible business conduct and the latest trend for mandatory national measures triggered by the proven inefficiency of the voluntary schemes from bad corporate practices. In addition to the case of VW presented in our introductory chapter, there is evidence of various other EU companies or foreign undertakings operating in the EU, which demonstrate an oxymoronic and inconsistent tandem between their voluntary corporate responsibility commitments and their actual performance and policy.[578]

The proposal for a Directive on Corporate Sustainability Due Diligence (CSDDD)[579] is the product of a legislative initiative by the European Parliament. According to Parliament's own initiative, the act should impose on undertakings to make public their due diligence strategy and provide a grievance mechanism to respond to stakeholders' warnings and concerns. Further to that initiative, on 23 February 2022 the European Commission presented a proposal for a directive on mandatory positive requirement for corporate due diligence and accountability for adverse effects on human rights, the environment and good governance stemming from business' operations and relationships. Its scope covers large EU and non-EU undertakings operating within the Union. Their main obligation thereby introduced regards compulsory due diligence to identify, prevent, mitigate, bring to an end adverse human rights and environmental risks and hazards of their own operations as well as explicitly subsidiary companies. Notwithstanding, the proposal also envisages civil liability for companies in breach of their obligations. Member States are also required to provide for sanctions and to put in place a regime to address

[578] European Commission, Directorate-General for Justice and Consumers, Torres-Cortés, F., Salinier, C., Deringer, H., et al., *Study on due diligence requirements through the supply chain: final report* (Publications Office of the European Union 2020) <https://data.europa.eu/doi/10.2838/39830>accessed 6 October 2022

[579] Commission, 'Proposal for a directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937' (Communication) COM (2022) 71 final.

companies' liability for any harm arising out of potential or actual adverse impacts on human rights, the environment or good governance.[580]

The draft Directive, which is already debated in Parliament (the rapporteur submitted the draft report on 7 November 2022, now awaiting Committee opinion)[590b] and in Council (Council's negotiating position, aka 'general approach,' was adopted on 1st December 2022)[590c], is expected to become law by the end of 2023. This directive is not a self-standing measure; it frames and takes a step further towards a wider context of EU legislation and initiatives such as the non-financial reporting directive (NFRD) which requires certain large companies to disclose information about the way they operate and manage social and environmental challenges.[581] It complements also other relevant sectoral EU measures such as Directive 2011/36/EU on the prevention and the combat of trafficking and protection of victims which includes safeguards against forced labour, sexual exploitation, slavery and other similar practices; the Employers' Sanctions Directive 2009/52/EC which forbids the employment of irregular migrants as well as victims of trafficking as well as the conflict minerals regulation[582] and timber regulation[583] which require due diligence

[580] European Parliament, 'Report with recommendations to the Commission on corporate due diligence and corporate accountability 2020/2129(INL)' (11 February 2021) A9-0018/2021 <https://www.europarl.europa.eu/doceo/document/A-9-2021-0018_EN.pdf> accessed 9 December 2021

[590b] For the progress in Parliament see the dedicated webpage < https://oeil.secure.europarl.europa.eu/oeil/popups/thematicnote.do?id=41380&l=en> Accessed 25 March 2023

[590c] "Council adopts position on due diligence rules for large companies" https://www.consilium.europa.eu/en/press/press-releases/2022/12/01/council-adopts-position-on-due-diligence-rules-for-large-companies/ Accessed 25 March 2023

[581] European Parliament and Council Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance [2014] OJ L330/1.

[582] European Parliament and of the Council Regulation (EU) 2017/821 of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold from conflict-affected and high-risk areas [2017] OJ L130/1, requires due diligence for Union importers of the said minerals which originate from conflict-affected, politically unstable high-risk areas over the supply chain. EU importers of tin, tantalum, tungsten and gold must check that the minerals or metals they buy do not contribute to the financing of armed groups, conflict, forced labour, the support of corruption, money laundering or other illicit activities. The regulation requires importers to follow the five-step framework established by the OECD.

[583] 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 EU market [2010] OJ L 295/23, takes measures to stop the trade in illegally harvested timber and timber products. It requires EU traders who place timber products on the EU market for the first time to exercise 'due diligence'. Under the regulation, due diligence refers to a system of measures and procedures to minimise the risk of placing illegally harvested timber and timber products derived from such timber on the internal market.

only for specific products. The proposal on a CSDDD joins the fractional Union legislation already in force and efforts under domestic laws to address in a coherent manner the puzzling and frustrating issue of lack of accountability of transnational corporations for their abuses.

Initial criticism over the proposal concerns its rather limited scope and vagueness on environmental and climate change mitigation due diligence;[584] but overall, the proposal has been well received. It creates high expectations as a possible game-changer in the area of corporate liability over environmental and human rights protection.[585] What is of particular interest from an EU law perspective is the choice of the legal basis for the adoption of the proposal, i.e. Article 50 TFEU on the freedom of establishment. The Commission backs its choice to address the need for harmonization of such rules due to existing divergent national measures in Member States which are therefore capable of producing disparities among national rules, thus create barriers to the internal market. Although considered together with Article 114 TFEU, the centre of gravity of the legal basis is on Article 50 TFEU, which according to cited case-law, can be used as legal basis 'if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws' provided that the emergence of such obstacles is likely, and the measure in question must be designed to prevent them.[586] The Commission makes a plausible argument; the likelihood of judicial review under article 263 TFEU arguing for an incorrect legal basis cannot be however excluded.

[584] Tania Pantazi, 'The Proposed Corporate Sustainability Due Diligence Directive and its Provisions on Civil Liability and Private International Law in Particular' (2022) <https://www.researchgate.net/profile/Tania-Pantazi/publication/365638137_The_proposed_Corporate_Sustainability_Due_Diligence_Directive_and_its_provisions_on_civil_liability_and_private_international_law_in_particular/links/637cc11d1766b34c54479cba/The-proposed-Corporate-Sustainability-Due-Diligence-Directive-and-its-provisions-on-civil-liability-and-private-international-law-in-particular.pdf> accessed 2 December 2022

[585] Andre Hoffmann, 'How Mandatory Human Rights and Environmental Due Diligence Can Create a Sustainable Future' (*World Economic Forum*, 18 February 2022) <https://www.weforum.org/agenda/2022/02/good-corporate-governance-and-a-sustainable-future-the-role-of-mandatory-human-rights-and-environmental-due-diligence/> accessed 8 December 2022.

[586] Case C-380/03 *Federal Republic of Germany v European Parliament and Council of the European Union* [2006] ECR I-11573, para 38.

2.9 Sub-conclusion | a short critique

There is no doubt that the EU has been increasingly turning into a community where fundamental principles and values are expressly provided for; where respect for and protection of the rule of law, human rights and sustainable development are not only an implied part of its identity but are spelt out in legally binding commitments in the Treaties. This normative reality is a perfect depiction of EU's constitutional development.[587]

The Union which endeavours to safeguard respect for the rule of law, human rights and sustainable development has an overall quite advanced regulatory framework. That said, Member States or the EU itself are not always champions in the application and actual implementation of those standards. Empirical analysis suggests that few sustainability international treaties have had little or disparate effect in practice amongst the EU Member States which sometimes fail to go the extra mile for real action, beyond signature and ratification. And not only that: for many years now, certain core EU policy areas seem to ignore some of the integrative principles and objectives of EU legislation. The protagonist is probably the EU's antitrust - competition policy. This exclusive EU competence, enshrined under articles 101 to 106 TFEU, is at the very core of the internal market. But the EU has been stubbornly resisting prioritizing sustainable development principles; surprisingly, the EU's competition policy is a sustainability-proof area framed in almost purely competition considerations with only limited exceptions. For example, in the area of clearance on mergers and acquisitions as well as the identification of possible cartels, the Commission has in the past allowed sustainability agreements between competitors to be regarded outside the scope of Article 101 TFEU as contributing 'to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting

[587] Joseph H. Weiler, 'A Constitution for Europe? Some Hard Choices' (2002) 40 JCMS 563.

benefit' (Article 101(3) TFEU).[588] Besides, in the framework of EU's state aids' restrictions (Articles 107-108 TFEU), there have been important exceptions granted to subsidies into green technologies in the framework of the General Block Exemption Regulation 651/2014, the newest "Green Deal GBER amendment" as well as other implementing legislation thereof*; but that's it. These are mere exceptions. Not only are agreements in the framework of Article 101 TFEU very rarely considered in view of sustainability criteria, but also actions of companies with dominant positions carrying out environmental services are not seen more leniently or differently just because of their nature or activities. The Commission treats them exactly like any other undertaking in terms of examining possible abuses of dominant positions.[588b]

This is why in the feedback that the Commission has received through various public consultations regarding the reform of competition policy, the issues most respondents spotted were 'climate change and the corresponding challenging environmental and sustainability goals', which the Commission has interpreted as an 'increased demand from consumers and businesses for sustainable, ethical and environmentally friendly business practices'.[589] The nexus between competition policy and sustainable development is crucial and it has proven to be likely to create legal problems.[589b] In a global environment, under the pressure *inter alia* of the landmark US Inflation Reduction Act (IRA) which aims to allocate $369 billion to green the economy, it is becoming crystal clear to EU leaders that in order to keep having a level-playing field and to avoid unfair competition, closing down markets

---

[588] See, *Exxon/Shell* (COMP/33.640) Commission Decision 94/322/EC [1994] OJ L 144/20; *CECED* (COMP/36.718) Commission Decision 2000/475/EC [2000] OJ L 187/47; *ACEA* (COMP/37.231); *JAMA* (Case IV/F-2/37.634) and *KAMA* (Case IV/F-2/37.611) and Communication from the Commission, Results of the review of the EU Strategy to reduce CO 2 emissions from passenger
cars and light-commercial vehicles, COM(2007) 19 final; Commission Decision 92/96/EEC Assurpol [1992] OJ L37/16.

[588b] <https://competition-policy.ec.europa.eu/state-aid/legislation/regulations_en#implementing-regulation> accessed 5 January 2023

[588c] N.deSadeleer (n565b) 424

[589] European Commission, 'Factual Summary of the Contributions Received during the Public Consultation on the Evaluation of the Two Block Exemption Regulations and the Guidelines on Horizontal Cooperation Agreements' (2019) <https://ec.europa.eu/competition/consultations/2019_hbers/HBERs_consultation_summary.pdf> accessed 13 March 2023.

[589b] N.deSadeleer (n565b) 468-469

and fragmenting supply chains, something needs to change in competition policy too.[591] For the time being, little do the Commission's intentions indicate in this direction, but no doubt we will witness even radical changes in the immediate future.[592]

[591] Andy Bounds and Sam Fleming, 'EU Struggles to Counter Joe Biden's Big Green Push' *Financial Times* (London, 12 December 2022).
[592] Jurgita Malinauskaite, 'Competition Law and Sustainability: EU and National Perspectives' (2022) 13 Journal of European Competition Law & Practice 336.

Chapter 3 | The quest for EU's world 'actorness'

Whereas the exercise of EU's competences in its external action continues to puzzle most Europeans, and while EU foreign policy is an almost enigmatic concept,[593] EU external action has gone through major changes.[594]

3.1 The bumpy road to today's CFSP: back to square one?

Certain 'founding fathers' had a vision of a united post-war Europe on the political level. The concept was proven a far-sighted, hence premature, and unrealistic dream. To put the issue into perspective, we need to consider how different the times were back then: the idea of heads of State and governments meeting in the framework of a permanent Council was thought inconceivable.[595]

Amidst other foredoomed initiatives over coordinating member states' foreign policies outside the context of the (then) European Economic Community (EEC),[596] ill-starred initiatives were also instigated in the scope of the EEC. As early as in 1950, the 'Pléven plan' for the creation of a European army was put forward for negotiation between the Member States of the European Coal and Steel Community (ECSC). It led to the signature of the Treaty establishing the European Defense Community (EDC) and in 1953, to the agreement on the creation of the 'European Political Community'. The latter was planned to be a powerful structure that would

[593] It has been said that 'European foreign policy' itself has always been an elusive concept. Christopher Hill, 'Closing the Capabilities-Expectations Gap?' in John Peterson and Helen Sjursen (eds) (n 1) 19.
[594] Manfred Elsig, *The EU's Common Commercial Policy: Institutions, Interests and Ideas* (Springer 2018).
[595] For Albert Borschette this was an 'illusion': 'Le Conseil de Ministres, même à son niveau le plus élevé, celui des Ministres des Affaires Etrangères - car c'est une illusion de croire que certains Chefs d'Etats ou de Gouvernements accepteraient de se réunir dans le cadre des Conseils […]', Lettre de Albert Borschette à Eugène Schaus (8 novembre 1961) <https://www.cvce.eu/obj/lettre_de_albert_borschette_a_eugene_schaus_8_novembre_1961-fr-0f6b495c-742b-434a-be53-69435741c255.html> accessed 16 March 2023.
[596] We shall not examine at all other attempts for coordination of European political and foreign action falling outside the European Community and the EU such as the Western Union (WU). Despite their significance for historical purposes, they are outside the scope of our research and do not have value our legal analysis.

run in parallel with the ECSC and the EDC, and would subsequently substitute them. However, it never saw the light of day.[597] The French National Assembly rejected it in 1954.[598] What happened in the meantime needs no further analysis; the purely 'political' plans having failed, integration went forward though the creation of the common market of the European Economic Community (EEC) and the signature of the Treaty of Rome in 1957.

A few years after, in early 1961, French President De Gaulle put forward the concept for a political cooperation scheme, which embodied his idea for reform of the European project through a centralized Franco-German 'confederation'[599] and had an intergovernmental rather than a supranational character.[600] The Paris Summit of 10-11 February 1961 sought 'the methods by which closer political co-operation could be organized'.[601] The exact wording evidenced that this plan would run on a basis of cooperation, concurrently with the 'new type of relationship based on the development of a Common Market'.[602] At all evidence, there was a demonstrated will to create a united European front that would 'carry more weight in the world'[603] and reconcile the two diverging schools of thought: the French strong predilection for a purely intergovernmental cooperation on all fronts and the path already taken on the economic front towards integration building on a supranational/community pattern.

---

[597] 'Common Foreign and Security Policy' (Summaries of EU legislation) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:a19000&from=DE> accessed 9 December 2020.
[598] ibid.
[599] 'Historical Events in the European integration process (1945-2014): The Fouchet Plans' (*CVCE.eu*) <https://www.cvce.eu/en/collections/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/a70e642a-8531-494e-94b2-e459383192c9> accessed 9 December 2020.
[600] General De Gaulle had his own very specific vision about the cooperation of European states. He wanted Europe to become the third superpower in the post-war world but through pure intergovernmental cooperation of sovereign states. The limitation of sovereign rights and the supranational character of the Community/common market was not acceptable to him. A clear depiction of the French position for the European unification project is made by Luxembourgian diplomat Borchetter. See, Lettre de Albert Borschette à Eugène Schaus (n 598)
[601] Conference of the heads of State or of Government and the Foreign Ministers of the Federal Republic of Germany, Belgium, France, Italy, Luxembourg and the Netherlands, Paris, 10 and 11 February 1961), 'Press release issued by the Paris Summit (10 and 11 February 1961)' (*CVCE.eu*) <https://www.cvce.eu/en/collections/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/a70e642a-8531-494e-94b2-e459383192c9/Resources#12a9fdc6-a14e-426c-90eb-548eb571806a_en&overlay> accessed 9 December 2020
[602] ibid.
[603] ibid.

The French initiative for a 'political union' of foreign policies should not -despite its name- be mistakenly conceived as a pro-integrationist approach. In fact, what De Gaulle was trying to achieve was for Europe to gradually transit from the 'common market' supranational approach to a purely intergovernmental collaboration of the Six founding member states on all fronts.

Discussions continued at a second Summit in Bonn on 18-19 July of the same year. The ad-hoc French study group[604] called upon to reflect on the issues revolving around political cooperation unanimously recognized that progress in this respect was 'welcome'.[605] It was also admitted that the Community(ies) instituted by the Treaties of Rome (EEC) and Paris (ECSC) would be fulfilled only by a certain level of harmonization of the member states' foreign policies.[606] Notwithstanding these bold affirmations and the strive for a *modus vivendi* of all Six stances which crystallized into a draft proposal for a treaty on an intergovernmental political union for the coordination of foreign and defence policies,[607] the first 'Fouchet Plan' was rejected later that year.[608] The dichotomy between France's desire for a purely intergovernmental union on both the political and economic fronts and the reluctance of the rest five to abandon the 'community' framework would prove unsurmountable. The draft treaty presented by the French was in direct contradiction with the Treaty of Rome as it provided for the creation of a 'Union of States' under the 'union of peoples' of the EEC.[609] A second attempt was made by the submission of draft

[604] The group was chaired by Christian Fouchet, Gaullist French diplomat after whom the group ('the Fouchet Committee') and the proposals ('Fouchet Plan' I and II) were named. Ibid

[605] '[la Commission] a été unanime à reconnaître que la mise en œuvre d'une coopération politique entre les Six rendait souhaitable qu'un progrès fût accompli dans ce domaine', Rapport de la Commission d'étude sur le problème de la coopération politique' (1961) (*CVCE.eu)* <https://www.cvce.eu/content/publication/1999/1/1/981f57c9-7e66-420b-bd01-f1e9600dc9d1/publishable_fr.pdf> accessed 30 April 2022 [*emphasis added*]

[606] ibid.

[607] Lettre de Albert Borschette (n 598).

[608] Specific institutional arrangements for an intergovernmental cooperation on foreign policies were proposed by the study group in an initial draft treaty on European Political Union (Fouchet Plan I). 'Draft Treaty – Fouchet Plan I of 2 November 1961' in European Parliament: Committee on Institutional Affairs, *Selection of Texts Concerning Institutional Matters of the Community from 1950-1982* (European Parliament 1982) 112.

[609] Eric Stein, 'European Political Cooperation (EPC) as a Component of the European Foreign Affairs System' (1983) 43(1) ZaöRV 49.

'Fouchet Plan II' on 18 January 1962 which was, however, doomed by default since it proposed an even more intergovernmental character for the union of Six and was seen mainly by the Dutch and the Belgians[610] as a distressful risk to the accession of the United Kingdom, the relations with the United States and NATO.[611] Deal fell through finally in 1962.

Quite interestingly, the failed project bore some noteworthy points which shall interestingly reappear in the future in terms of EU's CFSP post-Lisbon. A key institutional arrangement which stands out concerned the creation of a new permanent 'Council', complementary to the Council of Ministers of the EEC consisting of Heads of State and Governments, and Foreign Ministers.[612] The new 'Council' which would convene every four months, would be purely intergovernmental: decisions would be made by unanimity, and States would have the possibility to abstain and opt-out on selective decisions. It would however be a proper institution with decision-making powers. Under Article 3 of the draft treaty, that Union would also have a legal personality enjoying 'in each of the Member States the most extensive legal capacity accorded to legal persons under their domestic law'. It is probably impossible to speculate what the legal value of decisions of the failed union would have been. It is however clear that despite its purely intergovernmental character, that failed union would have the legal capacity to adopt legally binding enforceable decisions. The European parliament of the EEC would also bear an advisory and scrutinising role in the political union's actions under Article 7 of the draft treaty, adding a pinch of democratization. The 'Fouchet working group' also considered the usefulness of interventions by the heads of State and governments for the purposes of achieving political compromise and consensus in the framework of the EEC.[613]

---

[610] ibid

[611] 'Compte rendu de la réunion de la Commission politique européenne' (18 janvier 1962)' (*CVCE.eu*) <https://www.cvce.eu/en/collections/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/a70e642a-8531-494e-94b2-e459383192c9/Resources#660622ca-2d9d-49d0-b22a-b11a4583dbb0_en&overlay> accessed 10 December 2020.

[612] Article 4 of the draft Treaty on European Political Union ('Fouchet Plan I').

[613] 'L'intervention des chefs d'État ou de gouvernement serait souhaitable dans les cas où, en raison des responsabilités politiques exceptionnelles ou des exigences d'unanimité qu'impliquerait l'adoption d'une décision, l'exécution de ces traités par les institutions qui en sont normalement chargées se trouverait retardée ou compromise'. Ibid

The epic failure of the Fouchet plan did not disappoint European visionaries to the point of abandoning the objective of a common ground in foreign policies. After some less emblematic, yet unsuccessful initiatives such as the Spaak plan of September 1964, the German memorandum and the Italian propositions of November 1964, and the Harmel plan of 1968,[614] the idea of a common foreign and security policy as we currently know it materialized in the immediate aftermath of the Gaullist period. With the French having lifted their veto on the UK's accession, and given further developments in the EEC[615] and the world more generally,[616] the right conditions had been formed for an eventual political cooperation on the level of foreign policy. The first concrete and productive step towards a systemized action within the EEC was the creation of the predecessor of the CFSP, the European Political Cooperation (EPC) in 1970.[617]

The Hague summit of 1-2 December 1969 invited EEC foreign ministers to approve a new plan for the coordination of foreign policy, which they did only one year later. The 'Davignon report'[618] suggested an organized form of political cooperation in foreign policy. This time, the idea of a 'political community' running utterly outside the scope of the 'Community method' was wholeheartedly accepted. Member states had not essentially changed their prior stances over the matter. But the earlier clash vanished since the new arrangement was not envisioned as a stage towards the gradual substitution of economic integration but as a parallel process.[619] By recognizing another dichotomy, that of high and low politics and the need to address each one separately, member states could finally agree on a mere fine tuning

[614] Panayiotis Ifestos, 'European Political Cooperation (EPC): Its evolution from 1970 to 1986 and the Single European Act' 11 [1987] Journal of European Integration 47.
[615] In 1969 Georges Pompidou was elected President of France and General de Gaulle retired from politics.
[616] 'Historical Events in the European integration process (1945-2014): European Political Cooperation' (*CVCE.eu*) <https://www.cvce.eu/en/collections/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/fed975ca-665b-4c89-ac04-0ac7e8919c51> accessed 9 December 2020
[617] Elfriede Regelsberger, 'European Political Cooperation (EPC)' *Oxford Research Encyclopedia of Politics* (2020).
[618] Alias the 'Luxembourg report', took its name from the chairman of the drafting committee convened by foreign ministers, Belgian diplomat Étienne Davignon.
[619] E.Stein (n 612).

of their presence in the world[620] that would serve the objective of 'Europe speaking with one voice'[621]. The two processes of economic integration and political cooperation would be concurrent but 'hermetically separated (…) in order to avoid contamination with the insidious Brussels atmosphere of supranationalism'.[622] This 'separateness' besides being a demand of France was, soon supported by the UK and Denmark.[623] In this context and on the basis of the political nature of the commitments establishing the EPC,[624] its constituent documents[625] set no tangible objectives. The means to achieve the desired coordination would be through regular exchange of information, structured consultations and a 'promotion' of harmonisation of positions in a system of mere collaboration without the mediation of institutions.[626]

Institutional arrangements were even lighter than what was provided for by the Fouchet plan or -to be more accurate- merely inexistent. The EPC mechanism would run under a net of structured coordination fora whose mandate was not premised on a proper legal basis. Their decisions would hence have no legally binding effect; on the contrary, they would be purely declaratory,[627] as their names (i.e. 'common position' and 'declaration') imply. The highest-ranked formation would be the 'European Council,' an existing informal summit of heads of State and governments accompanied by foreign ministers that would hold regular meetings. Despite its name reminding of a formal institution, the European Council was

[620] E.Regelsberger (n 620).
[621] P.Ifestos (n 617)
[622] E.Stein (n 612)
[623] Simon Nuttall, 'The CFSP at Maastricht: Old Friend or New Enemy?' (European Union Studies Association, Biennial Conference, 29 May-1 June 1997) <http://aei.pitt.edu/2690/> accessed 10 January 2021
[624] 'Davignon Report (1970)' (*CVCE.eu*) <https://www.cvce.eu/content/publication/1999/4/22/4176efc3-c734-41e5-bb90-d34c4d17bbb5/publishable_en.pdf>; subsequent Copenhagen Report, 'Second Report on European Political Cooperation in Foreign Policy Matters (Copenhagen, 23 July 1973)' *(CVCE.eu)* <https://www.cvce.eu/content/publication/1999/1/1/8b935ae1-0a38-42d4-a97e-088c63d54b6f/publishable_en.pdf>; London Report, 'Report on European Political Cooperation (London, 13 October 1981) <https://www.cvce.eu/en/obj/report_on_european_political_cooperation_london_13_october_1981-en-869a63a6-4c28-4e42-8c41-efd2415cd7dc.html> all accessed 30 April 2022; E.Regelsberger (n 620)
[625] E.Stein (n 612)
[626] N.Winn, C.Lord (n 54).
[627] E.Regelsberger (n 620).

conceived only as a purely occasional coordinating conference. In practice, agreed actions were adopted by consensus and were purely declaratory without specific implementation targets. Strictly speaking all decisions under the EPC were made unanimously, this being one of the most significant signs of intergovernmentalism and of members' denial to confer their sovereignty over foreign policy.[628] There was no 'secretariat' supporting its works. Other standardized meetings were also foreseen in the framework of the EPC (such as the Conference of foreign ministers, the meetings of heads of political departments of foreign ministries under a Political Committee and so on). The informal European Council also discussed community matters, thus ensuring some level of awareness among member states. Besides, since 1974 it was proclaimed that it constituted the 'highest political instance of both Community affairs and the EPC'.[629] Nevertheless, no involvement of any EEC institution was foreseen in the EPC mechanism. As it has been underlined, competences between the community and EPC fields would be 'strictly divided'.[630] In practice this was not realistically feasible; some minor interferences were unavoidable. For instance, not having a secretariat to administer the works of the European Council, the representatives of the Member State holding the rotating Presidency of the Council of Ministers would also chair the works of all EPC conferences. In addition, the European Commission had limited involvement. According to the original Davignon report, the Commission could be 'invited to make known its views' in the EPC fora should their work affect the activities of the Communities.[631] Progressively the need of consistency dictated[632] regular

[628] Sophie Vanhoonacker, 'From Maastricht to Amsterdam: Was it Worth the Journey for CFSP?' (1997) <https://www.researchgate.net/publication/29991520_From_Maastricht_to_Amsterdam_Was_it_Worth_the_Journey_for_CFSP> 20 November 2020

[629] P.Ifestos (n 617)

[630] E.Stein (n 612).

[631] ibid

[632] Tackling the issue of the Arab-Israeli conflict in the 1970s is a good illustration of this reality. Regarding the preparatory meetings of diplomats for the coordinated positions of EC member states under the EPC, due to the highly possible overlap of the issues discussed with matters coming under the Community umbrella, both the Commission and COREPER were invited to participate. David Allen, 'Political Cooperation and the Euro-Arab Dialogue' in David Allen, Reinhart Rummel and Wolfgang Wessels (eds), *European Political Cooperation: Towards a Foreign Policy for Western Europe* (Butterworth Scientific 1982) 69.

Commission participation in deliberations of EPC fora[633] but only in a consultative role.[634] Neither Parliament nor the Court of Justice had a say in EPC-related decisions.

The first years of EPC's life can be assessed as a not unsuccessful period of experimentation.[635] From the outset, EC leaders declared that 'Political Cooperation between member states in the area of foreign policy has got off to a good start'.[636] Several attempts were made for concerted action in significant issues on the international scene such as the Arab crisis and the Israeli-Palestinian conflict. Early years' practice proved that although Member States were not in a position to engage into concerted action, they were very keen in engaging in collective declaratory diplomatic moves such as the Euro-Arab dialogue of 1975[637] and the Venice declaration on the Middle East of June 1980.[638]

The works of the EPC machinery triggered certain minor adjustments on the organizational front which overall are not of great importance. The occasional, 'institution-free' character of the EPC and its strict division from the EC was rather further consolidated. This is an expected corollary of a generally challenging climate of economic recession, severe internal and international crises. What more could have been expected from the updates of EPC's constituent documents[639] after the unfortunate fate of the 'Tindemans report' for a European Union,[640] pragmatic (or

[633] As the London report of 1981 denotes, the EC Member States 'attach importance to the Commission of the European Communities being fully associated with Political Cooperation at all levels'. P.Ifestos (n 617)
[634] Since 1975 Commission officials would participate at the meetings of the Political Committee and gradually the Commission president and the commissioner responsible for foreign affairs regularly participated at the European Council without any voting powers. Ibid
[635] P.Ifestos (n 617)
[636] Bulletin-EC, 10-1972, p. 22 in P.Ifestos (n 617)
[637] D.Allen, 'Political cooperation and the Euro-Arab dialogue' (n 635) 74-77.
[638] For a comprehensive analysis for the first fifteen years of EPC's operation, see P.Ifestos (n 617)
[639] E.Regelsberger (n 620)
[640] Belgian Prime Minister Leo Tindemans was mandated by the Paris Summit of 9 and 10 December 1974 to draft a report on the creation of a 'European Union'. The report submitted to the European Council on 29 December 1975 proposed *inter alia* the strengthening of EC institutions and the development of more common policies such as the creation of a monetary union. On EPC, it proposed the introduction of majority voting instead of unanimity. Leo Tindemans, 'European Union: Report by Mr.Leo Tindermans, Prime Minister of Belgium, to the European Council' (1976) Bulletin of the European Communities, Supplement 1/76' (*AEI*) <http://aei.pitt.edu/942/> accessed 30 April 2022.

pessimistic) affirmations on the state of the Community such as in the report of the "Three Wise Men",[641] or the relentless stance of Margaret Thatcher, who, although despised the EEC, showed enthusiasm over the intergovernmental EPC?[642] Adding to that the favouritism of diplomats for secrecy[643] and the feeling of belonging to an 'elite',[644] one does not wonder that even in circumstances where bolder proposals were put forward for the reform of the Community, no one dared to lay hands on the division between Community and EPC methods[645] rather than agree to codifications and further acknowledgement of existing practices.

And yet, amidst this rather negative ambience, as often is the case in the EU, change was achieved. The first amendment of the Treaty of Rome, the Single European Act (SEA) in 1986 is a major milestone for various policy areas as also seen above[645b] but also for the subsistence of the EPC. The treaty did not alter the distinction between EEC and EPC but the latter was incorporated in the EEC constituent document, hence acquiring a legal basis. Title III of the SEA was devoted to the EPC and the endeavour of Member States to 'jointly formulate and implement a European foreign policy'.[646] This may sound a more ambitious mission than the actual commitments of Member States as per the following clarifying paragraphs in the SEA which speak about some moderate obligations to 'inform and consult each

---

[641] The 'Report on the European Institutions' of the 'Three Wise Men' (namely Barend Biesheuvel, former Prime Minister of the Netherlands and Member of the European Parliament, Edmund Dell, former UK Minister for Trade, and Robert Marjolin, former Vice-President of the European Commission) presented in 1979 noted that the 'present time seems to us ill-suited to futuristic visions which presuppose a profound and rapid transformation of attitudes within the Community. The chance of such transformation in the next few years seems to us exceedingly slight'.
European Council, Barend Biesheuvel, Robert Marjolin, and Edmund Dell, 'Report on European Institutions: Presented by the Committee of Three to the European Council (1996) European Council, Publications Office 79-801 ; Edmund Dell, 'The Report of the Three Wise Men' (1993) 2 Contemporary European History , 35

[642] Desmond Dinan, 'The Single European Act: Revitalising European Integration' in Finn Laursen (ed), *Designing the European Union: From Paris to Lisbon* (Springer 2012) 124.

[643] E.Stein (n 612)

[644] P.Ifestos (n 617)

[645] For example, the Genscher-Colombo initiative launched by the German and Italian foreign ministers for an institutional reform which resulted into the 'Solemn Declaration' endorsed by the summit in Stuttgart of 19 June 1983 adopted some "ingenious" wording on the EPC and called for greater powers in foreign relations but did not ask for any alteration in the distinction between EEC and EPC. P.Ifestos (n 617)

[645b] See Chapter 2.4 and 2.6.

[646] Article 30(1) Single European Act (1978) OJ L169/1 (SEA).

other', and to converge and determine common positions as point of reference and 'as possible' [Article30(2)]. Title III also provided for a detailed description of meeting practices which were of course still completely independent from EC institutions. Involvement of the Commission was explicitly provided[647] as well as the requirement for consistency between the external policies of the EC and the policies of the EPC.[648] Even a symbolic part of 'close association' of the European Parliament was foreseen.[649] Notwithstanding the significance of the incorporation of the EPC in the treaty and the granting of a legal basis, the SEA still distinguished the Community, its powers and institutions from all EPC-related action and kept all related actions immune from the Court's jurisdiction.[650] What is more, in the absence of any concrete commitments, and more importantly deprived of the possibility to adopt any justiciable legally binding acts in a structured decision-making framework, meant that foreign policy coordination 'remained political rather than legal'.[651]

The EPC gave the first tangible results of at least some level of coordination in foreign policies. Far beyond speaking in one voice in the world, Member States did however sincerely engage into their commitment to inform, consult and attempt to formulate common positions even on difficult issues. As such, EPC did gain some recognition in the international fora and created a certain buzz over the matter of a European Community *actorness* but measuring its success or failure has been nearly impossible.[652] EPC results are not truly measurable,[653] and the idea of *political acquis* is rather controversial. Yet, there are certain noteworthy events to be commemorated

[647] 'The Ministers for Foreign Affairs and a member of the Commission shall meet at least four times a year within the framework of European Political Co-operation' (Article 30(3) SEA); 'The Presidency and the Commission, each within its own sphere of competence, shall have special responsibility for ensuring that (…) consistency [of the external policies of the EC and the policies of the EPC] is sought and maintained' (Article 30(5) second indent SEA); 'The High Contracting Parties and the Commission, through mutual assistance and information, shall intensify co-operation between their representations accredited to third countries and to international organizations' (Article30(9) SEA).
[648] Article 30(5) SEA.
[649] Article 30(4) SEA.
[650] Loreta Šaltinytė, 'Jurisdiction of the European Court of Justice over Issues Relating to the Common Foreign and Security Policy under the Lisbon Treaty' (2010) 1 Jurisprudencija/ Jurisprudence 261.
[651] P.Ifestos (n 617).
[652] E.Regelsberger (n 620).
[653] E.Stein (n 612)

such as: common positions on Rhodesia-Zimbabwe, Namibia, relations with the ASEAN and -the trickiest of all- Middle East and the Arab-Israeli conflict.[654] Europeans have been criticized to have acted reactively rather than proactively on these matters.[655] It is nonetheless indicative of their intent to cooperate that they did engage into such complex international issues from the very early days of the EPC.[656] Another successful practice of the EPC was the coordination of member states' positions in international conferences. According to one of the very few measurable indicators of diplomatic cohesion -the frequency with which countries vote the same in the UN- the formation of the EPC coincides with an increase of common voting Member States of about 40-50 per cent by the end of the first decade of the EPC's life.[657]

The EPC -under this quite misleading[658] in my opinion name- ran up until 1993. Its results remained questionable. Albeit some academic attention to a possible 'EPC actorness' and some limited international recognition of the latter as a result of Member States common stance over certain significant global issues, as mentioned, its impact has been pretty much unmeasurable.[659] The necessary impetus for the development of the EPC 'beyond its post-SEA phase of procedural fine-tuning and diplomatic restraint' came with the fall of the Berlin Wall[660] in 1989.[661]

---

[654] ibid
[655] P.Ifestos (n 617).
[656] The issue was discussed at the very first meeting of foreign ministers under the EPC in 1970 as well as at the second meeting in May 1971. In 1973 Member States issued a 'Declaration on the crisis in the Middle East,' which very much followed UN Res 242. In the following years, EPC declarations became regular and on 13 June 1980, the European Council issued the 'Venice Declaration', which has been characterized as a "remarkable" performance of the (then) Nine. P.Ifestos (n 617) and D.Allen (n 635).
[657] N.Winn, C.Lord (n 54).
[658] For some examples of possible misunderstood explanations over the notion of 'political cooperation', see Renaud Dehousse, 'L'Europe politique a-t-elle encore un avenir?' in Renaud Dehousse (ed), L'Union européene, acteur des relations internationales' <https://www.diplomatie.gouv.fr/IMG/pdf/03.03.pdf> accessed 25 October 2020
[659] E.Regelsberger (n 620).
[660] Martin Holland (ed), *The Future of European Political Cooperation* (n 53) 1.
[661] Cornelia-Adriana Baciu and Alexandra Friede, 'The EU's CFSP/CSDP in 2030: Towards an Alternative Vision of Power?' (2020) 28 New Perspectives 398.

In the aftermath of the fall of Berlin Wall and the emergence of a new quasi 'monopolar' world, united Europe's big revolutionization could not let the 'European form' of foreign 'actorness'[662] completely unchanged. With Europe not being ready to be truly united on the political level, the 'pillarisation' of the 'Maastricht edifice' was conceived as a way out of vociferous debates over a possible further 'communiterisation' of foreign policy coordination.[663] The Common Foreign and Security Policy (CFSP) was born. CFSP was included in the Treaty on European Union becoming the second pillar of the EU edifice. Its structure was to a large extent inherited from its precursor, meaning it sustained its intergovernmental nature with the consistent "reign" of unanimity. There was nonetheless to a certain extent a moderation of the institutional 'separateness'. The highest coordinating forum remained the informal European Council (still not mentioned in the treaty), but decisions were no longer taken by an unidentified independent meeting forum of foreign ministers, but by the Council. While the intergovernmental logic prevailed in subsequent treaty amendments, some significant institutional change came with the treaty of Amsterdam which brought the possibility of 'constructive abstention' in CFSP and Qualified Majority Voting (QMV) in the Council regarding certain CFSP-related acts. The establishment of the post of the High Representative in 1999[664] and some other moderate institutional restructuring by the Treaty of Nice followed.

CFSP aspired to be an 'almost revolutionary change in member state commitments'[665] and raised expectations about a possible role of the EU in international organisations on its own as well as to align and coordinate effectively

---

[662] M.Smith (n 55)

[663] Fraser Cameron, 'The Convention and CFSP/ESDP' in Martin Holland (ed), *Common Foreign and Security Policy*. *The first ten years* (2nd edn, Continuum 2004).

[664] Council Decision 1999/629/EC, ECSC, Euratom appointing the Secretary-General, High Representative for the Common Foreign and Security Policy, of the Council of the European Union [1999] OJ L248/33 *(High Representative Decision)*

[665] Michael Smith, 'The Framing of European Foreign and Security Policy: towards a Postmodern Policy Framework?' (2003) 10(4) Journal of Public Policy 556.

the positions of the member states within.[666] However, this labelled 'common' policy was far from being truly 'common', not to mention that its nature of competence was legally troublesome since the beginning.[667] The new branding was to a certain extent more of a representation of the wishful thinking of pro-integrationists than an accurate depiction of reality and it fell short of meeting the expectations preceding it.[668] While the creation of the pillar structure and the coexistence of all EU-related powers under one roof has been advertised as a way to facilitate the spillover of jurisdictions from the second and the third pillars to the first,[669] what was in fact achieved was a mere rebranding of the EPC[670] and -even worse- the institutionalization of the hybrid nature of foreign policy coordination.[671] This 'hybridity' is not an *ab novo* creation[672] of Maastricht and the so-called 'pillarization'; besides, the Single European Act had already rubber-stamped it. It is undeniable, however, that it was consolidated by Maastricht.

The main records of the pre-Lisbon CFSP were mere declaratory statements and limited constructive and coercive diplomacy initiatives.[673] Their results are dubious; the only rare exceptions are those related to mercantilism and the 'power of money'. It is being argued that the EU has been successful in applying financial sanctions against third countries as well as in implementing humanitarian aid and development programmes, especially in the vicinity of the Union such as in the former Yugoslavia and the wider Western Balkans region. Let's not delude ourselves though; these missions did create an important precedent and have most likely produced

---

666 Daniele Marchesi, 'The EU Common Foreign and Security Policy in the UN Security Council: Between Representation and Coordination' (2008) BRIGG Working Paper 2008/3 <https://cris.unu.edu/eu-common-foreign-and-security-policy-un-security-council-between-representation-and-coordination> accessed 28 April 2022.
667 R.Schütze (n 73) 200.
668 Antonio Missiroli, 'CFSP, Defence and Flexibility' (2000) Institute for Security Studies, Chaillot Paper 38 <https://www.iss.europa.eu/sites/default/files/EUISSFiles/cp038e.pdf> accessed 30 April 2022.
669 Thomas Christiansen, Simon Duke & Emil Kirchner, 'Understanding and Assessing the Maastricht Treaty' (2012) 34 Journal of European Integration 658
670 N.Winn, C.Lord (n 54)
671 M.Smith (n 55)
672 N.Winn, C.Lord (n 54).
673 Panos Koutrakos, *Trade, Foreign Policy and Defense in EU Constitutional Law* (Hart Publishing 2001) 21-22.

some results but they concern purely administrative and material activities, falling short of EU's 'grand objectives'.[674] Notably, timing has played an important role since the Yugoslavian civil war broke out exactly when CFSP was being unveiled, thus providing a momentum for the EU to test its new capacities.[675] Last but not least, these crisis management and reform missions are part of the Common Defense and Security Policy (CSDP),[676] which certainly comes under the broader concept of CFSP,[677] but do not embrace any supranational integrated aspect. Besides they resemble dramatically missions of purely intergovernmental organisations such as UN or OSCE (Organization for Security and Cooperation in Europe) missions, with which EU missions also formally collaborate.[678] In that context, CFSP has long been considered devoid of 'real law' (or better EU law) and a place for political bargaining between Member States.[679]

Regarding humanitarian aid towards third countries and development cooperation, it is noted that these policy segments were never part of CFSP; they always belonged to 'supporting' EU competences, now under Title III and Articles 208–215 TFEU. Even the supporters of CFSP who contend that CFSP's activities and impact have grown steadily since the 1970s, admit that in various instances such as in Rwanda, Iraq, but also Bosnia-Hercegovina and Kosovo, the EU has proven unable to act in a concerted way due to divergent interests of member states.[680]

---

[674] ibid 21.
[675] John Peterson and Helen Sjursen (eds) (n 1) 171.
[676] Decided by the St Malo declaration in 1998 and established at the Cologne European Council of June 1999, EU's Common Security and Defense Policy (CSDP) is designed to deploy support missions in third countries in response to international crises. It has been conceived as the means for the EU to acquire a capacity for autonomous military action as the continuation of the WEU. By December 1999, the European Council was able to declare a deployment capacity of about 50.000 military personnel. Despite initial focus on military action, since the early 2000s the emphasis is given to civilian crisis management (mainly police). Michael Emerson and Eva Gross (eds), *Evaluating the EU's Crisis Missions in the Balkans* (CEPS 2007) 1-16; Nicole Gnesotto (ed), *European Security and Defense Policy: the First Five Years* (Institute for Security Studies - EU 2004).
[677] M.Emerson and E.Gross (n 679) 1.
[678] See for example the 'Framework Agreement Between the United Nations and the European Union for the Provision of Mutual Support in the context of their respective missions and operations in the field' [2020] OJ L389/2; 'UN and EU sign agreement to enhance cooperation and strengthen response in peace operations' (*United Nations Peacekeeping,* 29 September 2020) <https://peacekeeping.un.org/en/un-and-eu-sign-agreement-to-enhance-cooperation-and-strengthen-response-peace-operations> accessed 10 January 2021
[679] Cardwell, 'The Legalisation of European Union Foreign Policy and the Use of Sanctions' (n 83).
[680] R.Ginsberg and M.Smith (n 75) 274.

While the CFSP governed by Article 46 TEU continued to be largely restricted from the Court's jurisdiction, there was a quite important alternative in place: Article 46 was subjected to Article 47 TEU which stipulated that no TEU provision shall affect the provisions of the TEC, hence granting a legal basis for the judicial review of certain instruments adopted under Title V of the treaty.[681] That said, in their view, member states persisted to explicitly exclude CFSP from the Court's jurisdiction, giving a strong signal of their unwillingness to open the way for a possible spill-over, suspicious and afraid of potential integrative judicial activism in this sensitive area.[682]

Regarding the pre-Lisbon CFSP everything leads to the conclusion that it was 'crippled', notably by three 'fundamental defects': a) lack of identity, b) unidentifiable common European interests, and c) weak institutions.[683] As the father of the ERASMUS programme, former Commissioner Manuel Marín had argued, 'the Union [lacked] firmness, [did] not react quickly and [was] not coherent. It [did not] even fulfil what it [promised]'.[684] The most important deficiency of the Maastricht Treaty, however, is probably that it institutionalised within the EU framework a 'hybrid structure of external relations' which got entrenched[685] and has been difficult to unroot. After the forlorn crumbling of the constitutional treaty, the advent of the Lisbon treaty created new hopes for EU integration, the process of CFSP inclusive, especially with the denunciation of 'pillar talk'.[686] The certainly appealing attempt to ditch 'pillarization' once and for all is not however as convincing as the drafters of the treaty would have liked it to be. A glimpse of CFSP-related provisions shows that the second pillar is in reality alive and kicking![687] The initial enthusiasm was lost here and there.

---

[681] See in that respect namely Case C-91/05 *Commission v Council* (*Small Arms and Light Weapons*) [2008] ECR I-3651; Case T-349/99 *Miroslav Miskovic v Council of the European Union* [2000] OJ C79/75; Case T-350/99 *Bogoljub Karic and four others v Council of the European Union* [2000] OJ, C79/35

[682] Ramses Wessel quoted in L.Šaltinytė (n 653).

[683] Luke Eric Peterson, 'Bilateral Investment Treaties and Development Policy-Making' (n 192).

[684] John Peterson, 'Introduction - The EU as a global actor' in John Peterson and Helen Sjursen (eds) (n 1) 12.

[685] M.Smith, 'Still Rooted in Maastricht' (n 55)

[686] Piet Eeckhout, 'The EU's Foreign and Security Policy after Lisbon: from Pillar Talk to Constitutionalism' in Andrea Biondi, Piet Eeckhout and Stephanie Ripley (eds), *EU Law After Lisbon* (OUP 2012) 265.

[687] Simon Duke, 'Consistency, Coherence and European Union External Action' (n 460) 20.

An empirical observation of the situation shows that the sole tangible and 'nearly effective'[688] EU initiatives related to CFSP are the CSDP crisis management missions, which continue to be widely deployed around the globe, the Civilian CSDP Compact (CCC)[689], and the adoption of the off-budget European Peace Facility (EPF)[690] which despite criticisms,[691] proved to be crucial at the 'watershed moment'[692] of the Russian invasion in Ukraine in February 2022. Other strands of work concern migration and humanitarian aid.[693] Indeed, the EU together with the Member States are 'the world's largest development and humanitarian donor' especially for refugees.[694] As mentioned however, this is not part of the CFSP, not to mention that EU migration and asylum policies have proven to have serious flaws. Actually, the efforts to reform the European asylum system after the 2015 migratory crisis have proven to be a very representative example of EU 'disintegration', incoherence and a certain lack of solidarity in response to flagrant inequalities

[688] It has been observed that 'even after a decade on the ground, the CSDP missions are successful in little other than operational advice and in conducting trainings – far from the ambition of strategic change'. Henrik Larsen, 'Why Aren't EU's CSDP Missions Working?' (*EU Observer,* 22 July 2021) <https://euobserver.com/opinion/152502> accessed 5 January 2021

[689] Council of the European Union, 'Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the establishment of a Civilian CSDP Compact' (19 November 2018) 14305/18 <https://www.consilium.europa.eu/media/37027/st14305-en18.pdf> accessed 16 March 2023; Council of the European Union, 'Civilian CSDP Compact 2021: Council adopts Conclusions' (*Council of the European Union*, 7 December 2020) <https://www.consilium.europa.eu/en/press/press-releases/2020/12/07/civilian-csdp-compact-2021-council-adopts-conclusions/> accessed 30 April 2022.

[690] Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528 [2021] OJ L102/14.

[691] 'Advocacy groups and experts have harshly criticised the project, with some NGOs having highlighted the risk that the weapons and equipment supplied by the EU could end up being used by authoritarian governments to suppress internal dissent'; Alexandra Brzozowski and Tiago Almeida, 'EU Adopts €5billion Fund to Train and Equip Foreign Military Forces' (*Euractiv.com*, 23 March 2021) <https://www.euractiv.com/section/eu-council-presidency/news/eu-adopts-e5billion-fund-to-train-and-equip-foreign-military-forces/> accessed 27 February 2022.

[692] 'Statement by President von der Leyen on Ukraine' (*European Commission,* 27 February 2022) <https://ec.europa.eu/commission/presscorner/detail/en/statement_22_1441> accessed 27 February 2022.

[693] See for example the 2017 CFSP report. Council of the European Union-Political and Security Committee, 'CFSP Report – Our priorities in 2017' (5 July 2017) 10650/17 CFSP/PESC 583 <https://data.consilium.europa.eu/doc/document/ST-10650-2017-INIT/en/pdf> accessed 30 April 2022.

[694] Commission, 'Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration (Partnership Framework on Migration)' (Communication) COM (2016) 385 final.

between Member States, still unresolved today.[695] The agreement between Turkey and EU Member States for instance -or to be more accurate the Turkey and EU Member States statement which embodies EU's response to the crisis- is not only devoid of legal value but also caused more intra-EU disagreements than it prevented.[696] Despite initial evidence of this being an international covenant concluded by the European Council, it is nothing more than a 'political arrangement'[697] between Turkey and the 28 -at the time- EU Member States (not the EU itself as a legal personality)[698] which met 'on 18 March 2016 in the margins of and following the meeting of the European Council'.[699] Such was the decision of the Court, which although it did not go into the substance of the statement and decided that it lacked jurisdiction only on the ground that this was not an act of an EU institution within the meaning of Article 263 TFEU, it also hinted that it agreed with the concurring opinions of the European Council, the Council and the Commission[700] that the agreement constitute a mere political statement which did not produce any legal effects.[701]

---

[695] A new Pact on Migration and Asylum which 'recognises that no Member State should shoulder a disproportionate responsibility and that all Member States should contribute to solidarity on a constant basis' has been put forward by the European Commission in September 2020 but is still a draft; Commission, 'Communication on a New Pact on Migration and Asylum' (Communication) COM (2020) 609 final.

[696] Panayotis Tsakonas, 'EU-Turkey Relations and the Migration Challenge: What is the Way Forward?' (2021) ELIAMEP Working papers (*ELIAMEP*) <https://www.eliamep.gr/en/publication/%CE%B5%CF%85%CF%81%CF%89%CF%84%CE%BF%CF%85%CF%81%CE%BA%CE%B9%CE%BA%CE%AD%CF%82-%CF%83%CF%87%CE%AD%CF%83%CE%B5%CE%B9%CF%82-%CE%BA%CE%B1%CE%B9-%CE%B7-%CF%80%CF%81%CF%8C%CE%BA%CE%BB%CE%B7%CF%83%CE%B7/> accessed 17 March 2021

[697] Case T-192/16 *NF v European Council*, Order of the General Court (First Chamber, Extended Composition) of 28 February 2017 [2017] ECLI:EU:T:2017:128, para 29.

[698] Carmelo Danisi, 'Taking the 'Union' out of 'EU': The EU-Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States under International Law' (*EJIL Talk,* 20 April 2017) <https://www.ejiltalk.org/taking-the-union-out-of-eu-the-eu-turkey-statement-on-the-syrian-refugee-crisis-as-an-agreement-between-states-under-international-law/> accessed 14 February 2022.

[699] Case T-192/16 *NF v European Council* (n 700), para 38.

[700] The legal service of the European Parliament had also previously expressed the same opinion. See: Nikolaj Nielsen, 'EU-Turkey Deal Not Binding, says EP Legal Chief' (*EU Observer,* 10 May 2016) <https://euobserver.com/justice/133385> accessed 16 February 2022.

[701] 'For the sake of completeness, with regard to the reference in the EU-Turkey statement (…) the Court considers that, even supposing that an international agreement could have been informally concluded during the meeting of 18 March 2016, which has been denied by the European Council, the Council and the Commission in the present case, that agreement would have been an agreement concluded by the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister'; Case T-192/16 *NF v European Council* (n 700), para 72 (*emphasis added*).

The most efficient case in the exercise of EU power in foreign policy evidenced lately was driven by an extremely cogent and grisly catalyst: the Russian invasion of Ukraine. Reportedly the EU demonstrated a unique decisiveness in adopting sanctions,[702] in forming a 'united front'[703] and in providing financial and further humanitarian aid such as the temporary protection scheme for refugees fleeing form Ukraine[704] or the dispatch of five hundred million euro (€500 million) from the European Peace Facility to support defence and another five hundred million euro (€500 million) from the EU budget 'to deal with the humanitarian consequences of this tragic war both in the country and for the refugees'.[705] Despite enthusiasm for this truly unprecedented EU responsiveness, it needs to be underlined that action was still under the intergovernmental hat of the treaties. While standing 'united in solidarity with Ukraine', intergovernmental segments of the initiatives still prevail.

As mentioned above, Articles 22 and 24 TEU, read in conjunction with Article 31 TEU on decisions by the European Council or the Council related to CFSP specify that these are subject to 'specific rules and procedures' under the unanimity rule. CFSP overall is still quite meagre, again intergovernmental, largely governed by unanimity[706] and well separated from the 'functional' limb of the two treaties, i.e. the

---

[702] 'EU restrictive measures against Russia over Ukraine (since 2014): EU sanctions in response to Russia's invasion of Ukraine' *(Council of the European Union)* <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-ukraine-crisis/> accessed 5 March 2022

[703] At the extraordinary European Council of 24 February 2022, EU leaders issued a joint statement that condemns Russia which 'bears full responsibility for this act of aggression and all the destruction and loss of life it will cause. It will be held accountable for its actions'; European Council, 'Joint statement by the members of the European Council' and 'European Council conclusions, 24 February 2022' (*Council of the EU*) <https://www.consilium.europa.eu/en/press/press-releases/2022/02/24/joint-statement-by-the-members-of-the-european-council-24-02-2022/> and <https://www.consilium.europa.eu/en/press/press-releases/2022/02/24/european-council-conclusions-24-february-2022/> respectively, accessed 5 March 2022.

[704] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L71/1.

[705] 'Speech by President von der Leyen at the European Parliament Plenary on the Russian aggression against Ukraine' (*European Commission,* 1 March 2022) <https://ec.europa.eu/commission/presscorner/detail/en/speech_22_1483> accessed 5 March 2022

[706] Note that there are certain possibilities for QMV in various provisions throughout the Treaties but the 'rule' for CFSP remains unanimity. For a collection of the exceptions of the unanimity rule, see Ramses Wessel, 'Initiative and Voting in Common Foreign and Security Policy: The New Lisbon Rules in Historical Perspective' in H.J.Blanke and S.Mangiameli (n 423) 506 – 513.

TFEU and the rest of the enumerated policies in Articles 3-6 TFEU. This segregation brings in mind the abandoned pillar structure,[707] showing that the Maastricht structure is so well embedded that the practices of policymaking are still strongly influenced by it.[708] The new Lisbon format smacks of a modus of a 'parallel' or 'special' or *sui generis* CFSP competence within the Union legal order.[709] There are certainly significant institutional changes widely analysed in bibliography: i) the new actors, i.e. the permanent High Representative/Commission Vice President (HRVP) and the President of the European Council, and their quite 'innovative'[710] roles; ii) the creation of an EU diplomatic body (i.e. the External Action Service, EEAS); and iii) the formalisation of the European Council (at last) are probably the most prominent. Moreover, judicial review is clearly possible for measures falling entirely within the CFSP: jurisdiction of the Court is in no way restricted with respect to legislative acts and acts producing legal effects vis-à-vis third parties adopted for example on the basis of Article 215 TFEU, which gives effect to the positions adopted by the Union in the context of the CFSP. All these acts 'constitute EU acts, adopted on the basis of the TFEU, and the Courts of the EU must, in accordance with the powers conferred on them by the Treaties, ensure the review, in principle the full review, of the legality of those acts'.[711]

On the legal plane, changes brought by the Lisbon treaty in the context of CFSP are only limited to the above. And since the EU is a 'Union of law' and Europeanisation is largely a 'legalisation project',[712] this is far from trivial. In that respect, we do not refer to legalisation in the sense of a process whereby cooperation between actors develops into an institutionalised decision-making forum, or the transformation from

[707] P.Eeckhout (n 689) 294.
[708] MSmith, 'Still Rooted in Maastricht' (n 55).
[709] R.Schütze (n 73) 201.
[710] Piergiorgio Cherubini, 'The Role and the Interactions of the European Council and the Council in the Common Foreign and Security Policy' in H-J.Blanke and S.Mangiameli (n 423) 472.
[711] Case C-72/15 *The Queen ex parte PJSC Rosneft Oil Company v Her Majesty's Treasury, Secretary of State for Business, Innovation and Skills* [2017] OJ C161/2, paras 105-106.
[712] Geert De Baere and Ramses Wessel, 'EU Law and the EEAS: of Complex Competences and Constitutional Consequences' in David Spence and Jozef Bátora (eds), *The European External Action Service European Diplomacy Post-Westphalia* (Macmillan 2015) 175.

'informal' to 'formal'.[713] Clearly, this transformation has gradually taken place and is epitomized by the institutionalisation of the European Council with the adoption of the Treaty of Lisbon. In that sense, CFSP is a law-producing EU policy; nonetheless, not exactly 'just as any other EU public policy',[714] as sometimes claimed. Isolated from the TFEU in the sense of not being integrated and -to a large extent- absent the possibility of the EU legislators to adopt enforceable and reviewable acts within the exercise of power at the supranational level instead of at the level of mere intergovernmental coordination, CFSP is not normalised in EU law.

Despite the attempts to resolve the basic ambiguities which accompany this 'hybridity'[715] and by consequence produce confusion, the mission has not been accomplished. For example, the conundrum of the 'so-called Kissinger question'[716] which was deemed to be unravelled with the post of High Representative, got probably more perplexed with the addition of an extra permanent role to the picture. While external representation of the EU, previously shared between the Commissioners for 'Community' areas of competence and the rotating Presidency or the High Representative for 'pure' foreign policy issues, is now supposedly fused into the role of the High Representative, who wears two hats: he is High Representative and Vice-President of the Commission. It seems that the establishment of the permanent President of the European Council further complicates the situation pursuant to Articles 15(6) and 18(2) TEU.[717] Moreover, EU's competences over CFSP

---

[713] P.Cardwell (n 83).
[714] Sabine Saurugger and Fabien Terpan, 'Studying Resistance to EU Norms in Foreign and Security Policy' (2015) 20(2) European Foreign Affairs Review 1.
[715] Michael Smith, 'Still Rooted in Maastricht (n 55).
[716] Manuel Barroso quoted in David Brunnstrom, 'EU Says it has Solved the Kissinger Question' *Reuters* (Brussels, 20 November 2009) <https://www.reuters.com/article/us-eu-president-kissinger-idUSTRE5AJ00B20091120> accessed 10 January 2022. Note that although it is 'trotted out at almost every seminar [you] will ever [go] to Brussels', Kissinger's alleged famous remark –'if I want to speak to Europe, who do I call?'- which eloquently illustrates EU's failure to coherently act on the world stage, was never actually spelt out by Kissinger and was even disowned by the notorious diplomat himself. See: Gideon Rachman, 'Kissinger Never Wanted to Dial Europe' *Financial Times* (23 July 2009) <https://www.ft.com/content/c4c1e0cd-f34a-3b49-985f-e708b247eb55> accessed 2 May 2019.
[717] The President of the European Council shall 'ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy' [Article 15(6) TEU] while at the same time the High Representative 'shall conduct the Union's common foreign and security policy' [Article18(2) TEU].

are ill-defined. In a policy area such as foreign policy covering by default an extremely vast array of matters and as such possessing an infinite scope,[718] the complete lack of specification of the CFSP element[719] renders the task of determining CFSP competences quasi-impossible. On the important chapter of the Court's immunity to review CFSP related acts, the Lisbon Treaty brought certain adjustments that at first may appear notable. The treaty in force includes in Article 40 TEU a much clearer wording on the impossibility for CFSP to encroach competences conferred to the EU compared to previous versions under former Article 47 TEU. Moreover, the Council holds the right to adopt sanctions not only against third countries but also persons, hence providing under Article 24(1) TEU read in conjunction with the second indent of Article 275 TFEU, the possibility of an extended standing before the Court.

That said, a more careful juxtaposition of these 'adjustments' in the Treaty of Lisbon and previous case-law of the Court manifest that the Lisbon amendments have not brought any real expansion to the Court's jurisdiction, but sought to confirm already established practices.[720] Moreover, adding to the equation (the partly overlapping) declarations 13 and 14 concerning CFSP whereby member States emphatically recall what was previously stipulated in the main body of the Treaty[721] - namely that CFSP shall not affect existing legal basis, the responsibilities of Member States for the conduct of their foreign policy, their national representation in third countries and their national diplomatic service as well as membership to international organisations, including to the UN Security Council - [722] it is clear that even the meta-Lisbon CFSP still reflects the inherent problem of safeguarding

[718] Michele Comelli and Federica Di Camillo, 'Exploring the Principle of Coherence in EU External Action: A Legal Analysis' (2010) 45 The International Spectator 152.
[719] ibid, 267.
[720] L.Šaltinytė (n 653).
[721] Former Article 7(1) TEU, as amended by the Treaty of Amsterdam stipulated that: 'The policy of the Union in accordance with this Article shall not prejudice the specific character of the security and defense policy of certain Member States and shall respect the obligations of certain Member States, which see their common defense realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defense policy established within that framework'.
[722] Eileen Denza, 'The Role of the High Representative of the Union for Foreign Affairs and Security Policy' in H-J.Blanke and S.Mangiameli (n 423) 491.

sovereign rights,[723] lacks authority and fails to manage expectations and deliver tangible results.[724]

Besides, in practical terms, as regards participation of the EU to the UN, the Union has had observer status at the UNGA since 1974. This status has been 'enhanced' by Resolution 65/276 of 2011[725] allowing the EU to present positions and proposals and also speak at the UNGA. However, the EU still has no right to vote nor to co-sponsor draft resolutions or decisions, or to put forward candidates.

According to relevant quantitative and qualitative statistical research regarding EU member states' cohesion and voting patterns in the UNGA since the Lisbon Treaty, it is demonstrated that nothing has really changed. In certain time periods better coherence and coordination is observed while in others, the scores are worse. It is safe to conclude therefore that change in Member States' coherence is only incidental and that the Lisbon de-pilarisation, and any further amendments in CFSP have not substantially changed the scene in the consolidation of EU Member States positions within the UN and have not resulted into the coordination of EU Member States' policies on general issues of 'world politics.'[726] Overall, the end of pillarization and inclusion of CFSP to the 'corpus' of EU policies did not resolve once and for all another important issue examined in the following section, that of 'mixity of international agreements.'[727]

---

[723] Nadia Klein and Wolfgang Wessels. 'CFSP Progress or Decline after Lisbon?' (2013) 18 European Foreign Affairs Review 449.
[724] Cornelia-Adriana Baciu and Alexandra Fried (n 664).
[725] UNGA, Participation of the European Union in the Work of the United Nations' (10 May 2011) UN Doc A/RES/65/276.
[726] Madeleine O. Hosli and Jaroslaw Kantorowicz, 'The European Union in the United Nations: An Analysis of General Assembly Debates' (14th Annual Conference on the Political Economy of International Organization (PEIO), July 7-9, 2022) <https://www.peio.me/wp-content/uploads/PEIO14/PEIO14_paper_36.pdf> accessed 17 March 2023.
[727] Friedrich Erlbacher, 'Recent Case Law on External Competences of the European Union: How Member States Can Embrace Their Own Treaty' (2017) T.M.C. Asser Institute for International and European Law, CLEER Paper Series 2017-02 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3120550> accessed 30 April 2022.

On a parallel wavelength, other areas with a vast external component have been reinforced and also drifted EU's common external action. The Treaty of Lisbon built on what had started as early as the Treaty of Rome which, although was regarded as concerning only the internal construction of the Community, 'it also shaped its future as an international actor by creating a distinction between forms of international action that would be "in" and "out" of bounds of the EC'.[728] Therefore, while in various instances there are constant internal struggles for EU member states to remain individually visible and the EU decision-making machinery is limited to pursuing the coordination of the EU-position,[729] there are areas where the Union holds another degree of external competences. Legal pragmatism in analyzing EU external competences hence nullifies -to a certain extent- political analysis pointing to the direction of an EU that is not always capable of being a foreign policy actor in trade or environmental policy.[730] In addition to important external policies outside the scope of CFSP *stricto sensu* such as neighbourhood and enlargement policies enshrined in Articles 8 and 49 TEU respectively, there is a series of internal shared EU policies which are external by definition -i.e. development cooperation and humanitarian aid- while other internal shared competences such as environment and energy have important external components. And not only that: the 'rather small' category of exclusive EU competences under Article 3 TFEU comprises a significant share of policies with important ramifications for external relations (i.e. trade). Furthermore, this short list of *a priori* exclusive competences[731] is further amplified by the addition of 'acquired' exclusive competences pursuant to Article 4 TFEU –i.e. exercised shared competences- and implied external competences under Article 3(2) TFEU. It is particularly intriguing that given the reluctance of the 'masters of the treaties' to confer EU Member States' sovereignty on classical foreign and security policies upon the, exclusive competences exist very much with regard to external

[728] N.Winn and C.Lord (n 54).
[729] Jed Odermatt, 'The EU and International Institutions' in Ramses Wessel and Joris Larik (eds), *EU External Relations Law: Text, Cases and Materials* (2nd edn, Hart Publishing 2020) 255.
[730] S.Lütz and others (n 62) 2.
[731] A.Rosas, 'Mixity past, present and future' (n 21) 8.

relations. CCP or 'the mother of all EU external policies'[732] is the absolute protagonist, but other 'newer' policies on the EU agenda such as environment, climate and justice also bear indirect, yet very significant exclusive external implications.[733]

[732] R.Wessel and J.Larik (eds), *EU External Relations Law: Text, Cases and Materials* 75 (n 732).
[733] W.Wessels and F.Bopp, The Institutional Architecture of CFSP after the Lisbon Treaty – Constitutional breakthrough or challenges ahead?' (n 70).

3.2 The relationship between EU and international law

The EU constitutes a new legal order of international law. This has been established since *Van Gend en Loos*.[734] The interaction of this 'hybrid' system governed by the principles of primacy and direct effect, conferral, proportionality and subsidiarity, with the national laws of its member states, has been and is still widely analysed in case-law and international bibliography.[734b] The relationship between EU law and (the rest of) international law is much less discussed. Interactions and enforcement of international legal instruments in national legal orders already give lawyers a headache, let alone the interaction of international law with the EU legal order which is in itself a peculiar, incomparable to any other legal system (whether international/regional organisation's or federal state's) and therefore quite complex.

It needs to be recalled that the EU has legal personality and therefore is a subject of international law possessing -in general terms- the competence to enter into international, bilateral or multilateral agreements with third countries or other international organisations in its own right, pursuant to Articles 216 and 207 TFEU. Whether and under which conditions the EU can effectively conclude an agreement depends, as it shall be analysed in the following sections, on the subject-matter of that agreement and on whether it falls under the competences of the EU. Equally, when the matter regards an agreement with an international organisation (such as accession to it), it also depends of course on whether the organisation itself allows that to happen. Once agreements are entered into force though, these form an integral part of Union law, separate from primary and secondary legislation. In addition, pursuant to Article 216(2) TFEU, they are binding throughout the EU institutions and member states.

[734] Case 26-62 (n 510).

[734b] See indicatively P.Craig (n 43) 303-351; Stephen Weatherill, *Law and Values in the European Union* (OUP 2016) 153-252; Allan Rosas, 'European Union Law and National Law: A Common Legal System? in Katja Karjalainen, Iina Tornberg and Aleksi Pursiainen (eds), *International Actors and the Formation of Laws* (Springer 2022) 11.

Relatedly, as evidenced in Article 3(5) TEU and as the Court has reiterated in numerous occasions, the EU contributes 'to the strict observance and development of international law'. When it adopts an act, it is bound to observe international law which is binding upon the institutions of the EU.[735] What is more, EU law is also increasingly drafted to attain a high level of harmonization with international law and its enforcement within the Union. Such is the case for example on measures against terrorism financing and anti-money laundering legislation, which are partly implementing international commitments such as the Council of Europe Convention on terrorist financing or the UN Security Council resolutions, and recommendations of relevant international fora such as FATF,.

That said, it should be also borne in mind that this respect for international law cannot put in jeopardy the autonomy of Union law. If one should consider theoretically the place of international legal instruments in the hierarchy of norms of the Union legal order, one must first and foremost bear in mind that the Court does not allow any rule to be placed above the Treaties. This would undermine the autonomy of the EU legal order with respect to both the national law of the member states and international law which is justified by the essential characteristics of the EU legal system, 'in particular [to] the constitutional structure of the EU and the very nature of that law'.[736]

International agreements may in no way affect the allocation of powers to the EU which are assigned by the Treaties and the autonomy of Union law and cannot prejudice the EU system.[737] In that context, the CJEU does not recognize any absolute primacy of legally binding acts of international law such as resolutions of the UN Security Council; there is no basis for such acts and obligations to prevail over the Treaties within the hierarchy of norms of the Union legal order.[738] As such, in considering the lawfulness of a Union measure which implements an act of international law, it is settled case-law ever since *Kadi* that the Union must always

[735] Case C-561/20 *Q and others v United Airlines* [2022] ECLI:EU:C:2022:266, para 46.
[736] Case C-284/16 *Slovak Republic v Achmea BV* (n 195), para 33
[737] CJEU Opinion 1/91 of 14 December 1991 [1991] ECR I-6079, paras 35 and 71 and Case C-459/03 *Commission* v *Ireland* [2006] ECR I-4635, para 123.
[738] *Kadi* (n 515) para 305.

look into the measure's consistency with the Treaties as well as the values and general principles governing the Union legal order.[739]

Notwithstanding, and under the fundamental premise that no EU principle is under threat, international agreements producing legal effects under international law and creating rights and obligations for the parties, may have direct effect into the Union legal system. Agreements concluded by the EU become 'an integral part of the European legal order'. For agreements concluded by the EU in its capacity as an international actor, the Union has adopted the monist approach, i.e. the automatic adaptation of the agreement in EU law and its self-executing nature.[740] As such, provisions of agreements concluded by the EU with third countries can be directly effective on the EU and its member states without requiring any further incorporating act should they fulfil certain criteria - that is, the purpose and nature of the agreement itself allow it and the provision contains a clear and precise obligation whose implementation does not require any subsequent measure.[741] In this context, self-executing international agreements concluded by the EU take primacy over secondary legislative instruments such as Regulations and Directives but of course never over the EU Treaties. It is only as a consequence of the status of the EU as a contracting party to an international agreement that the latter enjoys supremacy over Member States' law. The conditions of the validity of international law obligations assumed by the EU in the Member States' legal orders are actually determined only by the EU. On the other end of the spectrum, international agreements concluded by Member States alone, cannot override EU secondary legislation since they are not an integral part of the EU legal order *stricto sensu*.

Another caveat concerns international agreements concluded by the Member States prior to their accession to the Union. As per Article 351 TFEU the rights and duties under an international agreement entered into by a Member State with a third country prior to the

[739] ibid paras 303-304.
[740] Francesca Martines, 'Direct Effect of International Agreements of the European Union' (2014) 25 European Journal of International Law 129.
[741] Case 12/86 *Demirel* [1978] ECLI:EU:C:1987:400, para 14.

Member State's accession to the EU are not affected by EU law. Therefore, the Article affords Member States the option to continue to adhere to obligations under public international law incurred before their accession to the EU.[742] Article 351 TFEU is of general scope and applies to all international agreements which may have an impact on the application of EU law, irrespective of their subject matter.[743] That said, it needs to be clarified that article 351 TFEU concerns only the relations of the EU Member States with third states and not relations intra-EU. This is why in cases that regard bilateral treaties under public international law concluded between current Member States, Article 351 TFEU is irrelevant, as demonstrated in *Achmea.*

3.3 Implied external powers: constitutionalisation of a constitutionalising judge-made doctrine

The treaty of Lisbon attempts a codification of one of the most important principles of EU law, the 'ERTA doctrine' on implied external powers in articles 3(2) and 216(1) -tantamount to the direct effect principle of *van Gend en Loos* and the primacy principle of *Costa v ENEL*. The 'ERTA doctrine' (or in its French acronym the 'AETR doctrine', also known as the 'parallelism' doctrine[744]) gives 'absolute precedence to the common institutional framework in the conduct of external action'[745] which ties 'unambiguously' internal Union policies with their external aspect.[746] When a competence derives from the Treaty and secondary law, there is no need for express provisions also conferring competence for the conclusion of

[742] Case C-282/19 *MIUR and Ufficio Scolastico Regionale per la* Campania [2022] ECLI:EU:C:2022:3, Opinion of AG Tanchev, para 43.
[743] Case C-74/16 Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe [2017] ECLI:EU:C:2017:496, Opinion of AG Kokott, paras 95 and 96.
[744] Tom Delreux, 'The EU in International Environmental Negotiations' in Andrew Jordan and Viviane Gravey (eds), *Environmental Policy in the EU: Actors, Institutions and Processes* (4th edn, Routledge 2021) 259.
[745] Loic Azoulai, 'Integration through Law and Us' (2016) 14 International Journal of Constitutional Law 449.
[746] Graham Butler and Ramses A. Wessel, 'Happy Birthday ERTA! 50 Years of the Implied External Powers Doctrine in EU Law' (*European Law Blog,* 31 March 2021) <https://europeanlawblog.eu/2021/03/31/happy-birthday-erta-50-years-of-the-implied-external-powers-doctrine-in-eu-law/> accessed 20 January 2022.

international agreements in such area.[747] Prompted by the expansion of international trade law beyond tariffs into areas affecting other policies, such as intellectual property, investment, subsidies and public procurement[748] this principle dictates that:

> (…) each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down **common rules**, whatever form these may take, the member states no longer have the right acting individually or even collectively, to undertake obligations with third countries which affect those rules. (…) As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.[749]

What this 'constitutionalising'[750] case does is quite phenomenal; the Court through its teleological interpretation which aims to deliver the *effet utile* of EU policies[751] determines that when a competence is conferred to the EU, it renders EU external action primary over member states' external acts.[752] The main rationale behind *ERTA* is 'to ensure that [an international] agreement is not capable of undermining the **uniform and consistent application of the Community rules** and

[747] Merijn Chamon, 'Implied Exclusive Powers in the ECJ'S post-Lisbon Jurisprudence: the Continued Development of the ERTA Doctrine' (2018) 55 Common Market Law Review 1101.
[748] Thomas Cottier, 'Towards a Common External Economic Policy of the European Union' in Marc Bungenberg and Christoph Herrmann (eds), *European Yearbook of International Economic Law: Common Commercial Policy after Lisbon* (Springer 2013) 8.
[749] *ERTA case (*n 43*)*, paras 17-18 (*emphasis added).*
[750] R.Weiler, 'The Transformation of Europe' (n 9), 2403, footnote 57.
[751] Christophe Hillion, 'ERTA, ECHR and Open Skies: Laying the Grounds of the EU System of External Relations' in Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 225.
[752] G.Butler and Ramses A. Wessel, 'Happy Birthday ERTA!' (n 749).

the proper functioning of the system which they establish[753]. In other words *ERTA* introduces a delimitation rule designed to ensure coherence[754] and to pre-empt obstacles.[755] In his otherwise dismissing Opinion, Advocate General Mr Dutheillet de Lamothe also observed that 'on a practical level, such a system would probably be best suited to preventing Member States from concluding with third countries agreements which would subsequently prove difficult to reconcile with Community provisions (…)[756] He also noted the possible fear of ministers to 'resist the adoption of regulations which would result in the loss, in cases not provided for by the Treaty, of their authority in international matters'.[757] The Union may derive external EU competence inferred from internal competences, when an international agreement is necessary to enable the Union to exercise its internal competence.

The doctrine itself has not been contested; besides Member States have always been conscious of the importance of the EU's aggregate bargaining power, and they would have no interest in undermining this power by refusing the doctrine of implied external powers.[758] But the conditions and the breadth of the doctrine's application have been subject to several alignments throughout the years and the source of several other principles inserted into the Union's 'constitutional fabric'.[759] The extent of implied powers has been at times construed restrictively, making difficult the distinction between the following: (a) whether the Union has a competence, (b) whether any such competence is exclusive, shared[760] or concurrent, and finally (c) if in areas of shared competences the Union has already exercised its powers.

---

[753] CJEU Opinion 1/03 (Lugano Convention) [2006] ECR I-1145, para 133 (*emphasis added*).
[754] Marise Cremona, 'Coherence in European Union foreign Relations Law' in P.Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (n 460) 68.
[755] M.Chamon (n 750).
[756] Case 22-70 *Commission of the European Communities v Council of the European Communities* [1971] ECR I-0263, Opinion of AG Mr Dutheillet de Lamothe, page 291.
[757] Ibid, page 292.
[758] M.Hilf (n 72).
[759] C.Hillion (n 754) 224
[760] Case C-600/14 *Federal Republic of Germany v Council of the European Union* [2017] ECLI:EU:C:2017:935, para 46 and case-law cited.

For areas of express exclusive competence, the issue is pretty much straightforward: the EU also possesses exclusive competence in concluding agreements with third countries. Whether a particular provision of an international agreement concerns effectively an area of exclusive competence has occasionally been a contested matter to be resolved by the Court, but once this is determined, there is no doubt over the exclusivity of competences. The best example is Opinion 1/75 referring 'to the rules relating to the common commercial policy, which *ipso jure* give the Community exclusive competence to enter into international agreements in the field in question'.[761] It has been undisputed since the *International Fruit Company* judgment that 'the EU succeeds the Member States in their international commitments when the Member States have transferred to it, by one of its founding Treaties, their competences relating to those commitments and it exercises those competences'.[762]

The issue is less downright when it comes to matters of an exercised shared competence with one of the main questions being when the conditions of the exercise of internal powers for acquiring external competences are fulfilled. The most frequent query regards therefore what 'common rules' refer to: is total harmonization a requisite for the viability of the doctrine or does the mere exercise of the competence suffice? In *ERTA* itself, the Court specified that 'Member States, whether acting individually or collectively, only lose their right to assume obligations with non-member countries as and when common rules which could be affected by those obligations come into being. Only insofar as common rules have been established at internal level does the external competence of the Community become exclusive'.[763]

Late Advocate General Yves Bot in his Opinion for the *Green Network* case gave a very useful and comprehensive depiction of the Court's evolutive interpretation. At

[761] Joined cases 3, 4 and 6/76 *Cornelius Kramer*, *Hendrik van den Berg* and *Vennootschap Onder Firma* [1976],ECLI:EU:C:1976:114, 1291
[762] CJEU Opinion 2/15 (n 26), para 248 and case-law cited.
[763] CJEU Opinion 1/94 of 15 November 1994 [1994] ECR I-5267 para 77 citing ERTA .

first, the Court adopted a broad interpretation, whereby it recognized 'the existence of an exclusive implied external competence of the Community entailing the obligation for the Member States to refrain from acting when examination of the respective spheres covered by the common rules and international obligations appear to correspond, even incompletely'.[764] In a second phase, covering the mid and late 1990s,[765] the Court's interpretation is characterized as 'stricter' or 'restrictive'[766] since 'exclusive external competence does not automatically flow from [the Community's] power to lay down rules at internal level'.[767] The Court authorizes exclusive external competence only when the EU has 'included in its internal legislative acts provisions' relating to the subject matter of the international agreement, has achieved complete harmonization or has expressly conferred powers to negotiate with third states countries.[768] For unharmonized or only partially harmonized policies, EU and the member states share competences.[769]

The new era or the 'third stage' as Advocate General Bot defined it, is more 'generous'.[770] Inaugurated in 2003 with Opinion 1/03,[771] the Court drifts back into its flexible reading, holding that when the conclusion of an agreement by member states 'is incompatible with the unity of the common market and the uniform application of Community law', exclusive external competence must be inferred. No perfect overlap between the subject-matter of an agreement and harmonized EU rules is necessary to give rise to implied exclusive external competences, and in principle any internal

[764] Case C-66/13 *Green Network SpA v Autorità per l'energia elettrica e il gas* [2014] ECLI:EU:C:2014:2399, Opinion of AG Yves Bot, para 43.
[765] Notably in Opinion 1/94 (n 766) and the 'Open Sky' judgments, Case C-471/98 *Commission of the European Communities v Kingdom of Belgium* [2002] ECLI:EU:C:2002:628.
[766] Generally commentators regard Opinion 1/94 and the 2002 *Open Skies* cases as 'a restrictive turn' taken by the Court, see M.Chamon (n 750).
[767] CJEU Opinion 1/94 (n 766) para 22 and Opinion of AG Bot (n 767) para 46.
[768] Opinion of AG Bot (n 767) para 46.
[769] CJEU Opinion 2/00, Opinion of the Court of 6 December 2001 [2001] ECLI:EU:C:2001:664 *(Cartagena Protocol)*, paras 44-47.
[770] M.Chamon (n 750).
[771] CJEU Opinion 1/03, Opinion of the Court of 7 February 2006 on the Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2006] ECR I-1145.

Community measure is capable of being affected and creating such competence.[772] Since the famous *MOX Plant* judgement of 2006, the Court held that the doctrine of implied external powers may apply also when the EU wishes to conclude international agreements covering matters which are not yet or are only 'very partially' the subject of rules at Union level; hence they 'are not likely to be affected'.[773] Overall, it can be concluded that the Court has been consistent in allowing implied competence to prevent any external unilateral action by member states that falls under the Union competences, which would jeopardise the Union's objectives. Before Lisbon it was settled case-law that the EU acquires implied exclusive competences for concluding external agreements in matters where the said agreements could possibly affect or alter the scope of shared Union competences even if there was no perfect concurrence between common rules and the subject matter of the agreement. The need to guarantee the uniform and consistent application of Union rules as well the full effectiveness of Union law sufficed as an underlying justification.

The Court's role is not only to uphold the unity and uniform application of EU law, but also to ensure an overall balance of powers and institutional integrity against possible encroachment of the Union's powers both residual and implied.[774] As such, in its first Opinion on the accession to the *ECHR*, Opinion 2/94, the Court explicitly referred to the principle of conferral to limit the reach of implied and residual powers based on ex Article 325 EEC Treaty, 308 EC Treaty (now Article 352 TFEU)[775] which 'cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community'.[776] The

[772] Rass Holdgaard, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses* (Wolters Kluwer 2008) 105.
[773] Case C-459/03 *Commission v. Ireland* (n 740), para 95.
[774] C.Hillion (n 754) 226.
[775] ibid
[776] CJEU Opinion 2/94, Opinion of the court of 28 March 1996 on the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1996] ECLI:EU:C:1996:140, para 30.

standard test[777] of what 'affecting the uniformity of EU law' entails is the one established by the Court in the *Lugano Convention* Opinion 1/03. According to the court, it has to be determined 'whether the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish';[778] in other words when a non-EU agreement may jeopardize 'the attainment of the objectives or the realization of the aims or purpose of those common rules' the doctrine applies.[779]

Last but not least, the Court has been dealing with the perennial dispute over the limits of the Union's external competences when member states are deprived of their rights to conclude external agreements and when the Union has no right. Seemingly, there are instances when an agreement covers areas where the Union has either exclusive competence (implied or express) or shared competence with the member states, but it may also be the case that it covers other areas where the Union has no competence whatsoever. One of the most significant and pertinent corollaries of the ERTA line of cases concerns the formula adopted for this sort of international agreements which contain both subject matters where the EU is externally competent (either impliedly or explicitly) and matters reserved under the competence of the member states. The so-called method of 'mixity' has become a 'perennial' issue in Union law. Consequently, in parallel with the exclusive external EU competences in a given area where the Union enters alone into legally binding agreements with other subjects of international law, there are also the so-called 'mixed agreements', namely agreements whereby both the Union as a legal person itself as well as each Member State alone are signatories. Therefore agreements which contain matters of EU and non-EU competences are concluded as mixed. The areas where the Member States are called upon to conclude the agreements themselves are regard either areas where the Union has not been conferred powers at all or areas where shared competences

[777] M.Chamon (n 750).
[778] CJEU Opinion 1/03 (n 774) para 133 (*emphasis added*)
[779] M.Chamon (n 750).

remain utterly unexercised, i.e. in the absence of any secondary acts. Caution is warranted to the confusion between mixity and shared competences, as it is wrong to equate shared competences and mixed action. Shared competences and mixed agreements are two separate issues. [780]

Practical problems with mixed agreements are not rare or unimportant. Member states have an effective veto power and there are several recorded cases where the conclusion of the agreement was postponed due to its rejection at the stage of ratification at the national level, blockage of the agreement by one single member state[781] or threat to block it, as Italy and Greece did recently with the agreement with South Africa, the Belgian region of Wallonia and Poland with CETA, and the Netherlands with the association agreement with Ukraine.[782] That said, despite criticism and doubts, as well predicted by one of its main expert analysts, former EU justice Allan Rosas,[783] the formula of mixed agreements has survived over the years and is still well alive. Besides, albeit sound legal reasoning that mixity is not always obligatory but also only 'facultative',[784] as the Court has confirmed in the *Cartagena Protocol* Opinion, 'concerns over practical issues generated by mixity, e.g. relating to the need for unity and rapidity of external action and to the difficulties which might

[780] Case C-600/14 (n 763), Opinion of AG Szpunar, paras 83-90.

[781] A.Rosas (n 21) 9; Merijn Chamon and Inge Govaere, 'Introduction. Facultative Mixity: More than Just a Childhood Disease of EU Law?' in Merijn Chamon and Inge Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill 2020) 1.

[782] Paola Conconi, Cristina Herghelegiu, and Laura Puccio, 'Legal and economic analysis of the incentives to negotiate mixed agreements' <http://respect.eui.eu/wp-content/uploads/sites/6/2020/03/CHP.pdf> accessed 2 March 2022

[783] A.Rosas (n 21) 9.

[784] This concept, not accepted by Member States, was first coined by Allan Rosas in his contribution 'Mixed Union – Mixed Agreements' in M.Koskenniemi (ed.), *International Law Aspects of the European Union* (Brill Nijhoff 1998) 131 cited in M.Chamon and I.Govaere 'Introduction. Facultative Mixity' (n 784) 2. It concerns a choice that can be made by the EU in concluding international agreements in subject matters covered by shared EU competences. At the same time, it seems that the Court in its latest case-law confirms the idea that the EU can -if the Council wishes to exercise the shared competence under Article216 TFEU- act autonomously on the international plane (See, A.*Rosas* (n 21) 10-16). Hence in areas which fall within the shared competence of the EU and its member states, the relevant agreement can be approved by the Union alone if there is possibility of the required majority being obtained within the Council for the Union to be able to exercise the external competence that it shares with the Member States in a certain area. See Case C-600/14 (n 763), paras 67-68; Laurens Ankersmit, 'Opinion 2/15 and the future of Mixity and ISDS' (*European Law Blog*, 18 May 2017) <https://europeanlawblog.eu/2017/05/18/opinion-215-and-the-future-of-mixity-and-isds/> accessed 20 February 2021.

arise (…) cannot change the answer to the question of competence (…) [W]hatever their scale, the practical difficulties associated with the implementation of mixed agreements (…) cannot be accepted as relevant when selecting the legal basis for a [Union] measure'.[785]

Contrary to the other two ultra-famous judge-made legal principles, i.e. direct effect and supremacy, the ERTA doctrine, as further construed and refined in subsequent case-law, is -at least to some extent- codified in the treaty of Lisbon. Although the codification is far from being a perfect or a holistic embodiment of the doctrine, thus it is open to judicial interpretation,[786] the mere fact that it is reflected in the treaty shows that Member States accept in principle that there is a legitimate 'implied' or 'supervening exclusivity' of EU competence for the conclusion of international agreements in certain situations.[787] As such, in addition to the explicit *a priori* exclusive competences listed under Article 3(1) TFEU, the Treaty also delineates in paragraph 2 of Article 3 TFEU the criteria for 'implicit' and/or 'supervening' exclusivity[788] for concluding and international agreement in three circumstances:

- when its [the agreement's] conclusion is provided for in a legislative act of the Union,
- when it [the agreement] is necessary to enable the Union to exercise its internal competence, and
- in so far as its [the agreement's] conclusion may affect common rules or alter their scope.

As seen above, Article 216(1) TFEU grants the EU a residual power to enter into international agreements not only where 'the Treaties so provide' but also 'where the conclusion of an agreement is necessary in order to achieve, within the framework of

[785] CJEU Opinion 2/00 (n 772) para 41.
[786] G.De Baere and R.Wessel ,'EU Law and the EEAS' (n 715) 182.
[787] M.Chamon (n 750).
[788] A.Rosas (n 21) 15.

the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope'.[789] In a formulation remarkably similar to Article 352 TFEU on EU general competences -as Schütze points out-[790] this provision is understood as the legal basis for implied external competences[791] even without the need for corresponding internal legislation, while Article 3(2) TFEU as the legal basis for exclusive implied external competences which requires parallelism between the exercise of internal competences and external action. The coexistence of these two provisions has created rather plausible confusion, which nonetheless has been duly clarified by the Court: Article 216(1) TFEU determines when the Union has an external competence and Article 3(2) TFEU if that competence is exclusive or not.[792] As such, Article 216(1) TFEU is itself a shared competence under one of the areas provided for in the treaties but not expressly mentioned in Article 4(2), 3 or 6 TFEU, pursuant to Article 4(1) TFEU. Member States within the Council, hence may, by virtue of Article 216 TFEU, decide to grant an external competence to the Union for any matter falling 'within the framework of the Union's policies' if this proves necessary to achieve one of the objectives of the treaties.

The Court has moreover specified that pre-Lisbon case-law remains relevant[793] and that these provisions are to be 'interpreted in the light of the Court's explanation with regard to them in the judgment in *ERTA* (…) and in the case-law developed as from that judgment'.[794]

---

[789] *Emphasis added.*
[790] R.Schütze (n 73) 195.
[791] See for example, CJEU Opinion 1/13, Opinion of the court (Grand Chamber) of 14 October 2014 [2014] ECLI:EU:C:2014:2303, para 67 and case-law cited: 'The competence of the EU to conclude international agreements may arise not only from an express conferment by the Treaties but may equally flow implicitly from other provisions of the Treaties and from measures adopted, within the framework of those provisions, by the EU institutions. In particular, whenever EU law creates for those institutions powers within its internal system for the purpose of attaining a specific objective, the EU has authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect (…) The last-mentioned possibility is also referred to in Article 216(1) TFEU'.
[792] Case C-600/14 (n 763), para 50.
[793] Laurens Ankersmit, 'Requiring 'Unity First' in Relations with Third States: the Court Continues ERTA-doctrine in Opinion 1/13' (*European Law Blog,* 20 October 2014) <https://europeanlawblog.eu/2014/10/20/requiring-unity-first-in-relations-with-third-states-the-court-continues-erta-doctrine-in-opinion-113/> accessed 2 February 2021
[794] Case C-114/12, *European Commission v Council of the European Union (Broadcasting Organisations)* [2014] ECLI:EU:C:2014:2151, para 67 cited in F.Erlbacher (n 730).

This means that Article 3(2) TFEU can be applied only to situations where the EU rule in question is a secondary rule adopted on the basis of the TFEU and not merely a provision of the treaty.[795] Extending the principle beyond secondary rules in the exercise of a Union shared competence, to rules of primary law would contravene the meaning of the *ERTA* case-law. Such practice would principally become redundant as contrary to the principle of primacy of EU law given that no international agreement between the Union and a third entity can by any means 'affect' or 'alter the scope' of EU treaty provisions.[796] In other words, the principle of implied exclusive external competences by virtue of Article 3(2) TFEU is to be applied only to exercised shared competences.

Regarding the level of 'affectation' of the concerned *acquis,* even though it does not need to be absolutely certain but likely, as Advocate General Ms Kokott has concluded, the international agreement must entail a 'specific risk' to affect EU common rules. To conclude, the principle may apply outside the scope of Article 3(1) TFEU, so long as the subject matter of an agreement lies within exercised shared competences of the Union and there is the likelihood or the risk of this agreement to "affect" the EU *acquis*. At the same time, exclusive competences under Article 3(1) TFEU, and notably the CCP, surprisingly are not 'given the larger scope'.[797] In cases of international agreements pursuing an objective with a specific connection to an express exclusive EU competence such as CCP, 'the conclusion of such agreement falls within the exclusive competence of the EU' pursuant to Article 3(1) TFEU;[798] no need to allude to Article 3(2) TFEU.

On the other hand, the treaty in force does not enlighten us on the question of mixity. It rather creates a complex mosaic of the external competences of the Union and its Member

---

[795] CJEU Opinion 2/15 (n 26), para 230.
[796] ibid, paras 234-235. See also on that point see Case C-402/05P *Kadi v Council and Commission* (n 515), Opinion of AG Poiares Maduro (ECLI:EU:C:2008:11), para 24 where he contends that '(…) it would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order. The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community'.
[797] F.Erlbacher (n 730).
[798] Case C-137/13 *Herbaria Kräuterparadies GmbH v Freistaat* Bayern [2013] OJ C171/14, para 76.

States,[799] and arguably the whole debate stands on questionable and precarious legal ground.[800] Notwithstanding, the Court has confirmed its soundness in its recent case-law, notably Opinion 2/15 on the EU-Singapore Free Trade Agreement (EUSFTA) as well as the subsequent judgements in *COTIF I*[801] and *Antartic MPA.*[802] In confirming that Article 216(1) TFEU is a shared EU power pursuant to Article 4(1) TFEU, hence not part of Article 3 and 6, the Court concluded that the envisaged agreement regarded matters under the umbrellas of both shared as well as exclusive EU competences. In that framework, one part of the agreement would be concluded by the Union only while the rest -referring to unexercised shared competences- could not be approved by the Union only, but had to be concluded by the Member States.[803] The Court noted that this was a case of 'facultative mixity', since there would be a possibility for the Union to act alone if it had exercised the shared competence provided for in Article 216 TFEU.[804] In the exact words of the Court, '[t]he mere fact that international action of the European Union falls within a competence shared between it and the Member States does not preclude the possibility of the required majority being obtained within the Council for the European Union to exercise that external competence alone'.[805] As simply put by Advocate General Wahl in his opinion on Opinion 3/15 '[t]he choice between a mixed agreement or an EU-only agreement, when the subject matter of the agreement falls within an area of shared competence (…) is generally a matter for the discretion of the EU legislature'.[806] It is crystal clear that the Union possesses sufficient powers to conclude an agreement in areas of shared competences alone/exclusively, and if it wishes, it may also refrain from exercising individual aspects of its powers.[807] The only general limit to the exercise of that power would possibly be international law itself.[808] In the same vein, the

[799] Joined Cases C-626/15 and C-659/16 *European Commission v Council of the European Union* [2018] ECLI:EU:C:2018:925, Opinion of AG Kokott, para 6.
[800] Inge Govaere, 'Facultative' and 'Functional' Mixity Consonant with the Principle of Partial and Imperfect Conferral' in M.Chamon and I.Govaere (n 784) 28.
[801] Case C-600/17 *Pina Cipollone v Ministero della Giustizia* (*COTIF I*) [2019] ECLI:EU:2019:29.
[802] Joined Cases C-626/15 and 659/16 (n 799).
[803] CJEU Opinion 2/15 (n 26) paras 242-244.
[804] Case C-600/17 (*COTIF I*) (n 801), para 68. See also comment on the rejection of the idea of 'facultative mixity' in footnote 784.
[805] Joined Cases C-626/15 and C-659/16 (n 802) para 126.
[806] CJEU Opinion 3/15, Opinion of the Court of 14 February 2017 on EU accession to the Marrakesh Treaty [2017] ECLI:EU:2017:114, Opinion of AG Wahl, para 119.
[807] Opinion of AG Kokott (n 799) para 115.
[808] Joined Cases C-626/15 and C-659/16 (n 590), para 127-128.

Council has no legal obligation to take action and it may also in cases of shared competences decide to make only partial use of its powers.[809]

To sum up, under the current state of Union law and practice when the centre of gravity of an international agreement lies within a shared EU competence there is a choice for the agreement to be concluded by:

- The EU alone;
- Jointly by the EU and the member states, simultaneously; or
- By the member states alone.

There is wide understanding that in purely legal terms and in the spirit of Article 2(2) TFEU, the above choices should not be available for exercised shared competences. Both the Union and the Member States may exercise shared competences but once the EU exercises a competence, Member States no longer have any power. In a sense, once the Union exercises a shared competence, this becomes exclusive. As such, simultaneous exercise of external competence for exercised shared competences would render Article 4(2) powers synonymous to parallel competences under Article 4(3) and (4) TFEU.[810] Despite the merit of this view, it seems that the Court accepts the possibility for the simultaneous external exercise of a shared competence,[811] but in specific areas such as the protection of the environment, as discussed below.

On the basis of the treaties and latest case-law, we can narrow down the division of external exclusive competences (implied and explicit) and mixity in the scheme below:[812]

[809] Opinion of AG Kokott (n 799) para 116.
[810] ibid, para 120.
[811] Anders Neergaard, 'Mixity from the Perspective of the European Parliament' in M.Chamon and I.Govaere (n 784) 275.
[812] Drawn from the typology over facultative and obligatory mixity in A.Rosas (n 21) 14.

Subject-matter(s) of int'l agreement	**Power to conclude & approve int'l agreement**
a) express exclusive competence	Union only | exclusive competence | Article 3(1) TFEU
b) express provision in legislative act	Union only | exclusive competence | Article 3(2) TFEU
c) necessity to enable an exercised shared competence [even if subject-matter on unharmonized or partially harmonized area]	
d) conclusion may affect or alter an exercised shared competence [i.e., common rules even if subject-matter on unharmonized area]	
e) residual national competence & EU exclusive competence	obligatory 'mixity'
f) unexercised shared competences	facultative 'mixity'
g) shared competence & exclusion of member states not allowed by int'l law	facultative 'mixity'
h) exercised shared competence where Article 3(2) TFEU criteria do not apply	facultative 'mixity'

3.4 Common Commercial Policy: if the EU can do something, that is trade![813]

> 'A strong, fair and open trade agenda, makes Europe an attractive place for business. This is key to strengthening the EU's role as a global leader while ensuring the highest standards of climate, environmental and labour protections. (…)
>
> The Commission seeks a coordinated approach to external action - from development aid to the Common Foreign and Security Policy - that secures a stronger and more united voice for Europe in the world.'
>
> European Commission
> *A stronger Europe in the world*
> *Reinforcing our responsible global leadership*

Getting back to the basics, nothing lies at the core of European integration other than trade. Long before foreign policy was included in the treaties, external trade relations were not only within the scope of the EEC but one of its main competences and objectives. It would suffice to read the original Treaty of Rome itself or any basic EU law textbook to learn that the main goal of the then EEC was the creation of a common market as between Member States, which would be

[813] Paraphrasing the title of Charlemagne's article "If the EU cannot do trade, what can it do? The CETA debacle heralds the age of "vetocracy" *The Economist* (29 October 2016, updated on 3 November 2016) <https://www.economist.com/europe/2016/10/29/if-the-eu-cannot-do-trade-what-can-it-do> accessed 6 February 2020

accomplished *inter alia* through a customs union; hence the 'establishment of a common customs tariff and **of a common commercial policy towards third countries**'.[814] The 'inevitable by-product' of the common market, the Common External Tariff (CET)[815] demanded the EEC to negotiate as a single entity in international trade relations, with the Commission on the negotiation table. This resulted into the creation of the external trade policy, known as Common Commercial Policy (CCP) which throughout the years became one of the most important components of the EU's external action, and the basic instrument of European influence in the world.[816] For this natural corollary of the customs union[817] to work, the treaty granted the new supranational entity an external personality.[818] As was eloquently put by the Court '[the Council] does not enjoy a discretion to decide whether to proceed through inter-governmental or Community channels (…) By deciding to proceed through inter-governmental channels it made it impossible for the Commission to perform the task which the Treaty entrusted to it in the sphere of negotiations with third countries'.[819] Pursuant to Article 113 of the EEC treaty (later Article 133 EC treaty, now Article 207 TFEU) and further confirmed by the Court in Opinion 1/75,[820] CCP became an exclusive EEC/EC/EU competence,[821] hence was subject to the supranational decision-making route. To put this in perspective, consider that at that time nearly all decisions in the Council came under the rule of unanimity, while the exclusive power of CCP required since then Qualified Majority Voting (QMV).[822] Ergo, it was an area where the founding treaty was truly

[814] Article 3(b) TEEC (*emphasis added*).
[815] S.Woolcock (n 2) 47.
[816] Artsiom Tkachuk, 'Common Commercial Policy of the European Union and its Significance to the World Trade: Transatlantic Trade and Investment Partnership case study' (2016) 10 RIE 481.
[817] M.Smith 'The EU as an International Actor' (n 57) 282.
[818] Sophie Meunier, Kalypso Nicolaïdis, 'Who Speaks for Europe? The Delegation of Trade Authority to the EU' (1999) 37 JCMS 477.
[819] *ERTA case* (n 43) para 70-71.
[820] CJEU Opinion 1/75, Opinion of the Court of 11 November 1975 [1975] ECR 1355; Allan Rosas, 'EU External Relations: Exclusive Competence Revisited' (2015) 38 Fordham International Law Journal 1072.
[821] John Peterson and Aladstair Young, 'Trade and Transatlantic Relations: Old Dogs and New Ricks' in S.Meunier and K.McNamara (eds), *Making History: European Integration and Institutional Change at Fifty* (n 75) 294.
[822] A.Tkachuk (n 819).

revolutionary.[823] As such, CCP -the 'façade' of the common market[824]- has been 'the boundary between the increasingly integrated common market and its external trade partners',[825] an area where the Community consolidated its EU policy-making even in times of integration stagnation.[826]

As a block, the EU has been since its creation the world's largest trader with a wide scope and range of international economic involvement,[827] gaining additional market power at every enlargement. It is indicative that before the 2004 Eastern enlargement, the EU already accounted for a larger percentage of global gross national product than the U.S. and Japan.[828] The original 'desire' of the founding Member States 'to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade'[829] was bred by the belief that being the biggest trader, the EU/EC has the most to gain from international trade liberalization. Treated as an end in itself, trade liberalisation has been enshrined as a pre-eminent commitment of the EEC/EC/EU in all treaties, something hardly ever done by any other constitutional document in the world.[830] The original Article 110 in the Treaty of Rome stipulated that by 'establishing a customs union between themselves Member States [aimed] to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers (…)'.[831]

Conferred with exclusive competence, the EU spoke ever since the Dillon Round in 1960-1962 with one voice -represented by the Commission- in all

---

[823] S.Meunier and K.Nicolaïdis (n 818)
[824] P.Eeckhout (n 689) 294
[825] Johan Adriaensen, 'The Common Commercial Policy' *Oxford Research Encyclopedias* (2020) <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1098#acrefore-9780190228637-e-1098-div1-2> accessed 5 March 2021
[826] A.Tkachuk (n 819).
[827] M.Smith 'The EU as an International Actor' (n 57) 282.
[828] Simon Duke, 'Consistency as an Issue in EU External Activities' (1999) EIPA Working Paper 99/W/06 <http://aei.pitt.edu/542/1/99w06.pdf> accessed 6 June 2021
[829] EC Treaty (Treaty of Rome, as amended) preamble.
[830] Piotr Krajewski, 'Always as an End, never as a Means? The EU's Commitment to Free Trade and its Limits' (*European Law blog*, 12 January 2022) <https://europeanlawblog.eu/2022/01/17/always-as-an-end-never-as-a-means-the-eus-commitment-to-free-trade-and-its-limits/> accessed 5 April 2022.
[831] EC Treaty (n 832) art110.

negotiations for the reform of the 1948 General Agreement on Tariffs and Trade (GATT). Starting with tariffs, international trade policy evolved with time into a more comprehensive agenda, including in the 1970s non-border measures and in the 1980s Uruguay Round (1986–94) investment, agriculture, services, and intellectual property.[832] The Uruguay Round was crowned with the establishment of the World Trade Organization (WTO). The expansion of WTO law to the aforementioned areas and the conclusion of the respective agreements on services (GATS) and trade-related aspects of intellectual property rights (TRIPs) triggered complex battles and complicated the situation of competences within the Union calling upon the intervention of the Court. Further to Opinion 1/94, the Court introduced the notion of 'mixity' with 'a gray area of concurrent jurisdiction between the Community and the member states' in areas where no harmonization had already been exercised.[833] Notwithstanding, the establishment of the WTO and the subsequent expansion of the international trade agenda coincided also with the completion of the common market, the growth of EEC trade *acquis*, and the phasing out of transitional measures and national margins to act.

According to Max Weber, power is 'the ability to move a party in an intended direction'.[834] Holding wide competences and being 'the world's trading superpower',[835] the EU thus played a pivotal role in the liberalization of world trade, and 'in the negotiation and establishment of a multilateral global trading regime' of the WTO tailored to its needs. At the Uruguay Round the EU could veto anything. Without its support, the WTO would not be able to function.[836] At the same time, the EU used its veto power to gain what it wanted in various sensitive policy areas such as agriculture. The serious delay in the final deal on agricultural subsidies is a good

[832] S.Woolcock (n 2) 47.
[833] Judith Hippler Bello and John R. Schmertz, Jr., 'Opinion 1/94, Community Competence to Conclude Certain International Agreements' (1995) 89 The American Journal of International Law 772.
[834] F.Pfetsch (n 51).
[835] European Commission, 'Mission Letter to Commissioner for Trade Phil Hogan' (10 September 2019) <https://ec.europa.eu/info/sites/default/files/mission-letter-phil-hogan-2019_en.pdf> accessed 20 March 2022
[836] Simon Hix, *The Political System of the European Union* (2nd edn, Palgrave 2005) 382

illustration of the EU's power. With the power of the biggest trader at hand, the EU has been intensely and continuously building an impressive network of commercial agreements,[837] imposing itself as a major 'actor' in international trade with a great deal of influence on the development of international economic law.[838] Evidently, this 'enormous bargaining power'[839] came thanks to collective action; with the EU operating as a block instead of every Member State (even the bigger ones) acting as singular unit.

The entire decision-making and governance of any exclusive EU competence -such as the flagship CCP- always depended primarily on the Commission. The treaty reserves special procedures for the exercise of external Union competence in CCP, which is sometimes being depicted as a typical principal–agent relationship, whereby Member States represent the principal who delegates powers to the agent, i.e. the Community, who acts on their behalf.[840] Albeit somewhat correct, this description is not entirely accurate and is fraught with danger. For the sake of clarity and to avoid common misunderstanding of Eurosceptic/populistic conclusions about EU unfettered action, we should probably highlight that supranationally administered policies in the EU do not mean an unconditional surrender of sovereignty. The Council -this 'hybrid' institution- is a core component of EU's supranational powers and at the same time is composed of representatives of the executives of sovereign governments. Its supranational character lies mainly in the dominant voting system of qualified majority, which by default excludes single voiced vetoing. Notwithstanding, less in theory and more in practice, Member States exercise significant control on the Commission.

---

[837] M.Smith 'The EU as an International Actor' (n 57) 286.
[838] Mads Andenas and Luca Pantaleo, 'EU External Action in International Economic Law and the Challenges Posed by the EU's Hybrid Nature' in Mads Andenas, Luca Pantaleo, Matthew Happold and Cristina Contartese (eds), *EU External Action in International Economic Law: Recent Trends and Developments* (Springer 2020) 3.
[839] CJEU Opinion 1/94 (n 766) Question 11 (ECR I-5388).
[840] S.Meunier and K.Nikolaides (n 818).

In more detail, the Commission has always held the monopoly of legislative initiative within CCP and has been responsible for the implementation of the policy, including adopting executive non-legislative binding acts for anti-dumping, countervailing duties and other import restrictions. The Commission is also, as aforementioned, the negotiator on behalf of the EU for all external trade agreements related to goods as well as in areas where the EU has competence. In these instances, however, the Commission acts only after having received a negotiating mandate from the Council which also gives the final green light to the conclusion of the agreement by adopting a decision to this end, akin to ratification, as per article Article 218(6) TFEU. In general, all Commission work under CCP is subject to the guidance and the scrutiny of a special committee composed of high-level trade government officials in the Council, as stipulated in Article 207(3) TFEU,[841] which in practice agrees on the basis on consensus.[842] Pre-Lisbon, Parliament had no formal role in CCP with the exception of giving its assent (at the time required under former Article 300 TEC for the adoption of international trade agreements). Post-Lisbon, Parliament comes in on a *quasi*-equal footing with the Council. Namely, the ordinary legislative procedure has been introduced for the adoption of "measures defining the framework for implementing [CCP]" pursuant to Article 207(2) TFEU. For the conclusion of agreements under the CCP too, Lisbon introduced also a new procedure defined in Article 207(3) TFEU, whereby the Commission has the obligation to report both to Parliament and to the Council special committee. For the ratification of such agreements, it is also now necessary to acquire the Parliament's consent, pursuant to Article 218(6)(a)(v). These novelties of the Lisbon treaty and are at large normalising

[841] Formerly known as 'article 113 Committee' and subsequently 'article 133 Committee', it has been rebranded after the Lisbon Treaty to Trade Policy Committee (TPC). It is now provided for under Article207(3) TFEU which states that '[t]he Commission shall conduct these negotiations [for agreements with one or more States or international organisations] in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations' (*emphasis added*). Note that the only change brought by the Lisbon Treaty is an additional reporting requirement by the Commission to Parliament. Beforehand, till the Treaty of Nice the Commission was required to report pursuant to Article 113 TEEC and later 133 TEC only to the committee in question.

[842] ibid.

the old 'anachronisms'[843] and reveal the Member States' intention to strengthen the Parliament's role in CCP but not to confer to Parliament complete congruence with the Council.[844]

Alongside its active participation to the WTO, EU's conclusion of preferential trade agreements (PTAs) and FTAs with third parties constitutes the backbone of CCP. FTAs are considered major contributors to EU's external trade performance because by creating a strong institutional framework, they help EU exporters access new markets, solve problems and overall do business in more predictable and rule-based environments.[845] In this context, the EU has developed over the last 50 years a strong network of FTAs. The economic impact of the Covid-19 pandemic was an important side effect of the sanitary crisis with severe repercussions also on trade, which dropped significantly. Trade agreements were reportedly crucial in mitigating the negative consequences i.e. against drop in trade.[846]

3.5 The EU as a sustainable global actor

3.5.1 The enforceability of Articles 3 and 21TEU

As already discussed, policy coherence with core EU values and principles, fundamental rights, the promotion of democracy, the rule of law and sustainable development as a whole is at the heart of European policymaking. Safeguarding and transmitting its set of values to the world is one of the goals of EU's external action. In fact, as also mentioned when discussing the protection of the rule of law as a value of the EU, express provisions about certain values such as the rule of law were at first

[843] ibid 70.
[844] Markus Krajewski, 'New Functions and New Powers for the European Parliament: Assessing the Changes of the Common Commercial Policy from the Perspective of Democratic Legitimacy' in Marc Bungenberg and Christoph Herrmann (eds), *Common Commercial Policy After Lisbon* (n 751) 74
[845] European Commission, *Report on Implementation of EU Free Trade Agreements 1 January – 31st December 2017* (Publications Office of the European Union 2018).
[846] Commission, 'Report on Implementation and Enforcement of EU Trade Agreements' COM(2021) 654 final

spelt out only regarding foreign policy. At the Treaty of Maastricht, Article J.1(2) TEU read:

> The objectives of the common foreign and security policy shall be:
> - to safeguard the common values, fundamental interests and independence of the Union;
> - to strengthen the security of the Union and its Member States in all ways; to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter;
> - to promote international cooperation;
> - to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.

Sometime before the Lisbon treaty, the EU praised itself on having 'developed a series of external policy instruments, political, economic, commercial and financial, which help [it] to protect and promote [its] interests and [its] values'.[847] Moreover, ever since the ruling in *Kadi* -also delivered before the entry into force of the Lisbon treaty- it has been settled case-law that all EU acts should be read 'in the light of the fundamental rights forming an integral part of the general principles of [Union] law'[848] seeking a 'workable balance' with constitutional core values even in cases regarding the protection against terrorism.[849]

Pursuant to Articles 3 TEU and 21 TEU, in engaging in its international action -whether CFSP or not- the Union must pursue the principles which have inspired its own creation, development and enlargement as well as the principles of the UN

[847] Commission, 'Europe in the World – Some Practical Proposals for Greater Coherence, Effectiveness and Visibility' Communication COM(2006) 278 final, 2.
[848] Joined cases C-402/05 P and C-415/05 P (n 515) para 326.
[849] Juliane Kokott and Christoph Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' (2012) 23 EJIL 1015.

Charter and international law such as democracy, the rule of law, universality and indivisibility of human rights, respect for human dignity, equality, and solidarity. Instilling policy coherence also in external action, Article 21 names which principles are "guiding" the Union's global action;[850] despite their breadth, they are at the same time unequivocal. Albeit of an extraordinarily broad scope,[851] these guiding principles are inextricably linked with Articles 2 and 3 TEU. In that sense they are both founding values under Article 2 TEU as well as guiding principles as per Article 3 TEU and express objectives. In that respect, Article 21(2) TEU includes an analogous and detailed long list of objectives consistent with upholding these values and principles.[852]

The question that comes to mind regarding these general affirmations on values and principles in treaty language is their actual legal value. Article 21 TEU, despite creating an obligation for the EU to act consistently with the specified values and principles, does not at the same time provide a standalone legal basis for EU action. Still, what matters mostly in our research is whether Articles 3(5) and 21 TEU create legally binding obligations. Clearly the Court is consistently treating them as binding. In *Commission v Council (Philippines agreement*), the Court examined the envisaged agreement also in light of its consistency with Article 21 TEU. [853] The contested agreement was concluded under the EU development policy, which is by definition an external policy and therefore constitutes part of EU's external action in which case articles 3(5) and 21 TEU apply. Besides, the treaty leaves no doubt over this correlation given that in the TFEU provisions governing the development policy it is expressly mentioned that it 'shall be conducted within the framework of the

[850] Alessandra Asteriti, 'Article 21 TEU and the EU's Common Commercial Policy: a Test of Coherence' in Marc Bungenberg,, Markus Krajewski, Christian Tams, Jörg Philipp Terhechte, and Andreas R. Ziegler (eds), *European Yearbook of International Economic Law 2017* (Springer 2017) 122

[851] Ramses Wessel and Joris Larik, 'The European Union as a Global Legal Actor' in R.Wessel and J.Larik (n 732) 72

[852] Thomas Ramopoulos, 'Article 21 TEU' in Manuel Kellerbauer and Marcus Klamert (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP 2019) 201-202.

[853] Vivian Kube, 'The European Union's External Human Rights Commitment: What is the Legal Value of Article 21 TEU?' (2016) EUI Department of Law Research Paper No 2016/10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2753155> accessed 20 March 2022.

principles and objectives of the Union's external action' (Article 208(1) TFEU). In this context, the Court reiterates that EU development agreements 'must pursue the objectives of that policy; that those are broad objectives in the sense that it must be possible for the measures required for their pursuit to concern a variety of specific matters; and that that is so, in particular in the case of an agreement establishing the framework of such cooperation'.[854]

On this note, we should not omit to mention that EU's external action has certain dynamic components, which are by definition meant to pursue sustainable development objectives. We refer to the development cooperation policy and humanitarian aid enshrined -as mentioned under the CFSP chapter above- in Title III TFEU (Articles 208-214 TFEU). The very substance of these 'special' shared competences conferred to the EU under Article 4(3) TFEU is sustainable development. The purpose of the development policy, as enshrined in the first paragraph of Article 208 TFEU, is the reduction, and in the long term, the eradication of world poverty. In addition to that primary objective, the policy development cooperation is to be conducted within the overall framework of Articles 3(5) and 21 TEU. Given this framework, when the EU concludes partnership agreements with third countries everything shall be sacrificed on the altar of that primary objective. Policy action in the field of development cooperation is still to be conducted within the framework of the principles and objectives which encompass horizontally EU external action. What is more, the EU runs its development cooperation action -and as we will also see in the following sections its external trade- with developing ACP countries in the framework of the Cotonou Agreement which has been in force from 2000 to 2021. This framework agreement which has poverty eradication at its core, also includes strict human rights conditionality. The predecessor of Cotonou, the Lomé Convention included a human rights clause ever since its fourth amendment in 1990. The even more up-to-date Lomé amendment of 1995 added democracy in the conditions as well as a suspension provision for any party which would have violated these conditions. The Cotonou Agreement of 2000 (scheduled to be in force by November 2021) comprises human rights, democratic principles and the rule of law as essential elements of the partnership

[854] Case C-377/12 *European Commission v Council* (Philippines Agreement) [2014] ECLI:EU:C:2014:1903, para 38.

whereas this time, good governance is also a key aspect and corruption would entail a violation of the agreement.[855]

3.5.2 External sustainable trade | Trade & sustainable development (TSD)

> 'Trade is more than simply the exchange of goods and services. It is also a strategic asset for Europe. It allows us to build partnerships, protect our market from unfair practices and ensure our values and our standards are respected'.[856]
>
> Ursula von der Leyen
> *President of the European Commission*

The power of the nexus between the internal and the external EU actions goes far beyond a mere legal and political discussion over the different formulas of how to conclude and approve EU-wide international agreements. This relationship fosters the role of the Union as an entity striving for the promotion of its values on the international plane. The EU is by now a lot more than a mere 'supranational community' linked though the internal market; it is a union of law 'dedicated to the creation of a comprehensive legal space *sui generis* also capable of projecting its values internationally'.[857]

Especially for CCP, the Lisbon treaty plays a very pivotal role. As professor Angelos Dimopoulos highlights, it transforms the CCP 'from an autonomous field of EU external action, subject to its own rules and objectives, into an integrated part of EU external relations, characterized by common values that guarantee unity and consistency in the exercise of Union powers'.[858] The affiliation and coupling of CCP with Non Trade Policy Objectives (NTPOs) -including human rights and labour and

---

[855] Emily Reid, *Balancing Human Rights, Environmental Protection and International Trade: Lessons from the EU Experience* (Bloomsbury 2017) 148-150
[856] 'Mission Letter to Commissioner for Trade Phil Hogan' (n 838).
[857] A.Asteriti, (n 854) 119.
[858] Angelos Dimopoulos, 'The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy' (2010) 15 European Foreign Affairs Review 153.

environmental standards-[859] governing the EU's (external) action as a whole, is particularly important. In an effort to assert its role as a world leader on the use of trade to promote SD, to export regulatory standards on sustainability and create a level playing field for European companies, what the EU wants to say basically is: 'if you want to do business with us, you need to be sustainable'.

This is translated into offering incentives to facilitate trade in green technologies even prior to the conclusion of the Lisbon treaty. Through implementing the special initiative GSP+[860] and eliminating tariffs for developing countries which enforce specific MEAs and human/labour rights conventions, the Union seeks to provide incentives for responsible policy action on their part. At the same time, the EU is actively engaged in the conclusion of the environmental goods agreement (EGA) within the WTO.[861] These certainly important initiatives have nonetheless sometimes fraught with uncertainty and have been lacking legal clarity, being only voluntary and possibly incompatible with WTO rules.[862] Even the Court has repeatedly held that the

[859] Ingo Borchert, Paola Conconi, Mattia Di Ubaldo and Cristina Herghelegiu, 'The Pursuit of Non-Trade Policy Objectives in EU Trade Policy' (2021) World Trade Review 1.

[860] The EU Generalised System of Preferences (GSP) was established in the EU as a follow-up to the recommendation of the United Nations Conference on Trade and Development (UNCTAD) of 1968 to create a 'Generalized System of Tariff Preferences' under which developed countries would grant trade preferences to all developing countries. In the WTO/GATT system, the GSP is covered by the 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries' (or 'Enabling clause'). The revised EU GSP established by regulation (EC) No 980/2005 entered into force in 2006. In addition, 'a special incentive arrangement for sustainable development and good governance, the GSP+, was created to benefit especially vulnerable countries that have ratified and effectively implemented key international conventions on human and labour rights, sustainable development and good governance. It covers 6400 products, which enter the EU duty free. The GSP+ incentive scheme was fast-tracked to enter into force on a provisional basis on 1 July 2005. The list of GSP+ eligible countries was confirmed before the beginning of 2006, by an assessment of their effective implementation of core international conventions on human and labour rights, good governance and environment'; Commission, 'GSP+: Report on the status of ratification and recommendations by monitoring bodies concerning conventions of annex III of the Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences (the GSP regulation) in the countries that were granted the Special incentive arrangement for sustainable development and good governance (GSP+) by Commission Decision of 21 December 2005' (Communication) COM(2008) 656 final.

[861] Eighteen parties, amongst which the EU, are engaged in negotiations to slash down to 0% tariffs on a number of environment-related products such as goods generating clean and renewable energy and improving energy efficiency, air pollution control, waste management, treating wastewater, combatting noise pollution etc.; WTO, 'Environmental Goods Agreement (EGA)' <https://www.wto.org/english/tratop_e/envir_e/ega_e.htm> accessed 20 February 2021

[862] David Langlet and Said Mahmoudi, *EU Environmental Law and Policy* (OUP 2016) 37.

right of the Union to act to pursue NTPOs within CCP, was a mere choice and not an obligation.[863]

One response to these shortcomings is the legally binding requirement for 'normative coordination'.[864] Therefore, in addition to the specific objectives for commercial policy under Article 206 TFEU -which remain intact as in ex Article 110 of the founding treaty of Rome[865]- Lisbon also spells out the implied externalisation of EU's internal constitutional values, for all six areas of EU external action. Up till Lisbon, uniformity of the entire EU external action was limited to ex Article 3 TEU on the requirement for consistency of the Union's 'external activities as a whole in the context of its external relations, security, economic and development policies' as well as to the requirement for the Council to 'ensure the unity, consistency and effectiveness of action by the Union' under former Article 13(3) TEU (now replaced by Article 26(2) TEU). Lisbon, with the inclusion of Article 21(3)(1) TEU read in conjunction with Article 2 TEU[866] as well as Article 7 TFEU, consistency between internal and external policies as well as among external policies[867] has become a legally binding requirement.[868] Especially for trade, the aforementioned provisions are to be read jointly with Article 205 and (partially redundant) Article 207(1) sentence 2 TFEU, paving the way for the 2030 Agenda on SDGs which considers 'international trade as an engine for development, debt, debt sustainability (…) inclusive economic growth and poverty reduction contributing to the promotion of sustainable development',[869]

---

[863] A.Asteriti (n 854) 124.
[864] A.Asteriti (n 854) 122.
[865] Christoph Vedder, 'Linkage of the Common Commercial Policy to the General Objectives for the Union's External Action' in M.Bungenberg and C.Herrmann (eds) (n 751) 120.
[866] ibid 118-120.
[867] S.Duke 'Consistency, Coherence and European Union External Action: the path to Lisbon and Beyond (n 460) 15
[868] Anne Thies, 'Principles of EU External Action' in R.Wessel and J.Larik (n 732) 54.
[869] UNGA, 'Transforming our world: the 2030 Agenda for Sustainable Development' (25 September 2015) UN Doc A/RES/70/1.

In a normative environment, the EU has adopted several legal acts which prohibit or limit the import or export of certain environmentally hazardous products and applies protective measures against countries not abiding with MEAs. It also includes environmental criteria in its PTAs, FTAs, stabilization and association agreements. Many international trade-related agreements of the EU with third entities such as the Euro-Mediterranean Agreement with Egypt and the Association Agreement with Ukraine contain clauses proclaiming the importance of the values inherent in democracy, the rule of law, and human rights as a basis for the cooperation[870] and go for a long time now beyond mere declaratory statements, to specific conditionality.[871] The Cotonou agreement and its consequent Economic Partnership Agreements (EPAs)[872] with ACP countries are perfect embodiments of the axiom. The 'essential and fundamental' elements of the Cotonou Agreement are the respect of human rights, democratic principles, the rule of law, good governance, and therefore, sustainable development. These are enforced through concrete commitments and terms in the 'non-execution clauses', which provide for 'appropriate measures' to be taken if a party fails to fulfil its obligations in respect of the essential and fundamental elements which include even the suspension of trade benefits.

The EU-CARIFORUM EPA concluded in 2008 is considered the starting point of the EU approach to a value-based trade policy. It was the first EPA and EU trade agreement to portray the 'mutual supportiveness' between trade, environment and sustainable development by reaffirming the commitment of the parties 'to promoting the development of international trade in such a way as to ensure sustainable and sound management of the environment, in accordance with their undertakings in this

[870] Pieter Jan Kuijper, Jan Wouters, Frank Hoffmeister, Geert de Baere and Thomas Ramopoulos, *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor* (2nd edn, OUP 2015) 279.
[871] Elena Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Kluwer Law International 2003) 240.
[872] EU EPAs are trade and development agreements concluded with African, Caribbean and Pacific countries (ACP) following the Cotonou Agreement, (*European Commission)* <https://trade.ec.europa.eu/access-to-markets/en/content/economic-partnership-agreements-epas> accessed 20 February 2021

area including the international conventions to which they are party and with due regard to their respective level of development'. It also accorded specific emphasis on the facilitation of trade in environmental goods and services such as environmental technologies, renewable and energy efficient goods and services and eco-labelled goods.[873] It contained in general much more references to social and labour standards.[874] As for disputes regarding TSD provisions, EU agreements followed the general rules of WTO. Inter-state trade disputes are dealt by the WTO Dispute Settlement Understanding of 1995 which excluded disputes related to TSD commitments. These were heard by an independent panel of experts whose decisions were not legally binding but more of a persuasive consultative nature for the parties.[875]

The FTAs being the backbone of CCP, they could not be left out of this consistency formula. Shortly after the CARIFORUM EPA, the EU-Korea FTA of 2011 included TSD provisions in a relevant chapter which encompassed both labour rights and environmental protection. Ever since, all 'new generation' EU trade agreements include TSD provisions, usually in a dedicated chapter, which as confirmed by involved stakeholders they were not initially considered as 'a natural part of trade agreements' and were proposed and required by the EU.[876]

The EU is proudly proclaiming that in developing the 'world's largest network of trade agreements' it 'also helps advance the respect of human and labour rights,

[873] Gracia Marín Durán and Elisa Morgera,(n 565) 99.
[874] Jean-Baptiste Velut, Daniela Baeza Breinbauer, Marit de Bruijne, et al, *Comparative Analysis of Trade and Sustainable Development (TSD) Provisions for Identification of Best Practices to Support the TSD* Review (LSE 2022) <https://www.lse.ac.uk/business/consulting/reports/comparative-analysis-of-tsd-provisions-for-identification-of-best-practices> accessed 20 March 2023
[875] Marco Bronckers, 'The EU's Inconsistent Approach towards Sustainability Treaties: Due diligence legislation v. trade policy' (*EJIL:Talk!,* 9 November 2022) <https://www.ejiltalk.org/the-eus-inconsistent-approach-towards-sustainability-treaties-due-diligence-legislation-v-trade-policy/> accessed 15 November 2022.
[876] James Harrison, Mirela Barbu, Liam Campling, Ben Richardson and Adrian Smith, 'Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters' (2018) JCMS 1.

and environmental standards'[877] which are designed also as 'levers to promote, around the world, values like sustainable development, human rights, fair and ethical trade and the fight against corruption'.[878] The Commission has been carrying out Sustainability Impact Assessments (SIAs) intended to offer an evidence-based *ex ante* assessment of the potential sustainability impacts of proposed trade agreement as well as propose measures to maximise benefits and mitigate negative effects of the said agreement as early as in 1999.[879] As EPAs, all contemporary EU FTAs also contain entirely dedicated chapters on trade and sustainable development (TSD) whose enforcement and implementation is said to be a priority of the EU trade policy.[880]

Nevertheless, both these initiatives and provisions have not proven to be an adequate relief for public opinion and civil society's concerns putting trade under increased scrutiny. Heated debates have occurred over the underlying stimuli and longer-term effects of these deals for a broader range of social issues, namely social and environmental protection, access to public goods and services, and data protection.[881] Are they intended to safeguard European interests and principles or promote the narrow interests of large corporations? Are they an actual threat to the EU's social model? What are their effects on the Least Developed Countries (LDCs)?[882]

---

[877] Former European Commissioner for Trade Cecilia Malmström in European Commission's press release, 'Report: EU trade agreeements deliver on growth and jobs, support sustainable development)' (Brussels, 31 October 2018) (*European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6267>

[878] Commission, 'Trade for All: Towards a more Responsible Trade and Investment Policy' (Communication) COM(2015) 497 final
< https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A52015DC0497> accessed 5 March 2023.

[879] European Commission, 'European Commission services' position paper on the Sustainability Impact Assessment in support of the negotiations on an Investment Protection Agreement between the European Union and the Republic of the Union of Myanmar' (2017) <https://trade.ec.europa.eu/doclib/docs/2017/april/tradoc_155500.doc.pdf> accessed 5 February 2021.
See also 'Trade Sustainability Impact Assessment (SIA) in support of Free Trade Agreement and Investment Protection Agreement negotiations between the European Union and the Republic of India. Draft Inception Report' (March 2023) < file:///C:/Users/Sofia/Downloads/Trade%20Sustainability%20Impact%20Assessment%20in%20Support%20of%20Free%20Trade%20Agreement%20and%20Investment%20Protection%20Agreement%20negotiations%20between%20the%20European%20Union%20and%20the%20Republic%20of%20India%20-%20Draft%20Inception%20Report.pdf> accessed 26 March 2023

[880] COM(2021) 654 final (n 850).

[881] European Commission, 'Strategic Plan 2020-2024: Directorate-General for Trade' < https://commission.europa.eu/system/files/2020-10/trade_sp_2020_2024_en.pdf> accessed 10 February 2021

[882] European Commission, 'Trade for all' (n 883).

Do they abet 'social and environmental dumping'? In response, the EU has produced in the last decade a significant number of programmes, action plans and legislative proposals which have turned into law to enhance and safeguard this valuable interplay.

The Commission's preceding trade policy strategy of 2015 entitled 'Trade for All'[883] claims to lay particular emphasis on sustainable development, human rights, tax evasion, consumer protection, and responsible and fair trade. The follow-up 2017 communication on a 'Balanced and progressive trade policy to harness globalization', reiterates that the Commission 'works to ensure that EU trade policy evolves to meet the Union's overarching economic and political aims', and notably 'the 2030 Agenda for Sustainable Development by focusing not only on economic aspects, but also furthering social and environmental objectives'.[884]

Broadly speaking, TSD chapters have 'worked well'.[885] Still, further and better implementation of TSD chapters was pinned down and addressed at the '15-Point TSD Action Plan'. Published in February 2018, the non-paper suggested a set of 15 actions for a revamp of TSD chapters. The EU trade strategy currently in place for an 'Open, Sustainable and Assertive Trade Policy' not only continues to acknowledge the need for trade's support for sustainable development, and combatting climate change. It places the need for EU's role as a global leader on sustainable growth in the epicentre. Thriving for an 'open and fair trade with well-functioning, diversified and sustainable global value chains' is seen as the only way to address contemporary geopolitical challenges for economic recovery, climate change and environmental

[883] ibid.
[884] Commission, 'A Balanced and Progressive Trade Policy to Harness Globalisation' (Communication) COM(2017) 492 final.
[885] 'Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements' (Non paper of the Commission services, 26 February 2018) <https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf> accessed 5 February 2021
See also: 'Commission unveils new approach to trade agreements to promote green and just growth' *European Commission press release* (Brussels, 22 June 2022)
<https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3921> accessed 5 March 2023

degradation.[886] Inherently linked with EU's overall growth strategy for 2030, viz the Green Deal, and the European Digital Strategy, the strategy is designed to help reach the Union's policy objectives for sustainability in line with the commitment of implementing the SDGs.[866a] As such one of the main components of the EU trade strategy is to link values and sustainability with world trade.[866b] It is no longer an ancillary means to an end, but a self-reliant component.

In this context, the Commission published in June 2022 a new stricter approach to the preservation of TSD provisions in trade agreements by issuing the Communication entitled 'The power of trade partnerships: together for green and just economic growth'.[887] From a legal perspective, two important aspects of that Communication regard enforcement and management of disputes arising from alleged violations of TSD treaty commitments. It is emphasized amongst others, that TSD provisions are legally binding and enforceable. Moreover, disputes concerning sustainability requirements will be heard by the dedicated state-to-state dispute settlement (SSDS) panel which will be part of the general SSDS mechanism dealing with all trade-related disputes under each FTA. The only difference is that the designated panelists which will be capable to hear TSD-related disputes will hold specific expertise. Moreover, for the first time the Commission envisages the imposition of sanctions for non-compliance with serious sustainability commitments. Although the possibility of sanctions comes only 'as a matter of last resort, in instances of serious violations' of a handful of international agreements such as failure to comply with obligations that materially defeats the object and purpose of the Paris Agreement or work principles and rights covered by the ILO, it is still a

[886] Commission, 'Trade Policy Review - An Open, Sustainable and Assertive Trade Policy' (Communication) COM(2021) 66 final
[866a] Ibid
[866b] Tobias Gehrke, 'EU Open Strategic Autonomy and the Trappings of Geoeconomics' (2022) 27 European Foreign Affairs Review 61.
[887] Commission, 'The power of trade partnerships: together for green and just economic growth' (Communication) COM(2022) 409 final.

significant development compared to the complete lack of acceptance of sanctions which would supposedly contravene Union law.

3.5.3 EU's environmental & climate diplomacy

> *'The Union is a global leader in the transition towards climate neutrality, and it is determined to help raise global ambition and to strengthen the global response to climate change, using all tools at its disposal, including climate diplomacy'.*
>
> European Climate Law, Recital 16

EU external competences remained for a long time implicit, through the internal powers by application of the 'ERTA doctrine.' Still, the 'implied nature' of early environmental external competence did not result into any limitations to the Union's action whatsoever. Besides, it did not impede the EU to utilize its doted powers widely and play a leadership role in international environmental affairs and climate policies through the development of a wide spectrum of international instruments.[888] Right after the notorious ERTA judgement, the Court confirmed the doctrine's validity for environmental matters too in *Kramer* as well as other subsequent rulings, as examined above in section 3.4. Thanks to applying 'ERTA' the EU became signatory and party to a series of global and regional MEAs covering the sustainable control of a wide array of issues, including climate change, air quality, biodiversity, waste, water and the sea – for instance, the Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol on Ozone depleting substances,[889] the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,[890] the United Nations Framework Convention

[888] Gracia Marín Durán, 'EU External Environmental Policy' in R.Wessel and J.Larik (n 732) 469.
[889] [1988] OJ L297/10 and [1998] OJ L297/21 respectively.
[890] [1993] OJ L39/3.

on Climate Change (UNFCCC) and the Kyoto Protocol,[891] the Convention on Biological Diversity and Cartagena Protocol (2000),[892] the Espoo Convention on Environmental Impact Assessment in a Transboundary Context,[893] and the United Nations Convention on the Law of the Sea (UNCLOS).[894]

The Lisbon treaty, albeit not bringing about any revolutionary changes to the internal dimension of EU environmental policy, contributes quite significantly to the external environmental and sustainability role of the EU. The treaty not only highlights the environmental and sustainability role of the EU on the international plane, but also offers by virtue of articles 3 and 21 TEU constitutional foundations to EU's leadership actorness in achieving global sustainable development and reaffirms its commitment to multilateralism.[895] In terms of external competence, by expressly acquiring legal personality under Article 47 TEU, the Union is capable of concluding MEAs further to Article 216 TFEU and on the basis of the Council's mandate under Article 218 read in conjunction with Article 191 TFEU. In the light of Article 4(2)(e) and 191(4) TFEU which stipulates that '[w]ithin their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations (…)', external competence over environmental protection is explicit and therefore undoubtful, but not exclusive. As Advocate General Kokott points out, 'the second subparagraph of Article 191(4) TFEU makes clear that member states' competence to negotiate in international bodies and to conclude international agreements is not prejudiced'.[896] It is therefore rather a shared competence between the Union and its member states.[897]

[891] UN Framework Convention on Climate Change (adopted 9 May 1992, entered in force 21 March 1994) 1771 UNTS 107 and for adoption of the Kyoto Protocol by the EU (*EUR-lex*) <https://eur-lex.europa.eu/EN/legal-content/summary/kyoto-protocol-on-climate-change.html > both accessed 20 March 2023.
[892] [1993] OJ L309/3 and [2002] OJ L201/50 respectively.
[893] [1992] OJ C104/7.
[894] Kati Kulovesi and Marise Cremona (n 537).
[895] E.Orlando (n 538).
[896] Opinion of AG Kokott (n 802), para 119.
[897] Nicolas De Sadeleer, *EU Environmental Law and the Internal Market* (OUP 2014) 38

As an unwavering supporter of multilateralism, the EU is nowadays a party to about 60 MEAs[898] and holds this role alongside with the member states. The 'normal pattern'[899] in EU's environmental, climate and sustainable diplomacy is for MEAs to be co-signed by the EU and the member states and therefore these agreements are classified as 'mixed'.[900] The first thing that needs to be highlighted regarding this 'mixity' is that in spite of it and in spite of member states' residual environmental external powers in relation to the 'arrangements for cooperation' with the competent international organisations and third countries',[901] the duty of genuine and loyal cooperation -now 'principle of sincere cooperation' pursuant to Article 4(3) TEU- dictates that after a mandate has been agreed in the Council, member states should refrain from continuing any bilateral negotiations without first consulting and coordinating with the Commission, as the Court has ruled.[902] [903] The Court has equally held, in relation to the residual right to pursue more stringent national measures, that the exercise of that right in international negotiations is subject to certain qualifications, and namely that it may not be exercised if this entails binding the entire Union through an international measure.[904] Academic discussion over the limits of Article 193 suggests that besides its apparently unambiguous wording, the adoption of more stringent measures without any restrictions jeopardizes the functioning of the internal market.[905] In acts where the 'centre of gravity' leans towards other legal bases beyond Title XX TFEU, there is no such risk. At all events, for legislation adopted under Articles 191-192 TFEU, the possibility of adopting more stringent measures does exist. So far, the only known confines to its exercise are the obligation to notify

[898] T. Delreux, 'The EU in International Environmental Negotiations' (n 747) 260.
[899] Andrea Lenschow, 'Studying EU Environmental Policy' in A. Jordan and V.Gravey (eds) (n 747) 64.
[900] ibid 143.
[901] See Article 191(4) TFEU or/and Article 193 TFEU on the power for member states to pursue more stringent environmental standards than the EU at international level; Opinion of AG Kokott (n 802) paras 119, 121.
[902] See for instance case C-266/03 *Commission v Luxembourg* [2005] ECR I-04805 and Case C-433/03 *Commission v Germany* [2005] ECR I-6985 as well as Case C-246/07 *Commission v Sweden* [2010] ECR I-3317 Opinion of AG Poiares Maduro, para 2.
[903] For a detailed, practical and accurate illustration of the internal EU procedures for negotiating and concluding MEAs and further positions at COPs/MOPs, beyond the treaties see T.Delreux, 'The EU in International Environmental Negotiations' (n 747) 265-268.
[904] Case C-246/07 *Commission v Sweden* (n 908), para 102.
[905] D.Langlet and S.Mahmoudi (n 866) 102 – 105.

the Commission under Article 193 TFEU and, pursuant to case-law, the implicit burden on Union law if national actions have as an effect the change of international rules whereby the EU is bound to follow. In case of the latter, a Member State should refrain from abiding to such international agreement imposing more such more stringent environmental measures.

The EU's coordinated position is crucial; in practice individual member states also often play a very important role in the day-to-day diplomatic relations due to various factors and constraints. This role can effectively lead to an implicit influence of involved member states in EU's stance, but this is only an informal process.[906]

The second thing that needs to be underlined with regards to mixity of MEAs is that it is often erroneously ascribed to the shared character of the Union competence in environmental policy. This is not the case. This 'misunderstanding' relates to the mistaken conflation between mixity and shared competences. But, as analysed previously in this chapter when I discussed EU implied external powers, the existence of a shared competence does not mean that there would have to be mixed action in an external area.[907] In the jigsaw of the codification of the ERTA doctrine in the treaty of Lisbon under Article 3(2) and 216 TFEU, the Court has clarified that a shared competence entails at best facultative mixity or even -if the criteria of Article 3(2) TFEU are fulfilled- Union exclusive external competence. At no event does it lead to compulsory mixity.

Notwithstanding the debate over the legal soundness of this approach for an area of shared EU competence, the Court accepts simultaneous action but not on the basis of EU law. It resolves the matter in the light of international law .[908] Specifically

[906] For a thorough presentation and analysis of the practicalities and realistic implementation of EU's green diplomacy see: Diarmuid Torney and Mai'a K. Davis Cross, 'Environmental and Climate Diplomacy: Building Coalitions Through Persuasion' in C.Adelle and others (n 562) 39.
[907] Opinion of AG Kokott (n 802) para 104.
[908] Charlotte Burns, Peter Eckersley and Paul Tobin (n 543).

for environmental protection, however, there is also the environmental guarantee enshrined in Article 193 TFEU. Advocate General Kokott in her Opinion on the *Antartic MPA* case agrees in part with the Commission that the Council has erroneously equated 'shared competence' and 'joint nature of external action'.[909] In her view, Article 193 TFEU was not relevant in that case since there was no objective evidence of any member state intending to commit to more stringent measures.[910]

The Court in its ruling does not address the relevance of Article 193 TFEU, and the issue has generated questions. Under the consideration on the inappropriateness of the application of Article 193 TFEU in such circumstance as a means to justify simultaneous joint external action, I therefore wonder what would happen in the following instance: suppose that the Council decided for the EU to conclude an environmental agreement alone because *inter alia* no member state wished to introduce more stringent protective measures. In a hypothetical scenario where a few years later a more rigorous protocol to this agreement would be adopted and the EU decided not to adhere to it, but one or more members states had a different intention – although under international law no possibility for signing the protocol would be granted to non-parties of the Convention – how could the interested member state(s) in this situation get access to their residual right under Article 193 TFEU, provided that the exercise of such right would not interfere with the Union's legal order? Would it/they be granted permission to become parties to the said agreement *a posteriori* or would they effectively be deprived of their right under Article 193 TFEU, hence stripping the said provision from its substantive meaning? Whatever the legal premises and footing, all comes down to a coherent EU stance in international environmental and climate negotiations at a remarkable point.[911] *De jure*, member states can have diverging positions, but *de facto* they actually cannot.[912]

---

[909] Opinion of AG Kokott (n 802), paras 106, 109, 125.
[910] ibid,para 121.
[911] Louise Van Schaik, 'The Sustainability of the EU's Model for Climate Diplomacy' in Sebastian Oberthür and Marc Pallemaerts (eds), *The New Climate Policies of the European Union: Internal Legislation and Climate Diplomacy* (VUB Press 2009).
[912] T.Delreux 'EU Actorness, Cohesiveness and Effectiveness in Environmental Affairs' (n 4) 1017.

List of MEAs to which the EU is a party or a signatory[913]

title	EU signature
Convention on Persistent Organic Pollutants (POP Stockholm Convention)	23/5/2001
New Rhine Convention)	12/04/1999
PIC Rotterdam Convention for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO)	11/09/1998
Aarhus Convention on access to environmental information, public participation in environmental decision-making & access to justice	25/06/1998
Agreement on the conservation of African-Eurasian Migratory Waterbirds (AEWA-CMS)	01/09/1997
Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD)	14/10/1994
Danube River Protection Convention) (DRPC)	29/06/1994
International Tropical Timber Agreement (ITTA)	13/05/1996
Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), as amended	22/09/1992
Annex V to the OSPAR Convention on the Protection and Conservation of the Ecosystems and Biological Diversity of the Maritime Area and appendix 3	
Framework Convention on Climate Change (UNFCCC)	13/06/1992
Protocol to the United Nations Framework Convention on Climate Change (The Kyoto Protocol)	29/04/1998
Paris Agreement	22/04/2016
Convention on Biological Diversity (UN) (CBD)	13/06/1992
Cartagena Protocol	26/05/2000

[913] European Commission, 'Environment' (2017) <https://ec.europa.eu/environment/international_issues/agreements_en.htm> accessed 27 February 2021.

title	EU signature
Nagoya – Kuala Lumpur Supplementary Protocol	11/05/2011
Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization to the Convention on Biological Diversity (The Nagoya Protocol)	23/06/2011
Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area	09/04/1992
UNECE Accident Convention	18/03/1992
UNECE Water Convention	18/03/1992
Alpine Convention (and related protocols)	07/11/1991
UNECE EIA Espoo Convention	26/02/1991
LISBON Agreement	17/10/1990
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their disposal	22/03/1989
Council of Europe Convention for the protection of Vertebrate Animals used for Experimental and other Scientific Purposes	10/02/1987
UNEP Vienna Convention for the Protection of the Ozone Layer	22/03/1985
Montreal Protocol on substances that deplete the ozone-layer to the Vienna Convention (as amended)	16/09/1987
Bonn Agreement for cooperation in dealing with pollution of the North Sea by oil and other harmful substances	13/09/1983
Convention for the Conservation of Antarctic Marine Living Resources (CAMLR)	04/09/1981
UNECE Convention on Long-range Transboundary Air Pollution (CLRTAP)	14/11/1979

title	**EU signature**
Protocol to the Convention on long-range Transboundary air pollution concerning long-term Financing of the Cooperative Programme for Monitoring and Evaluation of the Long-range Transmission of Air Pollutants in Europe (EMEP)	28/09/1984
Protocol to the Convention on long-range Transboundary air pollution concerning the control of emissions of Nitrogen Oxides or their transboundary fluxes (NOX)	
Protocol to the Convention on long-range Transboundary air pollution concerning the further reductions of Sulphur (SO_2) emissions	14/06/1994
Protocol to the Convention on long-range Transboundary air pollution on Heavy Metals	24/06/1998
Protocol to the Convention on long-range Transboundary air pollution on Persistent Organic Pollutants (POPs)	24/06/1998
Protocol to the Convention on long-range Transboundary air pollution to abate acidification, eutrophication and ground-level ozone	
Convention on the Conservation of European Wildlife and Natural Habitats	19/09/1979
UNEP Convention on the Conservation of Migratory Species of Wild Animals (CMS)	
UNEP Barcelona Convention for the protection of the Mediterranean Sea against pollution (as amended)	13/09/1976
Dumping Protocol for the prevention of pollution of the Mediterranean Sea (as amended)	13/09/1976
Protocol concerning co-operation in combating pollution of the Mediterranean Sea by Oil and Other Harmful Substances in cases of emergency (Emergency protocol)	13/09/1976
Protocol concerning co-operation in preventing pollution from ships and, in cases of emergency, combating pollution of the Mediterranean Sea (Prevention and Emergency Protocol)	25/01/2002

title	EU signature
Protocol for the protection of the Mediterranean Sea against pollution from land-based sources (Land-Based Sources Protocol, as amended)	17/05/1980
Protocol to the Barcelona Convention concerning specially protected areas of the Mediterranean Sea	30/03/1983
Agreement on the Protection and Sustainable Development of the Prespa Park Area	02/02/2010
Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)	09/04/2015
Minamata Convention on Mercury	10/10/2013

In environmental, climate and sustainable development international regimes,[914] the caveat for EU participation rules and voting rights depend -as do the obstacles for exclusive Union external action[915] - on the possibilities offered by international law and each international forum. The 'unique' character of the EU as an actor in international relations was a thorn in the international relation's flesh which required adaptation of public international law. Not being a sovereign state, it could not traditionally become party to international agreements; not being merely an international organisation it would not be satisfied with the limited capacities typically offered to international organisations.[916] EU's participation in international organisations was an issue of complexity and controversy in the 1970s and the 1980s. At present, the EU is a party to MEAs with the special accommodation of 'regional economic integration organisation' (REIO), through the REIO clauses.[917] For instance, in UNFCCC the EU possesses a formal membership as a REIO without separate voting rights. For matters of EU competence, the Union votes on behalf of its member states, holding 27 votes. If, nonetheless, even one member state decides to exercise its voting right separately, the EU cannot exercise its right to vote at all.[918] For matters concerning both the EU and the member states' residual competences, both decide on a jointly agreed basis again without possibility of casting separate vote.[919] In practice, these agreements are 'negotiated, concluded, implemented, and managed jointly by the EU and the Member States'[920] and both are represented at MOP/COPs usually with coordinated and united positions in light of Article 192(1) in conjunction with Article

[914] 'International regimes' is used as encompassing the set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area. See Stephen D. Krasner (ed), I*nternational Regimes* (Cornell University Press 1983) 1.
[915] See also note above on Joined Cases C-626/15 and C-659/16 (n 802)
[916] GM.Durán and E.Morgera (n 565).
[917] ibid 6-7.
[918] Lisanne Groen and Arne Niemann, 'EU Actorness and Effectiveness under Political Pressure at the Copenhagen Climate Change Negotiations' (2012) Mainz Papers on International and European Politics Paper No.1 <https://internationale.politik.uni-mainz.de/files/2018/12/Groen_Niemann_2012.pdf> accessed 4 March 2022.
[919] Susanne Lütz, Tobias Leeg, Daniel Otto, and Vincent Woyames Dreher (n 62) 178.
[920] N.De Sadeleer (n 903) 143.

218(9) TFEU.[921] That said, with this innovative formula the Union is a *de jure* negotiating partner to most MEAs. Even in other agreements concluded under the auspices of the UN where the EU is not a full member but is only granted an observer status, i.e. has no voting rights, *de facto* it is also a recognized negotiating partner.[922] Whereas it is theoretically possible for member states to hold separate positions and disagree, it is in fact quasi impossible. One significant variant which needs to be taken into account regarding EU decision-making processes for the bloc's common positions within international environmental negotiations, is the fact that COPs and MOPs usually do not aim at adopting legally-binding instruments. As such, they are not covered by the procedure set out in Article 218 TFEU but are likely addressed from the perspective of general principles such as the principle of sincere cooperation which, as aforementioned, based on case-law entails substantive and procedural obligations vis-à-vis the unity of the EU.[923]

In this context and with the exception of COP15 in Copenhagen in 2009 that is widely cited as a *momentum* of EU's failure to act in a coordinated way,[924] the EU has been for decades self-proclaimed, and largely accepted by the academic community, as a 'frontrunner' or a 'global leader' in environmental and sustainable diplomacy[925] often promoting the inclusion of rigorous environmental measures on the international plane.[926] There are various case-studies to prove this conclusion. The negotiation of the Kyoto Protocol is one of the greatest moments in the EU's 'green

[921] See for example Council Decision (EU) 2017/1346 of 17 July 2017 on the position to be adopted, on behalf of the European Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention as regards compliance case ACCC/C/2008/32 [2017] OJ L189/15.
[922] T.Delreux, 'The EU in International Environmental Negotiations' (n 747) 261.
[923] Antonio Cardesa-Salzmann and Elisa Morgera, 'The EU's External Action after Lisbon: Competences, Policy Consistency and Participation in International Environmental Negotiations' in *M.Peeters and M.Eliantonio* (eds) (n 539) 83.
[924] The 15th Conference of the Parties to the UN Convention on Climate Change, held in Copenhagen in December 2009 is consistently cited in world bibliography as the 'clearest example of the failure of the EU and its Member States to act in a consistent and coordinated way' (…) 'which led to [the] marginalisation of the EU and EU member states within the negotiating process and cast a significant shadow over their ability to exert 'leadership' in international climate change negotiations'. Cardesa-Salzmann and Morgera, 'The EU's External Action after Lisbon' (n 929) 81.
[925] T.Delreux 'EU Actorness, Cohesiveness and Effectiveness in Environmental Affairs' (n 4) 1017.
[926] Tom Delreux, 'Multilateral Environmental Agreements: A Key Instrument of Global Environmental Governance' in C.Adelle and others (n 562) 19.

diplomacy'.[927] Especially after the withdrawal of the United States from the Kyoto Protocol by the Bush administration in 2001, assuming leadership in international environmental and climate diplomacy became one of the primary concerns of the Commission.[928] In Kyoto, the EU proposed more ambitious CO_2 reduction targets than the proposals of all developed nations It strived and finally succeeded to reach a negotiated solution between the signatory states, including the United States.[929] Even the Copenhagen COP15 debacle is being displayed as a traumatic learning experience which helped the EU realise the weakness of segregation[930] and quickly manage to regain its ability to lead the negotiations for the Paris agreement of 2015.[931]

The EU's stance at the recent talks of COP27 in Sharm-El-Sheikh in November 2022 are also quite illustrative and keep on positioning the Union (and its Member States) as a sole actor and one of the world frontrunners in the struggle to limit global warming. In Egypt, with deliberations facing a stalemate regarding the goal of limiting global warming to 1.5 degrees Celsius, the EU threatened to walk out of the conference. 'All ministers, as they have told me — like myself — are prepared to walk away if we do not have a result that does justice to what the world is waiting for', said Commission Vice-President Frans Timmermans at a press conference on 19 November. The compromise found, which kept the targets and ambitions set at the Paris COP25 alive, was one actually presented by the EU which retreated and accepted the financial aid instrument to the most vulnerable climate-threatened countries (the so-called payments for 'loss and damage') in exchange for the climate target.

Given the weight of environmental protection and climate change in the framework of the overall objective of the world's sustainable development in Article

[927] Susanne Lütz, Tobias Leeg, Daniel Otto, and Vincent Woyames Dreher (n 62) 187.
[928] Charlotte Burns, Peter Eckersley and Paul Tobin (n 543).
[929] Susanne Lütz, Tobias Leeg, Daniel Otto, and Vincent Woyames Dreher (n 62) 189.
[930] Antonio Cardesa-Salzmann and Elisa Morgera (n 929) 81.
[931] Susanne Lütz, Tobias Leeg, Daniel Otto, and Vincent Woyames Dreher (n 62) 195.

3 TEU as well as their overall prominent position in the treaties, it is no wonder that environmental issues and climate in particular are occupying an important portion in EU's external action.[932] What is particularly interesting with EU environmental (and climate) action is once again the nexus between the internal and the external policymaking, considering that the latter can be understood only in conjunction with internal measures, in an analogous relationship to the level of European actorness in external relations.[933] The EU's external action in environmental protection is not only one of the objectives of the Union by virtue of Article 21(2)(h) TEU; following Article 191(1) TFEU, EU's competences in environmental protection can be also said to have an extraterritorial scope[934] since one of the objectives of the Union's policy on the environment is the 'promotion of measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change'. This lies on the simple premise that from the local, national, regional, or global perspectives, internal and external 'mashup' is inherent to environmental policy anyway given that success of any environmental policy is completely dependent on the success of neighbouring countries policy, and ultimately global tackling of environmental degradation. The number one 'global problem' affecting the entire world which is impossible to be tackled without universal solutions is climate change.[935]

No geographical restrictions are provided for on EU environmental policy and there is no strict limit on the application of environmental policy under the treaties.[936] In this respect, one of the EU's ambitions is to transfer its own rules and standards towards third countries. Of course, the EU cannot enforce its laws outside its sphere of territorial competence, without prejudice to any extraterritorial competences

[932] GM.Durán and E.Morgera (n 565) 44.
[933] S.Lütz,T. Leeg, D.Otto and V. Woyames Dreher (n 62) 178.
[934] GM.Durán and E.Morgera (n 565) 14.
[935] Alan Boyle, The Challenge of Climate Change: International Law Perspectives' in S.Kingston *(ed)* (n 571) 55.
[936] D.Langlet and S.Mahmoudi (n 647) 36

discussed in the next chapter. As a consequence, the epitome of this objective is mainly EU's active external role within international fora.

For many decades now implementation of international environmental law has been one of the cornerstones of EU environmental law, from public participation requirements enforcing the Aarhus Convention of 1998 to the European Trading System Directive (ETS) that links to the mechanisms of the Kyoto Protocol. At the same time, as EU environmental law has evolved, internal EU rules have gradually become global benchmarks with an increasing influence on the rest of the world.[937] As it has become a typical 'chicken and egg' problem, nowadays it is unclear 'whether EU law originates from international law or vice versa'.[938]

3.5.4 Human rights, global peace and security

Since *Kadi*, it is settled case-law that the EU is always looking into the consistency of external relations with the Treaties as well as the values and general principles governing the Union legal order.[939] In the saga of the *Bank Melli Iran* cases, both the Court has observed that certain restrictions to free movement can be justified in considering the control of proliferation of nuclear weapons under the prime importance of the preservation of international peace and security.[940] Further, the EU has lately adopted its own 'Magnitsky Act', an EU global human rights action regime which allows the EU to freeze assets and impose travel bans on individuals involved in human rights abuses. The EU Regulation 2020/1998 on restrictive measures against serious human rights violations and abuses (the 'Global Human Rights Sanctions Regime') and Council Decision (CFSP) 2020/1999 were adopted in

[937] C.Adelle and others (n 562) 2.
[938] N.De Sadeleer (n 903) 185 - 186
[939] *Kadi* (n 515) paras 303-304.
[940] Case C-380/09 P *Melli Bank v* Council [2012] ECLI:EU:C:2012:137, para 58, 61, 63, 64.

the framework of CFSP with Article 29 TEU as a legal basis.[941] This legislation follows the US Global Magnitsky Act and is founded on EU's policy goals under Articles 3 and 21 TEU encompassing the promotion of its founding principles (i.e. democracy, the rule of law, human rights and fundamental freedoms, and respect for human dignity). The EU act covers gross human rights abuses such as torture, genocide, crimes against humanity, slavery, arbitrary arrests or detentions, extrajudicial killings, and forced disappearance. Unlike its source of inspiration, i.e. the US Global Act, the EU Magnitsky regulation does not cover corruption. Since this is a CFSP act, Member States and the High Representative have the exclusive right to propose sanctions with adoption by the Council. It is not clear why corruption is out of the Regulation's scope. It has been speculated that it may be due to the disappointing results of geographical sanctions for misappropriation of state assets in Tunisia, Egypt and Ukraine, hampered by legal challenges. Many corrupt actors have the financial resources to initiate such legal actions, and numerous designations have been henceforth overturned.[942]

3.5.5 The case for extraterritorial application in and of the EU legal order

Whether a sovereign state can (or should) be able to apply its laws outside its jurisdiction, i.e. in the jurisdiction of another sovereign state, is a theme widely debated in international law. The basic rule dictates that the former cannot do so without the consent of the latter. Notwithstanding, there is a trend for countries to unilaterally adopt measures that can be enforced outside their jurisdiction. The US for example have taken in the past various embargo measures against economic operators dealing with certain countries, such as Cuba, Iran and Libya. The EU does

[941] Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violation sand abuses [2020] OJ L410I/1. This act has been changed. For details see, (*EUR-lex*) < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02020R1998-20230225> accessed 20 March 2023. Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses [2020] OJ L410I/13.

[942] Martin Russell, 'Global Human Rights Sanctions - Mapping Magnitsky laws: The US, Canadian, UK and EU Approach' (European Parliamentary Research Service 2021) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698791/EPRS_BRI(2021)698791_EN.pdf> accessed 8 October 2022.

not recognize any unilateral extraterritorial application of such laws. In addition to being against international law (which is respected, applied and enforced in the Union legal order, as analysed above under section 3.2), these specific laws also infringe fundamental EU principles such as the right to conduct a business, enshrined in Article 16 of the Charter. The Union has since 1998 in place legislation which protects EU entities that conduct lawful business with such countries.[943] The Court has verified the validity of the blocking regulation as per the protection of fundamental rights at various occasions. In the most recent *Bank Melli of Iran case*[944] the Court confirmed that although the regulation needs to be interpreted broadly, its application is also limited within the constraints of the principle of proportionality in order counterbalance the right to conduct business with the requirement to protect the Union legal order and the interests of the European peoples.

In the EU legal order, no general doctrine of extraterritoriality applies. In world bibliography there are arguments about certain extraterritorial characteristics of EU law in various areas such as competition, data protection (e.g. GDPR), environmental law and human rights.[945] These considerations are not very persuasive.

In the area of climate and environment, it has been argued that the EU emissions trading scheme for aviation, which is applied also to non-EU air carriers, i.e. international aviation, has been found to have an extraterritorial effect pursuant to the Court's judgement in *ATAA*. In this specific case, US carriers who challenged the

[943] Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom [1996] OJ L309/1; Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom [2018] OJ L199I/1; Commission Implementing Regulation (EU) 2018/1101 of 3 August 2018 laying down the criteria for the application, of second paragraph of Article 5 of Council Regulation (EC) No 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom [2018] L199I/7.

[944] Case C-124/20 *Bank Melli Iran v Telekom Deutschland GmbH* [2021] ECLI:EU:C:2021:1035, paras 65, 67, 91.

[945] Lena Hornkohl, 'The Extraterritorial Application of Statutes and Regulations in EU Law' (2022) MPILux Research Paper 2022(1) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4036688 accessed 20 March 2023.

enforceability of the scheme to international aviation for alleged breaches of customary international law lost their case since the EU Court specified that the scope of the measure concerns flights that arrive or depart from the airdrome of the EU. In that respect, the measures are territorial *per se* since they cannot be applied to aircrafts registered in third states flying over third states.[946]

Staying in the ambit of aviation but this time from a consumer protection viewpoint, the Court is also said to have found for a broad territorial application of regulation (EC) No 261/2004 concerning the compensation of air passengers in the event of denied boarding, cancellations or long delays. Once more, I do not find merit in this assessment; the Court found in that case that the regulation applied only because the applicants had booked their flights with a carrier of the Union and their flight, albeit consisting of various "legs" in third countries and had final arrival at a third country, departed from an airport located in the territory of a Member State. This, the consumer wass entitled to compensation from the third-country air carrier which operated the entirety of that flight acting on behalf of that Community carrier. Although there are certain events occurring outside the area of the Union, still the critical points of this assessment regard typical components of contract law: the contract has been concluded with a European company, in the EU. What is more, the performance of the contract started within the EU territory. There is no need to overanalyze this issue. It has been resolved by the Court itself by recourse to the 19th century-established principle that enforcement of a contract is determined by the *lex loci contractus*.[947]

Notwithstanding, taking into account EU law's connection with international law analysed above, as well as the EU's commitment to protect human rights within the Union or overseas pursuant to Articles 3 and 21 TEU, the case can be made for the possibility of extraterritorial application of obligations stemming from the Charter

[946] C-366/10 *Air Transport Association of America and others v Secretary of State for Energy and Climate Change* [2011] ECR I- 13755, paras 116-118, 122 and 125
[947] Joseph H. Beale, 'What Law Governs the Validity of a Contract' (1909) 23 Harvard Law Review 1.

outside the territory of the EU in areas of EU competence without such application being exercised in excess of Union powers whatsoever. Respect for fundamental rights is a basic EU principle. It needs to be applied therefore in any action of the EU.[948]

3.6 Sub-conclusion

The EU external action has undergone several institutional, legal and political changes since its inception. Today it is definitely alive and kicking, although not necessarily within the ambit of the CFSP. It is reminded that the definition of actorness which we apply herein encompasses the actions of an autonomous unit which can behave actively and deliberately on the international plane. Achieving actorness requires the fulfilment of certain criteria and components which inform the overall concept: 'legal behaviour,' 'actor capability' through legal competences and autonomy, but also actual 'actor behaviour.'

If one applies this in CFSP, it is not quite clear if the Union ticks all the boxes. In examining the 'legal behaviour' component, the EU has of course a legal personality which entrusts it with the capacity to conclude international agreements within the ambit of CFSP. Its 'legal behaviour' is guaranteed by Article 216 TFEU which grants the EU a legal personality, but its actor capability and behaviour are not achieved. In the area of CFSP, albeit very few exceptions amongst which the EU Magnitsky regulation, the EU has not been successful in formulating common positions or even in adopt legally binding acts frequently. Even in those cases, and despite institutional changes towards a more integrated approach to CFSP through the EEAS acting in the wider spectrum of the Commission and the High Representatives' double hat, the EU's action is still to a large extent intergovernmental.

[948] Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds), 'The EU Charter of Fundamental Rights: a Commentary' (OUP 2014) 1657.

At the same time, the actorness criteria in the other areas whereby progressively the EU has acquired competences implicitly, as a result of its internal competences, prove to be perfectly matched. Besides the legal behaviour component which is a given anyway, the EU has sufficient legal competence and autonomy to act through representation of the European Commission while it also adopts various legally binding acts and concludes binding agreements with third parties, which in most instances will require no ratification from individual Member States.

Considering the unique and complex nature of the EU as well as its (still) young age in the international arena, it was rather expected that it would not easily be established in the area of traditional external relations. The only logical way was to find a vacant space in newly bred niche areas of international relations that would appear -at least at first- unimportant to Member States. In order to assume actorness in the sense of a singular, pioneering and consistent stance, the EU also required to embody a role that would match its DNA, i.e. that of a responsible world leader who cares not only about its own interests *stricto sensu,* but aspires to transmit its values and principles around the globe and achieve sustainable development everywhere.

Chapter 4 | EU law on foreign investments

> '[EU law] allows for markets to be regulated to pursue legitimate public interests such as public security, public health, social rights, consumer protection or the preservation of the environment, which may have consequences also for investments. Public authorities of the EU and of the Member States have a duty and a responsibility both to protect investment and to regulate markets. Therefore, the EU and Member States may legitimately take measures to protect those interests, which may have a negative impact on investments. However, they can do so only in certain circumstances and under certain conditions, and in compliance with EU law'.
>
> Communication from the Commission
> 'Protection of intra-EU investments'
> COM(2018) 547 final

4.1. The Lisbon celebration of the EU investment policy's coming of age

In the 1990s and 2000s, amidst the legitimacy crisis of ISDS and international investment law, endeavours to create a multilateral framework such as the OECD Multilateral Agreement on Investment (MAI) were lost. And yet, significant developments were going on at EU level.[949] The new EU competence in FDI introduced with the Treaty of Lisbon is a far-reaching and long overdue turn of events.

At the time of conclusion of the Lisbon treaty, the EU's share of global FDI outflows and inflows was at 34 per cent and 20 per cent respectively,[950] rendering

[949] Jorun Baumgartner, *Treaty Shopping in International Investment Law* (OUP 2016) 24.
[950] Angelos Dimopoulos, *EU Foreign Investment Law* (OUP 2011) 17, 52.

the EU the world's largest exporter and recipient of FDI even at the time of the Eurozone financial crisis. EU member states had concluded in total over 1.200 BITs,[951] a bit less than half of the world's IIAs.[952] Also, as analysed in the previous chapter, external trade in the context of CCP has been a key factor of European integration since its very early days. Although cross-border investment permeated quite early the discussion of economic relations on the international plane, the EU had not set up any comprehensive common rules on FDI. As a general remark, it may be noted that EU competences in trade, although revolutionary from the outset, expanded slowly, not keeping up with the pace of changes in the international trade agenda[953] or the extension of EU powers in other policy areas such as the environment, as discussed in the previous chapter.

Overall, no treaty provision or secondary measures covered the international investment rules across the board.[954]

At the same time, the free movement of capitals and the freedom of establishment under former articles 56 to 59 of the EC treaty (current articles 63-66 TFEU), as inherent components of the internal market are also intrinsically linked with foreign investments. Capital movements related to direct investments are prerequisite for any foreign investment.[955] Therefore, these freedoms which aim at creating a liberal ecosystem for intra-EU investments through unrestricted capital flows, inevitably also affect aspects of investments from third countries such as FDI flows and portfolio investment.[956] Moreover, ever since the 1980s the EU fabricated

---

[951] Commission, 'Towards a Comprehensive European International Investment Policy' (Communication) COM(2010) 343.
[952] At the time of the entry into force of the Lisbon Treaty, there were about 2.600 BITs globally plus another 300 FTAs which contained investment chapters.
[953] John Peterson and Aladstair R. Young, 'Trade and Transatlantic Relations: Old Dogs and New Tricks' (n 824) 294.
[954] Wenhua Shan and Sheng Zhang, 'The Treaty of Lisbon: Half Way toward a Common Investment Policy (2010) 21 European Journal of International Law 1049.
[955] A.Dimopoulos, *EU Foreign Investment Law* (n 956) 76.
[956] Stephen Woolcock, *The EU Approach to International Investment Policy after the Lisbon Treaty* (European Parliament 2010) 9 <https://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/433854/EXPO-INTA_ET%282010%29433854_EN.pdf> accessed 15 March 2022.

a 'patchwork of dispersed and limited competences'[957] enabling it to hold powers on foreign investment at the pre-establishment stage. It could also get involved in the elaboration of international investment law norms through provisions regulating market access with a view of improving entry conditions of EU investors in third countries, through investment liberalization and non-discriminatory treatment of EU investors upon entry. Given the relative significance of preferential market access for FDI,[958] this was not a negligeable power. Of course, the member states continued being exclusively competent on the rules on the protection of already established investments and the negotiation and conclusion of IIAs,[959] and were particularly reluctant in giving away such powers.[960] In the pre-Lisbon era, it was therefore argued that competence over FDI was 'shared' between the member states and the Union,[961] or to be more accurate, joint or mixed in the sense that the member states were competent on the negotiation and conclusion of BITs/IIAs, and the determination of binding commitments for foreign investors post-entry, while the EU 'filled the gap' on entry conditions.[962]

The Commission -as the EU supranational body *par excellence* and the 'proxy' towards further integration- had been using all existing fractional EU competences to put pressure for the Union to acquire comprehensive competences in FDI well before this came into being. Through encroaching the member states investment competences and gradually establishing the Union as a global actor in international investment relations, the Commission aimed finally at extending Union competences over the entire spectrum of FDI. It did so by inserting investment-related provisions in EU international and bilateral agreements concluded in the framework of

[957] A.Dimopoulos, *EU Foreign Investment Law* (n 956) 18.
[958] Marco Fugazza and Claudia Trentini, 'Empirical Insights on Market Access and Foreign Direct Investment' (2014) UNCTAD Policy Issues on International Trade and Commodities Study Series No.63 <https://unctad.org/system/files/official-document/itcdtab67_en.pdf> accessed 28 April 2022.
[959] Catharine Titi, 'International Investment Law and the European Union: Towards a New Generation of International Investment Agreements' (2015) 26 EJIL 639.
[960] A.Dimopoulos, *EU Foreign Investment Law* (n 956) 18-19, 337.
[961] Michael Waibel, 'Competence Review: Trade and Investment' (2013) <https://ssrn.com/abstract=2507138> accessed 28 January 2021; W.Shan and S.Zhang (n 960) 3
[962] Commission, 'Towards a Comprehensive European International Investment Policy' (n 957).

development cooperation, negotiating on market access for trade in services, and positioning itself as one of the pioneers in the development of international investment norms through the conclusion of multilateral trade agreements such as the Agreement on Trade-Related Investment Measures (TRIMs) or GATS.[963]

The issue has been the apple of discord in the never-ending tension between pro-integrationist voices embodied by the Commission itself as well as certain member states or/and Members of the European Parliament (MEPs), and less integration-friendly member states.[964] The climax of the power-struggle in the 1990s led to notable disputes before the Court, which nonetheless was reluctant to interpret CCP as including establishment of foreign investors.[965] The Court held that rules such as 'national treatment concerning mainly the conditions for the participation of foreign-controlled undertakings in the internal economic life of the Member States in which they operate (…) applies to the conditions for their participation in trade between the Member States and non-member countries', hence are subject to the CCP. On the other hand, as far as the involvement of 'foreign-controlled undertakings in intra-Community trade is concerned', it was found to be governed by the rules of the internal market.[966] All those disparities before Lisbon limited the EU potential to become a true global actor in modern 'competitiveness-driven' international trade that will include FDI.[967] Approaching the conclusion of the Lisbon treaty, member states started embracing the idea of the establishment of 'an ambitious investment policy,' as evidenced by a Council internal document on Minimum Platform on Investment for EU FTAs (MPoI) in 2006.[968]

[963] Stephen Woolcock (n 962) 9.
[964] A.Dimopoulos, *EU Foreign Investment Law* (n 956) 18-19, 337
[965] ibid, 86.
[966] CJEU Opinion 2/92, 'Opinion of the Court of 24 March 1995 on the Competence of the Community or one of its Institutions to Participate in the Third Revised Decision of the OECD on National Treatment [2005] ECR I-00521, paras 24-25.
[967] Christiane Ahlborn, 'The EU and Foreign investment – Exclusive Competence, Shared Responsibility?' (2015) 6 KLRI Journal of Law and Legislation 6.
[968] W.Shan and S.Zhang (n 960)

In this context, explicit endowment of exclusive Union competence on the entire spectrum of FDI under the treaty did not come as a surprise; it was rather expected. Yet, the competence was not explicitly asserted any time before Lisbon, even as part of the -widely criticized- changes in other trade issues introduced by the treaties of Amsterdam and Nice, which in reaction to Opinion 1/94[969] expanded CCP to trade in services and trade-related aspects of intellectual property.[970] Building on existing exclusive external EU competences within trade, the Treaty of Lisbon set new boundaries for CCP[971] which was extended by virtue of article 207 TFEU to embrace additionally FDI, thus enabling the EU to conclude international investment agreements with third countries. Falling under CCP, FDI would therefore come within the ambit of articles 3(1)(e) and 2(1) TFEU, whereby only the Union may legislate and adopt legally binding acts.

4.2 New competences, new challenges

Whereas the addition of FDI to the ambit of CCP under the Lisbon treaty came almost automatically and pretty much uncontested,[972] in the immediate aftermath of its entry into force a new episode of intra-EU power struggle was inaugurated, this time to delineate the scope and possible limits of the newly acquired express and exclusive competence. Commission, Council/member states and Parliament battled over the interpretation of FDI's incorporation in article 207 TFEU, which was furthermore coupled with a lively academic debate.

Already in July 2010, the Commission issued a Communication presenting its view on the 'main orientations' of the future foreign investment policy.[973] As

[969] See above, section '1.3 Common Commercial Policy: if the EU can do something, that is trade!
[970] M.Waibel (n 967).
[971] ibid.
[972] August Reinisch, 'The EU on the Investment Path - *Quo Vadis Europe*? The Future of EU BITs and other Investment Agreements' (2014) 12 Santa Clara Journal of International Law 111
[973] Commission, 'Towards a Comprehensive European International Investment Policy' (n 957)

expected, the Commission took an expansionist stance, suggesting that from then on, only the Union would be competent to negotiate and enter into such agreements on pre- and post- establishment. More precisely, in the short-term, investment would be integrated in the new generation mega-FTAs which would be broadened in their scope and include dedicated investment chapters.[974] For the Commission, existing BITs concluded by the EU which were binding under international law, would become automatically redundant in the eyes of EU law. Accordingly, the EU should and would be exclusively responsible for all: from picking the countries and regions to partner with to setting the standards of investment protection and determining the content of future EU investment agreements, including non-discriminatory and proportionate rules on expropriation measures. For the time being, in the short run, investment would be included in existing and forthcoming FTAs.

On the execution of investor protection rules, the Commission also considered that ISDS would come in the ambit of EU exclusive competence under article 207 TFEU, as 'a key part [of] the inheritance that the Union receives from Member State BITs'.[975] This understanding would have a rather obvious knock-on-effect, i.e. the culmination of member states' capacity to conclude investment treaties with third countries and the phase-out of BITs already in place. Henceforth, the 2010 Commission Communication on the vision for the future EU foreign investment policy was accompanied with a proposal for a regulation on transitional arrangements for BITs between Member States and third countries, known as 'the grandfathering regulation'. It was clarified[976] that -as the Union exercises its competence- existing BITs would be progressively replaced by agreements of the Union relating to the same subject matters. During the transitional period, the Commission would examine the

[974] The conclusion of stand-alone investment agreements was not excluded; on the contrary, it was said that in the longer run the 'Union should also consider under which circumstances it may be desirable to pursue stand-alone investment agreements' (*emphasis added*). Ibid.
[975]Commission, 'Towards a Comprehensive European International Investment Policy' (n 957)
[976] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L351/40.

compatibility of an existing BIT with the *acquis* and assess whether it could present an obstacle to developing the EU's objectives.

That said, member states -at least some of them- at the beginning seemed perplexed with the broadened contours of CCP and tried to give the narrowest possible interpretation.[977] Member states with long history in BITs showed reluctance in transferring the competence to the EU, notably Germany -the country who invented BITs[978] and which has been the ultimate BIT champion*- and the Netherlands -a country with one of the world's most tested 'gold standard' model BIT.[979] Presenting legally compelling arguments based on previous practice and case-law (already discussed above), it was suggested that FDI in the framework of article 207 TFEU does not refer to all international investment agreements; according to their reading the CCP would be concerned only with admission and pre-establishment aspects of investment[980] since other facets of FDI are irrelevant to international trade. In that framework, the Council suggested in its 2010 Council Conclusions that with respect to transitional arrangements, BITs concluded by Member States should continue to afford protection and legal security to investors until they are replaced 'by at least equally effective EU agreements.'[981]

It took two years for the final adoption of the 'grandfathering regulation' but eventually a viable compromise saw the light of day in 2012. The initial Commission proposal provided for a rather strict screening mechanism by the Commission, which

---

977 A.Reinisch 'The EU on the Investment Path' (n 978)

978 The first BIT in history was concluded between (Western) Germany and the Islamic Republic of Pakistan in 1959. 'Gesetz zu dem Vertrag vom 25. November 1959 zwischen der Bundesrepublik Deutschland und Pakistan zur Förderung und zum Schutz von Kapitalanlagen' (6. Juli 1961) Nr.33, Bundesgesetzhlatt Teil II 793 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1387/download> accessed 2 June 2020.
Germany had ratified already in 2015 131 BITs, Jan Asmus Bischoff, 'Initial Hiccups or More? Efforts of the EU to Find Its Future Role in International Investment Law' in J.E. Kalicki and Anna Joubin-Bret (eds) (n 380) 533

979 C.Titi (n 965)

980 A.Reinisch 'The EU on the Investment Path' (n 978)

981 Council of the European Union, 'Conclusions on a Comprehensive European International Investment Policy: 3041st Foreign Affairs Council Meeting (Luxembourg, 25 October 2010)' <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf> accessed 30 April 2022.

would check whether member states could maintain an existing BIT and/or conclude a new one. The final text looked quite weakened on that matter. The regulation does not require any authorisation to maintain existing BITs as a result of any screening process. All BITs predating the enactment of the treaty of Lisbon will be merely 'grandfathered' by the Commission which will assess if they pose a serious obstacle to new EU IIAs. Member states also retain their right to conclude new BITs with countries which are not a priority for EU IIAs. However, to start bilateral negotiations they need to request the authorisation of the Commission. That said, these concessions were accepted by the Commission only in return for the 'replacement principle' which means that BITs of member states shall stay in force as long as no EU IIA with the respective third states is in place; once the EU concludes a BIT with a said third state, any relevant BIT between the said third state and member states shall automatically cease and shall be replaced by EU investment agreements.[982]

4.3 The notion of FDI | Opinion 2/15

Questions on competence also revolved around the scope of FDI and its exact definition within the purview of article 207 TFEU. In international investment law there is no commonly accepted definition of an investment. The *Salini test* is often quoted, which refers to four requirements of a transaction to qualify as a FDI within the scope of the ICSID Convention:

(1) contribution of money or assets,

(2) a certain duration of performance of the contract,

(3) an element of risk/participation in the risks of the transaction, and

(4) a contribution to the economic development of the host State of the investment.[983]

---

[982] Nikos Lavranos, 'Have Member State BITs Changed since 2013?' (*Practical Law Arbitration Blog,* 11 May 2020) <http://arbitrationblog.practicallaw.com/have-member-state-bits-changed-since-2013/> accessed 22 May 2020.

[983] *Salini Costruttori SpA and Italstrade SpA v. Morocco,* ICSID Case No ARB/00/4 (Decision on Jurisdiction, 23 July 2001) para 52.For an analysis on the *Salini test* and further awards qualifying investments within ICSID see *inter alia:* Alex Grabowski, 'The Definition of Investment under the ICSID Convention: A Defense of Salini' (2014) 15

Based on the above, it could be said that FDI refers to 'capital flowing from an investor based in one country to an enterprise based in another country', where the investor holds a certain degree of managerial control and the investment has long-term and thorough perspective. This definition is understood as not comprising the concept of portfolio investment, which relates to short-term investments without managerial control and a narrow focus on the rate of return.[984]

Initially, in its 2010 Communication the Commission interpreted FDI in a much more inclusive character, as encompassing 'all investment types',[985] namely both direct and portfolio investments as well as all aspects of protection entrusted in BITs previously concluded by the member states.[986] The Commission's attempt for such a broad definition -quite expectedly- was not upheld. Lacking consensus, the definite solution came by the Court which exercising its jurisdiction under Article 218 TFEU was requested by the Commission to rule on the allocation of competences between the Union and member states for the EU-Singapore Free Trade Agreement (hereinafter EUSFTA). According to the Court's Opinion 2/15, the EU is exclusively competent for direct cross-border investments only; non-direct foreign investment, i.e. portfolio investments as well as ISDS are under the competences of the member states.

Opinion 2/15 was the first time the Court had the opportunity to interpret the scope of FDI under article 207 TFEU since the adoption of the Lisbon Treaty. The exclusion of portfolio investment from the purview of article 207 TFEU was quite an

Chicago Journal of International Law 288 <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1058&context=cjil> accessed 16 September 2022.

[984] Stephen Woolcock (n 962) 11.

[985] Commission, 'Towards a Comprehensive European International Investment Policy' (n 957).

[986] Anna De Luca, 'Non Trade Values Protection and Investment Protection in EU Investment Policy' in Tullio Treves, Francesco Seatzu and Seline Trevisanut (eds), *Foreign Investment, International Law and Common Concerns* (Routledge 2014) 248.

expected interpretative outcome.[987] The Court found that the express qualification of 'direct' investments in the said proviso in the light of settled case-law could not encompass investments without any 'lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity', hence without an effective participation in the management of that company.[988]

Moreover, EU mega-FTAs are said not to be fully in line with the *Salini* test. The definition of investment in already concluded mega-agreements encompasses every kind of asset that has the characteristics of an investment, including such characteristics as a certain duration; the commitment of capital or other resources; the expectation of gain or profit; and the assumption of risk but not the contribution to the economic development of the host State. For example, CETA reads 'investment means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk'. Equally the investment protection agreement under the EUSFTA reads 'investment means every kind of asset which has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk or a certain duration'. Similar wording is included in all EU mega-FTAs so far. In addition, all include a non-exhaustive list of examples of likely forms of investments within their scope such as property; a branch of an enterprise; debt instruments such as loans, financial assets; turnkey; construction; management; production; concession; revenue-sharing and other similar contracts; claims to money and so on.

4.4 Compatibility of international investment law with Union law

As already discussed in Chapter 3, the Union as a subject of international law enters into agreements with third parties and organisations. International law is one

[987] Marise Cremona, 'Shaping EU Trade Policy Post Lisbon: Opinion 2/15 of 16 May 2017' (2018) 14 European Constitutional Law Review 231.
[988] CJEU Opinion 2/15 (n 26), para 80.

of the sources of EU law and is thereby enforceable within the EU. Notwithstanding, nothing in the Union legal order is allowed to contravene the EU's constitutional texts, i.e. the Treaties. In such context, whereas the conclusion of a bilateral or multilateral trade and investment agreement between the Union and a third party is not only possible, but desired and pursued, these agreements should not include provisions contrary to EU law. Equally, these agreements should concern only the relations of the EU with the world and cannot in their traditional standard formats govern relations between EU member states, i.e. intra-EU. This does not mean that EU member states are forbidden to conclude other agreements between them; but these matters should in no way infringe upon EU law, which is part of their own legal systems.

When we discuss compatibility of international investment law with EU law, we therefore refer only to agreements concluded between the EU (or its member states) with third parties. In the area of international investment law, whereas no doubts are expressed over the legality of this kind of agreements overall, as already discussed the main questions concerned the scope of the EU's newly acquired exclusive competence: what FDI under the Treaty would include and what would the fate of existing agreements concluded by Member States with third parties be. The matters were resolved by Opinion 2/15 and by the adoption of the 'Grandfathering regulation' (see above), whose mere existence implies that the conclusion of mega 'new generation' FTAs by the EU with third parties is consistent with EU law. Since the EU may conclude such agreements with third parties, in principle international investment law is compatible with Union law. Notwithstanding, there are various sub-issues which generate questions.

The first and most prominent apple of discord is investment arbitration. As analysed in the first chapter, ISDS has become one of the main issues of controversy and raises questions regarding the legitimacy of international investment law. With regard to Union law, there has been wide discussion if ISDS conflicts with basic EU

principles, particularly the autonomy of Union law and the right of access to an independent tribunal.

4.4.1 Arbitration and the autonomy of Union law

The autonomy of Union law is one of its most important and fundamental characteristics enabling EU law -together with the principles of primacy and of direct effect of a long list of Union legal provisions and instruments- to be enacted in the Member States and take precedence over national law when it has become part of domestic legal systems. The autonomy of this legal system which stems from an independent source of law -the Treaties- is one of the most basic constitutional features of the EU. It is now settled EU case-law that ISDS poses a risk to the autonomy of Union law if provided for intra-EU investment disputes. In the notorious and widely analysed *Achmea* judgment, the Court held that investment arbitration is irreconcilable with the internal market and has an adverse effect with the principle of autonomy of EU law, as enshrined in Articles 344 and 267 TFEU.

After a long series of judicial discussion over the compliance of investment arbitration with the autonomy of EU law, the Court finally held in *Achmea* that arbitral panels dealing with disputes governed by intra-EU BITs, where the claimant was an investor from an EU member state and the respondent an EU member state, are likely to be confronted with the dilemma: to interpret or not to interpret EU law.[989] The stance of tribunals over the matter met with inconsistency: at times they have asserted primacy of EU law[990] and others they have stayed mute. Occasionally, they

[989] Angelos Dimopoulos, 'Achmea: The Principle of Autonomy and its Implications for intra and extra-EU BITs' (*EJIL Talk!,* 27 March 2018) <https://www.ejiltalk.org/achmea-the-principle-of-autonomy-and-its-implications-for-intra-and-extra-eu-bits/> accessed 14 April 2022.

[990] '(…) from whatever perspective the relationship between the ECT and EU law is examined, the Tribunal concludes that EU law would prevail over the ECT in case of any material inconsistency'. *Electrabel v Hungary,* ICSID Case No.ARB/07/19 (Decision on Jurisdiction, 30 November 2012) para 4.191 (*Electrabel arbitration*) <https://www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf> accessed 2 April 2022.

have summarily dismissed the principle.[991] From an EU law perspective, in the light of Articles 19 TEU, 344 TFEU as well as article 47 of the Charter, this was a rather preposterous situation. As consistently held by the Court,

> 'an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is notably enshrined in Article 344 TFEU, according to which member states undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein'.[992]

Consistency and uniformity in the interpretation of Union law and the full application of EU law has been entrusted by virtue of article 19 TEU to the EU judicial system, comprised of the national courts and tribunals of the member states and the Court of Justice of the EU.[993] It is also settled case law that arbitral tribunals cannot in any event be classified as a court or tribunal of a Member State, hence of the EU judicial system.[994] Besides, the independence of a tribunal within the meaning of article 6(1) ECHR which is a necessary precondition in that respect, requires an objective mode of appointment of adjudicators and their term of office. It furthermore demands the existence of guarantees against outside pressures, for the exclusion of any doubts of impartiality generated by indication of personal prejudice or bias. In that respect, the confidence which the courts must inspire in the public in a democratic society is a key component of access to justice.[995] From the above, and considering that for the resolution of disputes arising in the framework of an intra-

[991] Harm Schepel, 'From Conflicts-Rules to Field Preemption: Achmea and the Relationship between EU Law and International Investment Law and Arbitration' (*European Law Blog,* 23 March 2018) <https://europeanlawblog.eu/2018/03/23/from-conflicts-rules-to-field-preemption-achmea-and-the-relationship-between-eu-law-and-international-investment-law-and-arbitration/> accessed 3 April 2022.
[992] CJEU Opinion 2/13 (n 514) para 201.
[993] ibid; Case C-284/16 *Slovak Republic v Achmea BV* (n 195) paras 35-36.
[994] Case C-377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* [2014] EU:C:2014:1754, paras 25-26.
[995] Joined cases C-585/18, C-624/18 and C-625/18 (n 345) paras 127-128.

EU BIT tribunals need to take account of the law in force of the contracting parties concerned, which includes EU law, it is self-evident that arbitral tribunals could not be normalised in the Union.

Still, as aforementioned, this issue regards only intra-EU agreements and ISDS - that is arbitral tribunals set up by two Member States. It does not extend to EU IIAs and disputes between an EU member state and a foreign investor or vice-versa. The Court has specified in Opinion 1/17 of 30 April 2019 that the ISDS mechanism envisaged in an EU mega-FTA -the CETA in particular- does not infringe upon Union law. In that respect, a common misconception is that the Court has disallowed ISDS within the EU, but allowed it if it occurs between the EU or EU member states and third countries on the basis of international investment agreements between the Union and third parties. This is not an accurate explanation of the Court's Opinion. First of all, it needs to be recalled that the EU is party to a handful of international agreements which include judicial dispute settlement procedures such as the UNCLOS or the Marrakesh Agreements, and this has not been found incompatible with EU law.[996] Secondly, the Court was requested to give its Opinion concerned the compatibility of a novel investment arbitration mechanism enshrined at a specific treaty -the CETA- with the autonomy of the EU legal order, the general principle of equal treatment and the requirement of effectiveness, and with the right to be heard by an independent tribunal. The Court is not called upon to rule on the legality of traditional ISDS between the EU and third parties vis-à-vis Union law.

In that framework, regarding the autonomy of EU law, the Court specified that if a tribunal is not called to interpret EU law, the character of the Union legal order is not put in jeopardy. It is however also underlined that investment arbitration in extra-EU mega-FTAs is deemed compatible with EU law so long as the arbitral tribunal has no jurisdiction to examine the compliance of an EU measure aimed to protect the public interests which are guaranteed by Union law with the relevant IIA/FTA. Therefore, in a hypothetical

[996] Nanette Neuwahl, 'Emerging Principles of European Investment Protection: After the Example of the Comprehensive Economic and Trade Agreement (CETA)' in M.Andenas and others (n 842) 24.

situation where an agreement would give jurisdiction to an arbitral tribunal to apply Union law or to judge on the legitimacy of a Union measure vis-à-vis the interests of an investor, ISDS would be incompatible with EU law.

The Court was not called to and did not decide on the compatibility of traditional ISDS with Union law in general. In that context, the Court leaves no doubt that international investment agreements could not possibly be allowed to influence the pathway of EU law-making, thus shutting the door to any regulatory chill and clarifying that EU's right to regulate in the context of preferential bilateral or multilateral investment agreements of the Union is strict and decisive. In accordance with the general and fundamental principles of EU law and Article 344 TFEU, any international agreement likely to hurt or alter the Union's constitutional values would oppose EU law:

> If the Union were to enter into an international agreement capable of having the consequence that the Union — or a Member State in the course of implementing EU law — has to amend or withdraw legislation because of an assessment made by a tribunal standing outside the EU judicial system of the level of protection of a public interest established, in accordance with the EU constitutional framework, by the EU institutions, it would have to be concluded that such an agreement undermines the capacity of the Union to operate autonomously within its unique constitutional framework.
>
> *Opinion 1/17*, para 150

4.4.2 Arbitration and access to an independent tribunal

On the question of whether typical investment arbitration clashes with the fundamental principles and requirements for independent and impartial tribunals, it must be borne in mind that the Court has actually never pronounced itself. Whenever the Court has examined if arbitral tribunals can be characterized as courts or tribunals within the meaning of the Treaties, it has concluded that they are not. However, it has decided so only after

considering other preceding criteria, for example permanent character or compulsory jurisdiction.[997] In its Opinion 1/17 the Court reiterates how the requirement of independence is inherent to the task of adjudication. Reminding us of its specificities, namely of an adjudicator's capability to judge a case unobstructed by any possible pressure and interventions as well as his/her equal distance from the parties to the proceedings guaranteed by specific rules as regards the composition, appointment, length of service and so on, the Court also points out that these safeguards are placed also to remove any reasonable doubt in the minds of the subjects of the law as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. In that specific case, after examination of the elements of the specific dispute settlement mechanism set up by that disputed agreement, the Court finds that there is no incompatibility with the Union's principles and values. That said, it is also clearly implied that the Court would not find traditional ISDS panels to comply with the requirements of Union law. In making its case, the Court highlights that the prescribed system although largely inspired by traditional ISDS differs in how the tribunal is composed as well as its stable character, appointment and remuneration of its members.

Taking the above points into consideration, we may safely conclude that traditional ISDS would be unacceptable and incompatible with Union law.

4.5 Aligning international investment law with the EU system of values

4.5.1 Non-trade values in EU investment protection agreements

The inclusion of FDI under CCP in the Lisbon treaty generated hope as to the reform of the current FDI legal system. Yet, at least in the first years, reality seemed to fall short of expectations.[998] Without putting forward any specific model-treaty but insisting on the broad lines, principles and parameters of future EU IIAs, the Commission's intention was to build on best practices from existing investment

[997] See Chapter 1.2.2.
[998] P.Acconci (n 222) 185-186

treaties.[999] It has been argued that the Commission Communication placed as priority of EU investment policy the protection of European investors abroad. The 2010 Commission Communication expressly mentions NTPOs, making specific reference to the fact that investment agreements should be consistent with the other EU policies, 'including policies on the protection of the environment, decent work, health and safety at work, consumer protection, cultural diversity, development policy and competition policy,' and with the OECD Guidelines for MNEs as a useful instrument to balance investors' rights and responsibilities. While this holds true, the vast majority of the document is dominated by the need for a high level of protection of investors. That is so, despite the reassuring reminder that 'the Union's trade and investment policy has to fit with the way the EU and its Member States regulate economic activity within the Union and across our borders'[1000] and that investment policy will not preclude the EU's and member states powers to adopt and enforce measures necessary to pursue public policy objective,

This prioritising was enthusiastically endorsed and even emphasised by the Council.[1001] In its Conclusions on a Comprehensive European International Investment Policy of 25 October 2010, the Council expressed the view that no EU investor 'would be worse off than they would under Member States' BITs, and that the future of EU international investment policy should increase the current level of protection and legal security for the European investor abroad.'

On the other side of the spectrum, Parliament directly opposed the Commission's and Council's priority over the protection of investors at the very highest levels. The EU lower house made an interesting observation which the Commission and the Council missed. In a rare isolationist mood, and demonstrating even some delusion of greatness, both Commission and Council focused on outward

[999] Jansen N. Calamita, 'The Making of Europe's International Investment Policy: Uncertain First Steps' (2012) 39 Legal Issues of Economic Integration 301.
[1000] Commission, 'Towards a Comprehensive European International Investment Policy' (n 957)
[1001] J.Calamita (n 1005).

investors and profoundly disregarded the reverse situation of the increasing amounts of inward FDIs towards the EU. Parliament highlighted that we are in the era of increasing incoming investments and with this in mind prioritizing only the investors' protection could backfire, jeopardising the EU's protection of public interests and right to regulate.[1002] In my view, this stance -including Parliament's- indicates that despite declaratory provisions and statements on the importance of the world's sustainable growth and promotion of European values in the rest of the world, the point of departure for a foreign investment policy which takes into account NTPOs was the internal needs and not the will of such an actorness, therefore demonstrating a rather blunt colonialist position. It is noteworthy in that respect, -as seen in the above section- that one criterion of the *Salini test* in post-Lisbon EU mega-FTAs that is not include in the definition of investment is the requirement to contribute to the development of the host state. Incrementally however, whatever the motives, the Union perceived foreign investment law as an instrument for strengthening a rule-based rather than power-based approach to foreign investment, innovating from scratch.[1003] The most striking example is the EU's effort for a revised system of investment dispute resolution, not only internally but also globally.

4.5.2 Reforming investment arbitration

As seen in the first chapter, ISDS has been dividing actors into supporters of the traditional ISDS regime as it stands, foes and reformers.[1004] There is a general global trend for reform of the system through various incremental changes, all leaning towards the 'improvement' of the current ISDS system; that is, the establishment of more 'permanent', transparent and affordable configurations of arbitral tribunals, offering certain guarantees of objectivity, sufficient judicial remedies, legal certainty and finally credibility. All new generation EU mega-FTAs

[1002] ibid.
[1003] Wolfgang Alschner, 'The Global Laboratory of Investment Law Reform Alternatives' (2018) 112 AJIL Unbound 237.
[1004] Wolfgang Alschner, 'The Impact of Investment Arbitration on Investment Treaty Design: Myth versus Reality' (2017) 42 Yale Journal of International Law 1.

include one way or another provisions on dispute settlement. Notwithstanding, they are envisaged within the reformatory standpoint, in view of addressing the various legitimacy concerns.[1005] Considering the aforementioned legal context especially further to CJEU's rulings on *Achmea* and Opinion 1/17, it would be expected that the EU would be aligned with the reformers.

The motives have not been (only) legal. One of the most important drivers has been public awareness. IIAs albeit a 'European invention,' never made the headlines in the old continent. European public opinion was just ignorant or not interested in this niche corporate matter. Paradoxically, international investment agreements came 'from the backroom into the forefront of political attention' as a result of the new EU competences.[1006] In Germany, for example which was the first country ever concluding an IIA bilaterally and traditional supporter of investment agreements and ISDS, ISDS was completely unknown beyond competent public officials. The Lisbon treaty which prompted the launch of mega-FTAs negotiations that would typically include investment protection chapters (e.g. the Transatlantic Trade and Investment Partnership (TTIP) in 2013), coinciding with prevalent arbitrations like *Vattenfall* and *Philip Morris* that were suspect of compromising public interests in the name of investor protection, raised overnight ISDS public profile in the EU and turned it from a virtually unknown matter to an emotionally debated toxic issue which sparked protests across the Union and made the headlines. Starting from Germany,[1007] protesters accused ISDS of threatening democracy, pointing to the chilling effect in

[1005] Hannes Lenk, 'Investor-State Dispute Settlement: Constitutional Challenges and Pitfalls' in Mads Andenas, and others (eds), *EU External Action in International Economic Law* (n 842) 133.
[1006] ibid.
[1007] 'In the course of 2016, the debate on TTIP in Germany became increasingly toxic. Criticism got so widespread, that hardly any political actor was willing to invest political capital in order to save this trade deal'. (…) 'The reason for this major swing was a strong rejection of some elements of TTIP that went beyond the associated reduction of tariffs', the first being ISDS, an area that was perceived particularly negatively by the German public. Christian Bluth, 'Lessons from TTIP Toxicity for EU-US Trade Talks' in San Bilal, Bernard Hoekman (eds), *Perspectives on the Soft Power of EU Trade Policy* (CEPR Press 2019) 177-179 <http://respect.eui.eu/wp-content/uploads/sites/6/2019/11/Chapter18_Bluth_TTIP.pdf> accessed 5 April 2022.

environment, labour rights and food safety.[1008] Public policy debate of ISDS, which up till recently was a niche issue in Europe concerning specialized academics and practitioners, became predominant overnight. Public awareness inevitably led to political pressure for increased control.[1009]

In response to public criticism and scrutiny as well legal complexities, the European Commission started to actively engage in the discussion in 2015 with a two-fold objective: i) to trigger and participate in the negotiations for an international investment court and appellate mechanism with tenured adjudicators under the UN system, and ii) in parallel initiate the establishment of a temporary specific Investment Court Systems (ICSs) to be included in the meantime in the EU's mega-FTAs and investment agreements until it could be replaced by the international investment court under the UN.

The EU not only joined but orchestrated the reform of the *status quo* by taking a more rules-based approach against the background of respect for the rule of law, relating values and aims that drive the Union's internal and external actions according to articles 2, 3 and 21 TEU.

a) Multilateral Investment Court (MIC)

Various proposals have been put on the table, ranging from instruments on withdrawal of consent to ISDS and/or blunt termination of investment treaties[1010] to

[1008] Issam Hallak, 'Multilateral Investment Court Overview of the Reform Proposals and Prospects' (European Parliamentary Research Service 2020) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf> accessed 5 March 2020.
[1009] Wolfgang Alschner, 'The Impact of Investment Arbitration on Investment Treaty Design' (n 1010).
[1010] Lise Johnson, Jesse Coleman, Brooke Güven, Lisa E. Sachs, 'Clearing the Path: Withdrawal of Consent and Termination as next Steps for Reforming International Investment Law' (2018) Columbia Center for Sustainable Development Papers <https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/154> Accessed 9 March 2022

a recalibration of the current ISDS system. Concrete actions and proposals by decision-makers on the international plane encompass indicatively the following:[1011]

- A proposal submitted by developing states and endorsed by the EU for the set-up of an advisory centre for international investment law (ACIIL), similar to the Advisory Centre on WTO Law in Geneva, instructed to address cost and length of ISDS and assist countries to build their own judicial capacities and disseminate available information on cases.
- The establishment of an appellate body which would be competent for the judicial review (interpretation, revision and annulment) of awards rendered in existing private arbitral proceedings either through multiple-treaty specific mechanisms[1012] for a 'quality control' procedure, similar to the International Court of Arbitration of the ICC, or as a stand-alone permanent institution.
- EU and its member states' proposal for a permanent fully fledged two-tier tribunal (first instance and appeal), with a built-in appeal court, composed of full-time adjudicators.

The latter constitutes the most comprehensive and advanced proposal so far. It regards the negotiations for the conclusion of an international Convention establishing a multilateral investment court (MIC), including a Multilateral Investment Appellate Mechanism (MIAM) under the auspices of the UNCITRAL,[1013] discussed already since 2017 by Working Group III of UNCITRAL for the reform of ISDS.[1014] The new 'court' is envisaged most likely to constitute a new international organization. Suggestions on the specifics of the rules of procedure, membership, structure, funding and working languages are outside the scope of the present

[1011] I.Hallak, 'Multilateral Investment Court Overview of the Reform Proposals and Prospects' (n 1014).
[1012] Gabrielle Kaufmann-Kohler and Michele Potestà, *Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options* (Springer 2020) 87-90.
[1013] UNCITRAL, 'Working Group III: Investor-State Dispute Settlement Reform: 45th Session 17-31 March 2023, New York' <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 13 September 2022
[1014] G.Kauffmann-Kohler and M.Potestà (n 1019) 92.

research.[1015] The general purpose of the MIC though is to address the strong criticisms and concerns over lack of legitimacy, consistency, transparency, independence, and other ethical questions as well as the massive costs of *ad hoc* tribunals within the existing ISDS regime. The MIC endeavours hence to provide the necessary safeguards for all involved parties and concerned stakeholders, i.e. future contracting parties (states and REIOs), investors and civil society.

The basic lines of the EU's position following the first negotiating mandate given by the Council to the Commission in March 2018, *inter alia* contained the following elements:[1016]

- The MIC to be composed of two levels of adjudication, a tribunal of first instance and an appeal tribunal. The appeal tribunal should be competent to review decisions issued by the tribunal of first instance on the grounds of errors of law, manifest errors in the appreciation of facts or serious procedural shortcomings. The Convention should include provisions for the completion of the proceedings in light of the findings of the appeal tribunal, which should have the power, when appropriate, to send back cases to the tribunal of first instance ('remand').
- Judges should be tenured, receive permanent remuneration and have all necessary guarantees of impartiality and independence. As such their appointment should be subject to stringent requirements regarding their qualifications and impartiality and through an objective and transparent process while the court's rules of procedure will foresee strict safeguards on ethics and conflict of interests, including a code of conduct and

[1015] For a comprehensive set of options on the operation of the MIC see, Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement*' (Springer 2018).
[1016] Council of the EU, 'Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes' (20 March 2018) 12981/17 <https://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf> accessed 25 April 2022

challenge mechanisms. In addition, judges will satisfy criteria of regional and gender balance.

- Proceedings before the MIC should be conducted in a transparent manner.
- The MIC should operate in a cost-effective way with reasonable duration.
- The operative costs of the MIC should be borne by the contracting parties; disputing parties should be able to contribute through court fees, which however should not be linked to the remuneration of judges.
- Support should be made available for developing and least developed countries.

Between November 2017 and April 2019, the Working Group drew up a list of concerns regarding the current ISDS system, which it classified into three categories: (a) consistency, coherence, predictability and correctness of arbitral decisions; (b) integrity of arbitrators and decision-makers; (c) cost and duration of ISDS disputes.[1017] The project, which until 2018 was focused on identifying issues and concerns, entered in the solutions development stage in April 2019. Ever since, there are concrete elements discussed on the ISDS reform. It currently focuses on the development of provisions on an appellate mechanism as well as drafting codes of conduct for adjudicators and judges. Following the 42nd session of the Working Group in February 2022, the next session will take place in June 2023 and will focus mainly on the appellate mechanism and codes of conduct.

The EU participates in the Working Group as an observer represented by the Commission as well as by 13 of its member states which are fully fledged parties to UNCITRAL.[1018] That said, in accordance with the principles of sincere cooperation and

[1017] I.Hallak, 'Multilateral Investment Court: Framework Options' (European Parliamentary Research Service 2021)<https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690642/EPRS_BRI(2021)690642_EN.pdf> accessed 20 April 2022.

[1018] States members of the UNCITRAL are: Afghanistan, Algeria, Argentina, Armenia, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Czechia, Democratic Republic of the Congo, Dominican Republic, Ecuador, Finland, France, Germany, Ghana, Greece, Honduras,

of unity of external representation the Member States participating in the negotiations shall fully coordinate positions and act accordingly throughout the negotiations.[1019] Participating Member States hence, express the common negotiating positions and mandates given by the Council. As such, the Commission representation, although typically having that of an observer status without any voting rights, is very significant since it binds together the positions of 13 members.

b) EU-specific investment court systems

In the meantime, while the negotiations on a MIC are ongoing within the context of UNCITRAL, the EU is introducing its own permanent court systems for disputes arising from its mega-FTAs, which in the long term shall be substituted by the multilateral investment tribunal, if agreed upon. In the 2015 concept paper 'Investment in TTIP and beyond – the path for reform - Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court' the Commission first presented the issue and a first approach towards the creation of a new institutionalised court system for investment disputes' resolution which would apply to all future mega new generation FTAs and IIAs concluded by the EU and its Member States with third parties.[1020]

The proposal for a permanent mechanism of dispute resolution in the context of mega-FTAs has been the culmination of a long and gradual attempt and does not (yet) cover all EU agreements so far. That said, even in the agreements where disputes

Hungary, India, Indonesia, Islamic Republic of Iran, Iraq, Israel, Italy, Japan, Kenya, Kuwait, Malawi, Malaysia, Mali, Mauritius, Mexico, Morocco, Nigeria, Panama, Peru, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Somalia, South Africa, Spain, Switzerland , Thailand, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Bolivarian Republic of Venezuela, Viet Nam and Zimbabwe.

[1019] Council of the EU, Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes (n 1022).

[1020] Commission, 'Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court' (2015)m ù Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations' (*Commission press release*, Brussels, 16 September 2020) <https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5651> accessed 5 March 2023.

are to be settled in the more traditional ISDS system, there are some further safeguards of impartiality and independence. The EUSFTA for example, attempts to recalibrate the existing system and therefore provides for a slightly more elaborate procedure for the selection of arbitrators. It determines the pre-emptive designation of a short list of arbitrators able to constitute the arbitration panels and delineates some -albeit quite poor- selection criteria (article 14.20) and a Code of conduct under Annex 14-B. Equally, the first versions of CETA in 2014 provided for the creation of a more fair and impartial version of the ISDS system in place with compulsory incorporation of the UNCITRAL rules on transparency, public hearings and the possibility for *amicus curiae* interventions. It also embraced the requirement for a code of conduct for arbitrators and for interpretation of the agreement's provisions to be relied upon states and not tribunals, and stipulated that the costs of disputes of failed claims would be borne by the claimant (investors). There was also a commitment for a future agreement on an appeal mechanism between the parties.

The real breakthrough came however first with (the failed) TTIP and decisively with the final version of CETA where the EU and its member states agreed with their Canadian counterpart on the establishment of a permanent Investment Court System (ICS). This agreement aspired to be the personification of EU's 'new approach on investment protection in trade agreements' demonstrating the Union's determination to protect governments' right to regulate and to ensure that investment disputes will be adjudicated in full accordance with the rule of law.[1021] At first, the EU came forward with the proposal for a new court system for the TTIP in 2015. Reactive to public unrest and mistrust towards argued inability to pursue public policy objectives, mainly exemplified by suspicion over ISDS' unfairness and subjectivity, the EU started with the above-mentioned milder adjustments in the framework of the EUSFTA and the first CETA. As the Advocate-General put it in his

[1021] Statement of Vice-President of the European Commission Mr Frans Timmermans on CETA referred to in 'CETA:EU and Canada Agree on New Approach on Investment in Trade Agreement' (2016) (*European Commission*) <https://ec.europa.eu/commission/presscorner/detail/lt/IP_16_399> accessed 20 March 2020.

opinion in the framework of Opinion 1/17, 'what is at issue here is the definition of a model which is consistent with the structural principles of the EU legal order and which, at the same time, may be applied in all commercial agreements between the European Union and third States'.[1022]

4.5.3. Sustainable Investment Facilitation Agreements (SIFA)

Investment can be crucial in achieving the SDGs and the developed world should play a leading role in driving sustainable investments in developed countries.[1023a] The EU, as part of its overall trade strategy to promote non-trade values within CCP and boost sustainable development, recently launched a new strand of investment agreements. The Sustainable Investment Facilitation Agreements (SIFA) -along the lines of the work under preparation within the WTO mentioned in Chapter 1.3 above-are bilateral agreements between the EU and trade partners from the developing world. The aim of these agreements is not investor protection but to create 'attractive, transparent and predictable investment climate'[1023b] that will trigger investing 'in a way that contributes to the objective of sustainable development.'[1023c]

The first ever agreement is the EU-Angola SIFA.[1023d] The Commission received the negotiating mandate from the Council in May 2021[1023e], negotiations were launched in June 2021 and concluded in November 2022. Much like the Brazilian CIFAs -also mentioned in Chapter 1.3 herein- the first EU SIFA is focused on procedural arrangements including the possibility for digital bureaucratic

---

[1022] CJEU Opinion 1/17 (n 359), Opinion of AG, para 86.
[1023a] See above Chapter 1.3 and relevant negotiations within the WTO.
[1023b] 'Negotiation directives for the negotiation of an agreement on investment facilitation with the Republic of Angola' 8441/21 (10 May 2021) <https://data.consilium.europa.eu/doc/document/ST-8441-2021-ADD-1/en/pdf> accessed 5 March 2023
[1023c] Article 5.1, Draft Sustainable Investment Facilitation Agreement between the European Union (EU) and Angola (18 November 2022) < file:///C:/Users/Sofia/Downloads/Text%20of%20the%20agreement-1.pdf> accessed 3 March 2023
[1023d] 'Draft EU-Angola Sustainable Investment Facilitation Agreement' (18 November 2022) <file:///C:/Users/Sofia/Downloads/Text%20of%20the%20agreement-1.pdf> accessed 5 March 2023
[1023e] 'Negotiation directives for the negotiation of an agreement … (n 2013b)

procedures (Article 3.4) and fees (Article 3.6), as well as on details for the incoming FDI. As mentioned in the introductory paragraph

> 'The Parties affirm their commitment to facilitate the attraction, expansion and retention of foreign direct investment between them for the purpose of economic diversification and sustainable development and hereby lay down the necessary arrangements'

Emphasis is given on transparency (Articles 2.1-2.7), publicity (Article 3.8), impartiality/objectivity (Article 3.7), legal certainty, regulatory coherence (Article 4.4), and the guarantee of policy space (Article 1.2), while here too -much alike the Brazilian CIFA- there is no ISDS provision but a provision about a state-to-state dispute settlement as last resort to resolve differences (Articles 6.1-6.6). An important part of the Agreement regards the Parties' commitments to combat corruption (Article 1.5).

These elements play themselves a crucial role for ensuring sustainability, as extensively analysed in Chapter 1.2. What is more, the EU-Angola draft SIFA contains also a dedicated chapter on investment and sustainable development (Chapter 5) whose aim is

> 'to enhance the integration of sustainable development, notably its labour and environmental dimensions, in the Parties' investment relationship in a manner that contributes to the achievement of the Sustainable Development Goals of the UN 2030 Agenda.'

Provisions are hence further guaranteeing the Parties' right to regulate specially to ensure adequate protections of the environment and workforce (Article 5.2). Parties are also bound to follow international commitments for labour rights (Article 5.3) as well as to abide to MEAs (Article 5.4). Last but not least, the new SIFA

is also guaranteeing the Most Favoured Nation treatment standard, amongst its General Provisions (Article 1.4).

These SIFA are definitely part of EU's new strategy for open, sustainable and assertive EU trade policy (see Chapter 3.5.2 herein). Being new and yet unimplemented, it is unsure what will be their impact and place in international investment law. There are many open questions on their regard: are they mutually exclusive with relevant IIAs or can they coexist? What will be their exact effectiveness and enforceability of contractual clauses? For example, it is quite vague what (and if) there will be sanctions against a Party not abiding to the commitments to combat corruption. Notwithstanding, even their mere existence is quite representative of the EU's commitment in supporting the need for investments which are sustainable and corresponding to the Union's values. In some ways, these SIFAs are an idyllic evolution of the old post-colonial investor protection treaties. Hence, in the post-colonial world, strong former colonial empires would push developing host states to accept their terms and conditions to facilitate investments, which were all to the benefit of their investors. Nowadays, through the SIPA, the strong capital-exporting party (i.e. the EU) uses its power to push towards protection of the general interests, and higher values, towards sustainable development, even if this would be to the detriment of the economic interests of its investors.

4.6 Comparative case study: CETA & USMCA

Amidst spark criticism and suspicion over ISDS, and unfettered protections of investors in international investment law, the political need for the conclusion of IIAs that would guarantee an even balance between the conflicting interests of the host states and investors' rights became pressing. Governments were asked to assert their role in regulating and re-conquering policy space, especially in view of urgent and highly publicized policy issues such as public health, sovereign debt restructuring, and the all-embracing sustainable development objective. In this environment, which coincided with the newly acquired EU competences over FDI, the Union has engaged into negotiating a series of mega-FTAs with investment chapters.

A comprehensive new generation mega-FTA already in force which aspired to respond to these issues is the CETA between the EU and Canada. It is therefore worthwhile examining certain critical provisions of CETA's dedicated investment chapter 8. The Comprehensive Economic and Trade Agreement (CETA) between Canada on the one part and the EU and its Member States on the other, was signed in Brussels on 30 October 2016 after many years of negotiations, political as well as legal debates. Legally speaking, after the Court clarified the competence division questions between the EU and its Member States for the different parts of the new mega-FTAs in Opinion 1/13 on the EUSFTA, the CETA agreement also required the Court's approval regarding the compatibility of provisions on the new permanent ISDS system with Union law. The agreement has not yet come into force as ratification in many Member States and Canada is still pending. In the meantime, the EU has been engaged in negotiations with various other third countries to conclude analogous FTAs. On the other side of the Atlantic, there are similar developments taking place. A noteworthy new agreement is the successor of the well-known 1994 NAFTA, which has been agreed amidst political turmoil too. Despite its design to protect US investors, especially in Mexico where the regulatory framework was considered quite unstable, thus perilous for foreign businesses, the former Trump Administration was

particularly hostile to investment protection under NAFTA. The new USMCA investment provisions reflect this reality in addition to further policy and practical considerations regarding the relations with the other party of the agreement, Canada, that focus mostly on disputes from US investors against Canada regarding, *inter alia*, environmental regulation. In this context, after a long run of negotiations, Canada, Mexico and the USA concluded the USMCA in late 2018.[1023]

Both the CETA and USMCA are considered 'new generation' trade agreements that include investment chapters. It is worthwhile examining the CETA with the aim to indicatively explore the EU's stance towards the questionable items of investment law. As a component of the EU's world 'actorness' on the matter, it is also useful to compare the results of the said elements of this EU agreement and EU's sustainability stance over IIAs with the developments in other parts of the developed world. We will therefore examine the investment chapters of the latter agreements, i.e. Chapter 8 of the CETA and Chapter 14 of USMCA) as well as other horizontal provisions related to sustainable development which apply to investments.

For the purpose of our study, we will focus on how CETA and the USMCA address the matters which have led to the legitimacy crisis of international investment law identified in the first chapter, namely:

- the States' rights to regulate to protect public interests – policy space;
- legal certainty in IIAs clauses to define violations of investment protection (i.e. FET); and
- ISDS' independence and impartiality.

[1023] Mélida Hodgson, 'The USMCA/CUSMA/T-MEC's Entry into Force: USMCA and U.S. Investors – A Reversal of Fortune?' (*Kluwer Arbitration Blog*, 25 June 25 2020) <http://arbitrationblog.kluwerarbitration.com/2020/06/25/the-usmca-cusma-t-mecs-entry-into-force-usmca-and-u-s-investors-a-reversal-of-fortune> accessed 2 October 2022.

4.6.1 Policy space

a) <u>General provisions on the protection of public interests</u>

As mentioned in the first Chapter, we are quite used to preambular provisions calling for the respect of the environment, sustainable development and for a responsible business conduct. EU FTAs in that respect contain not only general exceptions (modelled after Article XX of GATT) but also specific preambular and operative provisions targeting the preservation of public policy objectives such as the observance of environmental and social standards, the fight against corruption and commitment to adhere to relevant international agreements such as those of the International Labour Organization (ILO), prominent MEAs and human rights covenants.[1024]

- **CETA**, reiterating the strong commitment to democracy, fundamental and human rights, and the promotion of sustainable development, encourages businesses to operate in a socially responsible way and reaffirms that parties are committed to implement the agreement 'in a manner consistent with the enforcement of their respective labour and environmental laws and that enhances their levels of labour and environmental protection, and building upon their international commitments on labour and environmental matters'. Albeit the symbolic importance of these assertions, their legal value as per their enforceability and justiciability is of course questionable. As important as they may be as means of interpretation, they are not standalone enforceable provisions.

Moreover, the entire chapter 22 of CETA is dedicated to 'Trade and sustainable development' and is inherently linked to subsequent chapters

[1024] C.Titi (n 965).

23 and 24 on trade and labour as well as trade and environment respectively. The inclusion of such provisions in the operative part of IIAs is definitely welcome. Nonetheless, it has been argued that CETA appears to be just another IIA whereby no concrete measures are foreseen to hold investors accountable for possible breaches. The only 'weak' provision on investors obligations regards again the encouragement to follow OECD's Guidelines. For the rest, obligations are only addressed towards states parties.[1025] It has been argued that this adds nothing to the commitments of Canada and the EU and is a missed opportunity to strengthen compliance with the Guidelines and investors' accountability.[1026] But this is only partly true and it dismisses the Court's view regarding enforceability of sustainable development provisions in Opinion 2/15. Non-compliance with provisions of EUSFTA Trade and Sustainable development chapter may arise to a material breach of the agreement. The Court considers that the sustainable development chapter 'plays an essential role in the agreement' and that the agreement operates under a form of conditionality.[1027] As declared by the parties, 'the EU and Canada are trusted and like-minded partners that share the same goals when it comes to promoting open, sustainable and fair trade. Our EU-Canada Comprehensive Economic and Trade Agreement (CETA) aims to support our common objective of climate protection'.[1028]

- **USMCA**: in the preamble it is made clear that amongst the goals of the entire agreement is the promotion of 'high levels of environmental

[1025] Nathalie Bernasconi-Osterwalder and Howard Mann, 'CETA and Investment: What is it About and What lies Beyond?' in Makane Moïse Mbengue and Stefanie Schacherer (eds) (n 327) 350.
[1026] ibid.
[1027] Laurens Ankersmit, 'Opinion 2/15: Adding Some Spice to the Trade and Environment Debate' (*European Law Blog,* 15 June 2017) <https://europeanlawblog.eu/2017/06/15/opinion-215-adding-some-spice-to-the-trade-environment-debate/> accessed 5 March 2022.
[1028] Commission, 'Statement from the Commission on clarifications discussed with Germany regarding investment protection in the context of the CETA agreement' (29 August 2022) <https://ec.europa.eu/commission/presscorner/detail/en/statement_22_5223> accessed 23 March 2023.

protection, including through effective enforcement by each Party of its environmental laws'. To that end, the agreement includes chapter 24 entitled 'Environment' where it is further recognized that trade contributes to sustainable development (Article 224.2). The right for parties to adopt and enforce environmental legislation is moreover secured (Articles 24.3 and 24.4). Special provisions are reserved for the protection of the ozone layer (Article 24.9), marine environment (Article 24.10), fisheries and marine species (Articles 24.17, 24.18, 24.19, 24.20), air quality (Article 24.11) as well as biodiversity (Article 24.15), while at the same time parties are required under article 24.8 to uphold obligations imposed under 7 MEAs to which they are also parties and which are also specified in the agreement. Regarding potential disputes about interpretation and enforceability of environmental measures, their resolution is endowed to special government committees; as a last resort, solution by a special dispute resolution panel provided for in Article 23.32 is also possible.

Preambular language of the USMCA also underlines the protection and enforcement of labour rights. What is very interesting is the assertions in two preambular recitals of the parties' strong commitment for better regulation through enhanced transparency, accountability, and predictability as well as safeguard of the rule of law, elimination of bribery and corruption. Although the exact term 'sustainable development' is not spelt out in that respect, it is nonetheless explicitly mentioned. The latter elements constituting an improved regulatory framework shall facilitate growth, while contributing to each Party's ability to achieve its public policy objectives. Such protections are also covered in Chapters 27 on Anticorruption and 28 on Good regulatory practices.

These general provisions and committed chapters of the USMCA make such sustainable development requirements enforceable.

a) <u>The States' right to regulate</u>

- **CETA:** Article 8.9 on 'investment and regulatory measures' includes express requirements for consistency with obligations under the agreement as a prerequisite of the right to regulate, as is the case for new environmental measures which also need be consistent with treaty obligations under article 24.3 CETA.[1029]
- **USMCA:** In addition to the 9th recital of the preamble whereby it is recognized that the Parties have the express right to set their legislative and regulatory priorities, and protect legitimate public welfare objectives, Article 14.16 on Investment and Environmental, Health, Safety, and other Regulatory Objectives is a fairly typical provision on the right to regulate. Stating merely that '[N]othing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives', it is a provision rather open to interpretation. Article 14.10 also provides that measures adopted to protect legitimate public welfare objectives, cannot be construed as infringing upon performance requirements if they are not applied in an arbitrary or unjustifiable manner, or in a manner that constitutes a disguised restriction on international trade or investment.

[1029] ibid.

4.6.2 Expropriation exceptions – indirect expropriation

- **CETA:** Article 8.12 of CETA regarding expropriation reads, a '[P]arty shall not nationalise or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation (…) except (…) (a) for a public purpose, (b) under due process of law, (c) in a non-discriminatory manner; and (d) on payment of prompt, adequate and effective compensation'. For greater certainty, the article also refers to Annex 8-A 3°. Annex 8-A provides further clarifications on expropriations and on what measures constitute indirect expropriations, namely if they substantially deprive the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment without formal transfer of title or outright seizure. In the ambit of expropriation, equally prominent with regards to the criticism over international investment law is the issue of the investors' legitimate expectations against state activity. CETA's Annex 8-A, refers to 'distinct' expectations, which is being thought to mean that not every type of expectation is afforded protection under the CETA. Paragraph 3 of Annex 8-A provides further clarifications of the state's 'police power' general exception, in favour of measures designed and applied to protect 'legitimate public welfare objectives' such as 'health, safety or the environment' under the condition that they are non-discriminatory, that they pursue a legitimate public purpose, and finally with the caveat that they may still be considered as an expropriation if they appear to be manifestly excessive.
- **USMCA:** Under Article 14.8 of USMCA, expropriation may only occur for a public purpose, in a nondiscriminatory manner, with prompt, adequate, and effective compensation, and in accordance with due process of law. While indirect (also known as regulatory) expropriation is still included, the proposed USMCA affirms that nondiscriminatory regulatory actions designed to protect legitimate public welfare objectives would not

constitute indirect expropriation except in 'rare circumstances', similar to language in more recent U.S. FTAs. USMCA would also place new limits on the enforceability of this provision through ISDS.

4.6.3 Fair and equitable treatment

- **CETA**: Just like provisions under Article 8.9 on the right to regulate, provisions of the FET in CETA are considered a novelty in terms of international investment law. The new language on FET in Article 8.10 can be said to bring a certain degree of innovation in international investment treaty drafting since it provides for a rather extensive list of what situations may constitute FET.[1030] As such, Article 8.10 limits the possible breach of investors' legitimate expectations to situations where a specific promise or representation was made by the State and also provides that a breach of the FET obligation can only arise when there is:
    - denial of justice in criminal, civil or administrative proceedings;
    - a fundamental breach of due process, e.g. transparency in judicial and administrative proceedings;
    - manifest arbitrariness;
    - targeted discrimination on grounds of gender, race or religious belief; and
    - abusive treatment of investors, e.g. coercion, duress and harassment.
- **USMCA**: Article 14.6 of the USMCA provides that covered investments should be treated in accordance with customary international law, including fair and equitable treatment which 'includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world' and police protection at the level required under customary international law.

[1030] Patrick Dumberry, 'Fair and Equitable Treatment' in Makane Moïse Mbengue and Stefanie Schacherer (eds) (n 327) 95. Kriton Dionysiou, *CETA's Investment Chapter: A rule of law perspective* (Springer 2021) 79.

4.6.4 Dispute resolution

- **CETA:** The Investment Court System (ICS) established under the CETA has been promoted as a great novelty. According to Section F of Chapter 8 (Articles 8.18-8.45) establishes general rules of procedure of the new investment tribunals of first instance and appeal, which are meant to create a new hybrid independent judiciary outside the ambit of national judicial systems of the contracting parties. Under the CETA rules, these bodies will have a permanent nature. Adjudicators are no longer chosen by the disputing parties but are appointed from a standing roster drafted by common agreement of the Parties. There are also safeguards of transparency and publicity as well as rules of behaviour and ethics for adjudicators. Last but not least, there is an appeal mechanism under the appeal tribunal. The agreement also includes detailed provisions on the scope of claims, applicable law and ethics.

- **USMCA:** On the other side of the Atlantic things are dealt differently. Traditional ISDS, under ICSID or UNCITRAL rules is maintained for investment disputes between Mexico and the US (Annex 14-D) but only has a very limited scope and is treated as a measure of last resort. Investors will first have to pursue legal action claiming compensation over an alleged breach of the USMCA terms and conditions in the domestic courts and only afterwards can they pursue arbitration. On the scope, there can be no claim of a breach of the FET standard in ISDS. What is more, there is no ISDS possible at all for US-Canada disputes; investors will have to pursue their claims in domestic courts.

4.6.5 Results

a) Policy space: Both the CETA and USMCA have similar approaches over policy space. There is definitely a determination in the agreements to address scepticism on the

matter. It is obvious that the agreements attempt to tackle the same problem and pursue parallel objectives, but their approach is different. On this point, CETA's very specific language is prone to add on clarity. It needs to be noted that article 8.9 is a novelty of CETA, incomparable to the equivalent provisions in other IIAs. This is mainly thanks to its increased lucidity and detail. It has been argued that the detailed examples provided for in the second paragraph of article 8.9 may actually have a restrictive effect in the state's regulatory space because it would be implied that situations other than regulating in a manner that adversely affects an investment or interferes with an investor's expectation may actually violate CETA's Chapter 8. This article would weaken somehow the possibility of future judges'/adjudicators' to adopt a more expansive approach for regulation. I do not agree with this assessment. I believe that this article shall be construed as non-exclusive, with regulating 'in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits; being mere examples of the most typical situations. USMCA on its part, has a more typical general wording, leaving quite open the space for interpretation.

b) Indirect expropriation: CETA's detailed language on indirect expropriations does not seem to offer anything particularly new. Analysts are already construing the provision as quite broad, especially regarding the limits of legitimate expectations. Is it meant to require only written promises? Would a 'specific' representation for example by an even unauthorised government official suffice to generate investors' legitimate expectations. The construal of the definition and the exact scope of a 'legitimate welfare objective' has been also criticized. Could only a public policy/welfare purpose be sufficient for a measure to qualify as meeting the CETA criteria and not be considered an indirect expropriation? Or do we need to measure the relative importance of such a purpose? It is believed that both literary and teleological readings of the relevant provisions of the agreement suggest that the latter, more nuanced approach, is to be followed. This construal leads to the additional specification provided for in Annex 8-A 3° which reads that 'the police

power exception may be neutralized only when its impact on the investment is "excessive"'. It therefore introduces the requirement to calibrate the legitimacy of a measure taken to pursue public welfare objectives, clearly indicating the use of the proportionality test. That said, there is no explicit and direct allusion to the proportionality test either; only this implied, yet clear reference. USMCA's provisions on indirect expropriation are again in the same wavelength and objective, but less detailed.

b) Fair and equitable treatment: As analysed in the introduction, FET is the most invoked standard in ISDS claims, partly due to its increased ambiguity and vagueness, leaving a rather vast margin of arbitral interpretation.[1031] In that context, the bold attempt of a more precise wording in CETA which substantially intends to fetter discretion in arbitral interpretation may be considered as an important step towards legal certainty. USMCA's wording, although again less detailed, is still on equal footing.

c) ISDS: This is where things start getting really interesting. CETA's hybrid ICS has been widely discussed and publicized. In a frantic crusade against anything that remotely looks like a private investment arbitration, ICS introduced a new venue for dispute resolution. The fact that adjudicators should no longer be appointed by the disputing parties but from the roster created by the contracting parties sets apart arbitrators and investors which definitely eases hostility and criticism. The system has been designed as a new way forward that would address the concerns over traditional ISDS bias. When it is combined however with the equivalent provisions and solutions proposed in the USMCA it looks more like a viable political compromise designed to ease public concerns over the completely private ISDS system than a revolutionary step. While the USMCA mostly pulls the plug to investment arbitration, the CETA's persistence of an arbitration-like formula -albeit its enhancement- instead of the resolution of disputes in national courts could still raise concerns, not to

[1031] Ibid 78.

mention generate fear over bias from the other side.[1032] That said, it is questionable whether the USMCA's formula shall be a viable solution after all. The complete abandonment of arbitration for Canada-US disputes is quite straightforward and definitely the best -or the only- solution to the matter. At the same time, the 'in between' solution proposed for US-Mexico disputes is quite peculiar in the sense that ISDS is awarded a place of appellate jurisdiction, after exhaustion of national judicial remedies. What will the meta-meaning be if a claim is lost in national jurisdictions and then won in ISDS?

4.6.6 Assessment

It is apparent that both the CETA and the USMCA are seeking to address the main issues that have occurred in the last decades questioning legitimacy of international investment law. From a general perspective, they both include equally important declaratory provisions on the protection of legitimate public interests, which are also explicitly enforceable. CETA for its part appears to include more detailed wording on challenged provisions such as -primarily- the right to regulate but also FET, limiting the scope of their interpretation. That said, USMCA compensates this deficiency by almost eliminating ISDS and the scope of investors' challenges. One may argue that since investors' claims are largely no longer heard by ISDS tribunals but by domestic courts, there is no such need for detail. Moreover, since an alleged breach of the FET standard cannot be used under the USMCA as a basis for a claim of damages against a host state, it can also be argued that further detail in drafting would be redundant. That said, the right amount of detail in legal drafting is, as already proven, very important to legal certainty, no matter who sits as a judge. Although in the eyes of the subjects of the law it might appear that courts will interpret investment clauses in a better way, allowing for a great margin of interpretation could generate new problems. Regarding the choice between a refurbished ISDS and no arbitration at all, no one can know what is the best. What is

[1032] K.Dionysiou (n 1036) 144.

clear is that both agreements are premised on the same rationale but CETA's approach is more balanced, nuanced and pragmatic.

Overall, taking into consideration the points that we identified, the comparison between the two agreements can be summarised as follows:

Issue	CETA	USMCA
Policy space	Detailed dedicated provisions	General – typical language
Legal certainty	High	Normal
ISDS mechanism	Increased guarantees for independence & impartiality	Mostly no ISDS at all

4.7 Sub-conclusion

In this fresh -only a couple decades old- competence, the EU has already taken an active stance in pursuing its values and principles vis-à-vis the legitimacy questions over international investment law. This is a purely external competence; the assessment of the EU's results and commitments relates therefore to the way the EU approaches these issues vis-à-vis third parties, as a global actor. As it seems, even without having a full member status in relevant international fora, the EU -through its observer status and by maintaining the concrete and coordinated bloc position of its Member States- has succeed in being one of the frontrunners and advocates for change towards a more value- and rules-based international investment law system. In these few years, the Union has already managed to conclude investment agreements such as the CETA that are comparable or even more advanced to relevant instruments negotiated and adopted by like-minded third sovereign states with ample experience. What is more, the EU is leading the way to the new idea of investment facilitation agreements with developing countries, way before the WTO, in a move to further boost this policy trend. EU foreign investment law is forgotten by

commentators of EU's Open, Sustainable and Assertive trade policy, but analysis shows that it is not only part of the equation, but a very important component and tool -a means to EU's end.[1032a]

Notwithstanding, the approach of the EU is not always considered as ground-breaking but rather pragmatic and nuanced. Preserving arbitration for investment disputes, even if embellished and revamped, is one example, especially considering that other global actors are pulling the plug. Is pragmatism though a bad thing or -as the word suggests- is it a realist approach, able to give better results in the long run? The EU has taken other intrepid decisions, despite challenges, clearly leading the way amongst the developed nations in this new area of competence. For instance, in the context of the EU-China investment agreement (CAI), the EU had at first adopted a seemingly lenient, 'wait and see', strategy towards conjecture on forced labour in the Xinjiang region causing negative comments against it. The text of the draft agreement adopted at the end of 2020 included China's commitment to make 'continued and sustained efforts on its own initiative to pursue ratification of the fundamental ILO Conventions'. People hastened to accuse the EU of putting its purely economic interest above human rights. Although the EU was then portrayed as advocating that it would be unreasonable to expect an investment treaty to be criticised due to social issues,[1033] only a couple of months later, amidst deterioration of the situation, the EU was the first actor in the world scene to adopt sanctions against China, putting the CAI into deep trouble.[1034]

[1032a] Tobias Gehrke developed the 'geoeconomic toolbox' to reach the goal of the Open, Sustainable and Assertive Trade. According to his analysis the istruments the EU shall use are the International Procurement Instrument, the creation of the Chief Trade Enforcement Officer, Distortive Foreign Subsidies and the Anti-Coercion Instrument
See T.Gehrke (n 866b) and Gonçalo Castro Ribeiro, Geoeconomic Awakening: The European Union's Trade and Investment Policy Shift toward Open Strategic Autonomy' (2023) 3 EU Diplomacy Paper College of Europe < https://www.coleurope.eu/sites/default/files/research-paper/EDP%203%202023_%20Castro%20Ribeiro.pdf> accessed 23 March 2023

[1033] 'EU-China Investment Agreement: EU Negotiator Defends Forced Labour Provisions Amid Criticism' (*Business & Human Rights Resource* Centre, 27 January 2021 <https://www.business-humanrights.org/en/latest-news/eu-china-investment-agreement-eu-negotiator-defends-forced-labour-provisions-amid-criticism/> accessed 5 October 2022.

[1034] 'Xinjiang sanctions are sign of western resolve on China' *Financial Times* (24 March 2021) <https://www.ft.com/content/bb8215e2-2332-41d7-b468-94018ffa7a63> accessed 23 March 2023.

Concluding remarks

In this research I sought to examine if the EU has been able to assert its position as responsible leader on the international plane by implementing the objectives enshrined in articles 3 and 21 TEU within the context of the new EU foreign investment policy under article 207 TFEU, and more specifically by negotiating and concluding mega-FTAs which include investment protection chapters.

To that end, my introductory chapter delineated the contours of this hypothesis from a legal and theoretical perspective. I explained my vision of European integration, which is paradoxically shared between two rivalry grand theories, namely neofunctionalism and intergovernmentalism. As appealing as the context of functional spill-overs seems, I argue that there is an effective division between low and high politics, with a quasi-unsurmountable barrier for further integration in the areas of high politics. The latter are doomed by an eternal intergovernmental approach unless some unexpected external factor ignites another mechanism in this direction. Supranational bodies have a very constrained say in that process. They do however have an important role in other areas which, although classified as 'low politics', are becoming ever more important. Sustainable development is the protagonist in this category. After going through a brief overview of the concept of sustainable development, I prove that it is not a notion of normative value either in international or in Union law. It is however an important objective, which I opt to employ as a general overarching purpose.

Regarding international investment law, I attempt to provide an overview of its main characteristics and to explain the various issues which have led to its 'legitimacy crisis.' The primary purpose of international investment agreements (IIAs) has been to protect the investors' interests. IIAs have been traditionally short documents, intended to offer vast protection to investors. They included vague provisions very open to interpretation, which is traditionally bestowed not to judges but to arbitrators adjudicating in *ad hoc* private tribunal designed for investor-state

dispute resolution (ISDS) that has none of the safeguards of a public judiciary. Questionable outcomes of past investment arbitration awards which resulted into severely sanctioning states for regulating to protect public interests, have questioned the legitimacy of ISDS and international investment law overall. Indeed, based on our examination, there are various problematic points as to the compatibility of traditional international investment law and sustainable development objectives. The identified issues that must be addressed to resolve this situation are epitomized into matters that are destined to preserve the rule of law, namely: the need to ensure host state's policy space, requirements for further legal certainty and solutions over the lack of independence and impartiality of the bodies competent to resolve investor-state disputes.

The question I explore subsequently concerns the relevance of these issues for EU law and polity. First of all, the Union legal order is inextricably linked to pursuing sustainable development throughout a wide matrix of integrated and sectoral policies. The Union is founded on values and principles, including the rule of law, the safeguard of human rights and the protection of the environment. All actions in all areas need to respect these underlying values and objectives, not only internally but also in the EU's relations with the rest of the world.

In the context of external relations, although the EU has never succeeded to build an effective and persuasive position in terms of 'traditional' foreign policy, it has however a very powerful stance in various other areas with significant external elements. When there is a war, it is not the EU's voice that matters, but Germany's, France's or Italy's. When however, there is a trade or a climate deal under negotiation, Germany, France, Italy and so on, disappear behind the large umbrella of the EU which speaks in one voice through the European Commission. The Common Foreign and Security Policy (CFSP) therefore has brought very limited results despite its long history. On the contrary, other policies with very significant external elements, namely CCP and sustainable development including environment, climate and

social/labour rights, are very developed as to EU powers and actions. This did not occur overnight. It is the result of political will and the competence expansion through treaty amendments but has also emerged from the legal route of implied external powers. These powers, combined with the principled value-based approach of the EU in its internal policies, but also in external relations under articles 3 and 21 TEU, have resulted into an augmented proactive presence of the EU in international trade, environment, and climate fora.

As the Union has been formally given exclusive power over FDI in the context of external trade, it was only a matter of time to address this new competence under the prism of the general pursuit of responsible world actor. The ground was extremely fertile too in an environment of public hostility over international investment agreements legitimacy. The EU soon became one of the global protagonists towards reforming international investment law within the competent UN body (UNCITRAL) while negotiating and concluding new investment agreements with third parties. The EU is also a pioneer in introducing Sustainable Investment Facilitation Agreements with African partners. Compared with like-minded big powers – sovereign states- of the world, which have been concluding investment agreements for a long time, the EU is acting on an equal footing and, in many instances, towards a rules-based investment policy. Some of the EU's initiatives are said to be less bold than other countries.' The EU's suggested reforms have not eased public concerns totally. This is an unfair stance. EU reforms are sometimes more balanced and pragmatic than reforms included in agreements of other countries. Since we are only at the starting line for a new regime of international investment agreements, it remains to be seen which the more fruitful approach is. Besides, it will all come down to enforcement. Pausing a bit, patience and sangfroid would be therefore highly advised. Besides international investment law and arbitration are a European 'invention'. Their much-anticipated reform may as well be European.

***

This page is left intentionally blank

List of references | bibliography

Aagaard Nielsen Kurt, Bo Elling, Maria Figueroa and Erling Jelsøe (eds), *A New Agenda for Sustainability* (Routledge 2010)

Adefolake O. Adeyeye, *Corporate Social Responsibility of Multinational Corporations in Developing* Countries (CUP 2012)

Adelle Camilla, Katja Biedenkopf and Diarmuid Torney, *European Union External Environmental Policy Rules, Regulation and Governance Beyond Borders* (Palgrave 2018)

Aguilar Alvarez Guillermo and Michael Reisman (eds), *The Reasons Requirement in International Investment Arbitration* (Martinus Nijhoff 2008)

Ahlborn Christiane, 'The EU and Foreign investment – Exclusive Competence, Shared Responsibility?' (2015) 6 KLRI Journal of Law and Legislation 6

Allen David, Reinhart Rummel and Wolfgang Wessels (eds), *European Political Cooperation: Towards a Foreign Policy for Western Europe* (Butterworth Scientific 1982)

Alschner Wolfgang, 'The Global Laboratory of Investment Law Reform Alternatives' (2018) 112 AJIL Unbound 237

Alschner Wolfgang, 'The Impact of Investment Arbitration on Investment Treaty Design: Myth versus Reality' (2017) 42 Yale Journal of International Law

Andenas Mads, Luca Pantaleo, Matthew Happold and Cristina Contartese (eds), *EU External Action in International Economic Law: Recent Trends and Developments* (Springer 2020)

Andenas Mads, Luca Pantaleo, Matthew Happold and Cristina Contartese (eds), *EU External Action in International Economic Law* (Springer 2020)

Angelos Dimopoulos, *EU Foreign Investment Law* (OUP 2011)

Ankersmit Laurens, 'Opinion 2/15 and the Future of Mixity and ISDS' (*European Law Blog,* 18 May 2017) <https://europeanlawblog.eu/2017/05/18/opinion-215-and-the-future-of-mixity-and-isds/>

Ankersmit Laurens, 'Requiring 'unity first' in Relations with Third States: the Court Continues ERTA-doctrine in Opinion 1/13' (*European Law Blog,* 20 October 2014) <https://europeanlawblog.eu/2014/10/20/requiring-unity-first-in-relations-with-third-states-the-court-continues-erta-doctrine-in-opinion-113/>

Aspremont d', Jean, Tarcisio Gazzini, André Nollkaemper and Wouter Werner, *International Law as a Profession* (CUP 2017)

Azoulai Loic, 'Integration through Law and Us' (2016) 14 International Journal of Constitutional Law 449

Baciu Cornelia-Adriana and Alexandra Friede, 'The EU's CFSP/CSDP in 2030: Towards an alternative vision of power?' (2020) 28 New Perspectives 398

Barral Virginie 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23 The European Journal of International Law 378

Baumgartner Jorun, *Treaty Shopping in International Investment Law* (OUP 2016)

Benz, Arthur and Zimmer, Christina, 'The EU's competences: The "vertical" perspective on the multilevel system' (2010) 5 Living Reviews in European Governance 1

Bhattachary C.B., Sankar Sen and Daniel Korschun 'Leveraging Corporate Responsibility: The Stakeholder Route to Maximizing Business and Social Value' (CUP 2011)

Bilal San, Bernard Hoekman (eds), *Perspectives on the Soft Power of EU Trade Policy* (CEPR Press 2019) 177-179 <http://respect.eui.eu/wp-content/uploads/sites/6/2019/11/Chapter18_Bluth_TTIP.pdf>

Biloune v. Ghana Investments Centre (Award of 27 October 1989 and 30 June 1990) (1994) XIX Yearbook Commercial Arbitration 11

Biondi Andrea, Piet Eeckhout and Stephanie Ripley, *EU Law After Lisbon* (OUP 2012)

Bjorklund Andrea K. (ed), *Yearbook in International Investment Law and Policy 2014-2015* (OUP 2016)

Blanke Hermann-Josef and Stelio Mangiameli (eds), *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action* (Springer 2012)

Blanke Hermann-Josef, 'The Protection of Fundamental Rights in Europe' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action* (Springer 2012)

Bogdandy von Armin, 'The European constitution and European identity: Text and subtext of the Treaty establishing a Constitution for Europe' (2005) 3 International Journal of Constitutional Law 295

Bogojevic Sanja and Rosemary Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Bloomsbury 2018)

Böhme Bianca, 'Recent Efforts to Curb Investment Treaty Shopping: How Effective Are They? (2021) 38 Journal of International Arbitration 511

Borchert Ingo, Paola Conconi, Mattia Di Ubaldo and Cristina Herghelegiu, 'The Pursuit of Non-Trade Policy Objectives in EU Trade Policy' (2021) World Trade Review 1

Brabandere, De Eric and Tarcisio Gazzini (eds), *Foreign Investment in the Energy Sector Balancing Private and Public Interests* (Brill 2014)

Brown Chester and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011)

Brown Julia, International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?' (2013) 3 Western Journal of Legal Studies 1

Bungenberg Marc and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement'* (Springer 2018)

Bungenberg Marc and Christoph Herrmann (eds), *European Yearbook of International Economic Law: Common Commercial Policy after Lisbon* (Springer 2013)

Bungenberg Marc,, Markus Krajewski, Christian Tams, Jörg Philipp Terhechte, and Andreas R. Ziegler (eds), *European Yearbook of International Economic Law 2017* (Springer 2017)

Burley Anne-Marie and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47(1) International Organization 41

Burns Charlotte, Peter Eckersley and Paul Tobin 'EU Environmental Policy in Times of Crisis' (2020) 27(1) Journal of European Public Policy <https://www.tandfonline.com/doi/full/10.1080/13501763.2018.1561741>

Butler Graham and Ramses A. Wessel, 'Happy birthday ERTA! 50 Years of the Implied External Powers Doctrine in EU Law' (*European Law Blog,* 31 March 2021) <https://europeanlawblog.eu/2021/03/31/happy-birthday-erta-50-years-of-the-implied-external-powers-doctrine-in-eu-law/>

Calamita Jansen N., 'The Making of Europe's International Investment Policy: Uncertain First Steps' (2012) 39 Legal Issues of Economic Integration 301

Cappelletti Mauro, Seccombe Monica and Weiler Joseph H. (eds), *Integration Through Law: Europe and the American Federal Experience, Vol 1: Methods, Tools and Institutions, Book 1: A Political, Legal and Economic Overview* (Walter de Gruyter 1986)

Cardwell Paul James, 'The Legalisation of European Union Foreign Policy and the Use of Sanctions' (2015) 17 Cambridge Yearbook of European Legal Studies 287

Cass Deborah Z., *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (OUP 2005)

Castro Ribeiro Gonçalo, Geoeconomic Awakening: The European Union's Trade and Investment Policy Shift toward Open Strategic Autonomy' (2023) 3 EU Diplomacy Paper College of Europe <https://www.coleurope.eu/sites/default/files/research-paper/EDP%203%202023_%20Castro%20Ribeiro.pdf>

Chamon Merijn and Govaere Inge (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill 2020)

Chamon Merijn, 'Implied Exclusive Powers in the ECJ'S post-Lisbon Jurisprudence: the Continued Development of the ERTA Doctrine' (2018) 55 Common Market Law Review 1101

Cherubini Piergiorgio, 'The Role and the Interactions of the European Council and the Council in the Common Foreign and Security Policy' in H-J.Blanke and S.Mangiameli Blanke Hermann-Josef and Stelio Mangiameli (eds), The European Union after Lisbon: Constitutional Basis, Economic Order and External Action (Springer 2012)

Chrysomallis Michalis, 'The response of the Court of Justice of the EU on the setback in the application of the rule of law in Member States: the judgment of Associação Sindical dos Juízes Portugueses' (2019) Digesta 1 <http://www.digestaonline.gr/pdfs/Digesta%202019/Chris_2019.pdf> [in Greek]

Tony Cole, Ilias Bantekas, Federico Ferrett Christine Riefa, Barbara Alicja Warwas, Pietro Ortolani, 'Legal Instruments and Practice of Arbitration in the EU' (2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2637305>

Comelli Michele and Federica Di Camillo, 'Exploring the Principle of Coherence in EU External Action: A Legal Analysis' (2010) 45 The International Spectator 152

Commission, 'Europe in the World – Some Practical Proposals for Greater Coherence, Effectiveness and Visibility' Communication COM(2006) 278 final

Commission, 'Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration (Partnership Framework on Migration)' (Communication) COM (2016) 385 final

Conconi Paola, Cristina Herghelegiu, and Laura Puccio, 'Legal and economic analysis of the incentives to negotiate mixed agreements' <http://respect.eui.eu/wp-content/uploads/sites/6/2020/03/CHP.pdf>

Cordonier Segger Marie-Claire, 'Inspiration for Integration: Interpreting International Trade and Investment Accords for Sustainable Development' (2017) 3 Canadian Journal of Comparative and Contemporary Law 159

Cordonier Segger Marie-Claire, 'Sustainability and Corporate Accountability Regimes: Implementing the Johannesburg Summit Agenda' (2003) 12(3) RECIEL 295

Cordonier Segger Marie-Claire, and H.E. Judge C.G. Weeramantry (eds), *Sustainable Development Principles in the Decisions of International Courts and Tribunals* (Routledge 2017)

Cordonier Segger Marie-Claire, Ashfaq Khalfan and Salim Nakjavani, 'Weaving the rules for our Common Future: Principles, Practices and Prospects for International Sustainable Development Law' (Centre for International Sustainable Development Law 2002) <http://www.cisdl.org/wtr/pdf/WeavingtheRulesOct2002.pdf>

Corfee-Morlot Jan, Virginie Marchal and others, 'Towards a Green Investment Policy Framework: The Case of Low-Carbon, Climate-Resilient Infrastructure' (2012) OECD Environment Working Papers No 48 <https://www.oecd.org/env/cc/Towards%20a%20Green%20Investment%20Policy%20Framework_consultation%20draft%2018-06-2012.pdf>

Costas Lapavitsas, *The Left Case Against the EU* (Polity Press 2018)

Council of the European Union, 'Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the establishment of a Civilian CSDP Compact' (19 November 2018) 14305/18 <https://www.consilium.europa.eu/media/37027/st14305-en18.pdf>

Council of the European Union, 'Civilian CSDP Compact 2021: Council adopts Conclusions' (*Council of the European Union*, 7 December 2020) <https://www.consilium.europa.eu/en/press/press-releases/2020/12/07/civilian-csdp-compact-2021-council-adopts-conclusions>

Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528 [2021] OJ L102/14

Council Decision (EU) 2017/1346 of 17 July 2017 on the position to be adopted, on behalf of the European Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention as regards compliance case ACCC/C/2008/32 [2017] OJ L189/15

Council Decision 1999/629/EC, ECSC, Euratom appointing the Secretary-General, High Representative for the Common Foreign and Security Policy, of the Council of the European Union [1999] OJ L248/33 *(High Representative Decision)*

Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L71/1

Council, 'Brussels European Council 14 December 2007' (Presidency Conclusions) 16616/1/07 REV 1 CONCL 3

Council of the EU, 'Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes' (20 March 2018) 12981/17 <https://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>

Council of the European Union, 'Conclusions on a Comprehensive European International Investment Policy: 3041st Foreign Affairs Council Meeting (Luxembourg, 25 October 2010)' <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf>

Craig Paul and de Búrca Gráinne (eds), *The Evolution of EU law* (3rd edn, OUP 2021)

Craig, Paul and de Búrca, Gráinne, *EU Law: Texts, Cases and Materials* (7th edn, OUP 2020)

Craig, Paul, 'Integration, Democracy and Legitimacy' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (3rd edn, OUP 2021)

Crowther David Shahla Seifi and Abdul Moyeen (eds), *The Goals of Sustainable Development Responsibility and Governance* (Springer 2019)

Danisi Carmelo, 'Taking the 'Union' out of 'EU': The EU-Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States under International Law' (*EJIL Talk,* 20 April 2017) <https://www.ejiltalk.org/taking-the-union-out-of-eu-the-eu-turkey-statement-on-the-syrian-refugee-crisis-as-an-agreement-between-states-under-international-law/>

De Schutter Olivier, Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations', (Background paper to the seminar organized in collaboration with the Office of the UN High Commissioner for Human

Rights within the mandate of prof. J. Ruggie, the Special Representative to the UN Secretary General on the issue of human rights and transnational corporations and other enterprises, Brussels, 3-4 November 2006 <https://media.business-humanrights.org/media/documents/df31ea6e492084e26ac4c08affcf51389695fead.pdf>

Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting within the Council on 22 November 1973 on the program of action of the European Communities on the environment [1973] OJ C112/1

Delreux Tom, 'EU Actorness, Cohesiveness and Effectiveness in Environmental Affairs' (2014) 21 Journal of European Public Policy 1017

Delreux Tom, 'The EU in International Environmental Negotiations' in Andrew Jordan and Viviane Gravey (eds), *Environmental Policy in the EU: Actors, Institutions and Processes* (4th edn, Routledge 2021) 259

Di Federico Giacomo (ed), The EU Charter of Fundamental Rights (Springer 2011)

Dimitropoulos Georgios, 'National Sovereignty and International Investment Law: Sovereignty Reassertion and Prospects of Reform' (2020) 21 Journal of World Investment and Trade 71

Dimitropoulos Georgios, 'Comparative and international investment law: Prospects for Reform – an Introduction' (2020) 21 Journal of World Investment and Trade 1

Dimopoulos Angelos, 'Achmea: The Principle of Autonomy and its Implications for intra and extra-EU BITs' (*EJIL Talk!,* 27 March 2018) <https://www.ejiltalk.org/achmea-the-principle-of-autonomy-and-its-implications-for-intra-and-extra-eu-bits/>

Dimopoulos Angelos, 'The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy' (2010) 15 European Foreign Affairs Review 153

Dinan Desmond, 'The Single European Act: Revitalising European Integration' in Finn Laursen (ed), *Designing the European Union. From Paris to Lisbon* (Springer 2012)

Directive 2009/28/EC on the promotion of the use of energy from renewable sources read in the light of the principles of legal certainty, the protection of legitimate expectations, sincere cooperation, and effectiveness [2009] OJ L140/16

Directive 2014/95/EU of the European Parliament and of 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 Text with EEA relevance [2014] OJ L 330/1

Dolzer R. and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012)

Douglas Zachary, Joost Pauwelyn and Jorge Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 154

Drieskens Edith, 'Golden or gilded jubilee? A research agenda for actorness' (2017) 24(10) Journal of European Public Policy 1534

Dupuy Pierre - Marie and Jorge Viñuales (eds), *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (CUP 2013)

Durán Gracia Marín and Elisa Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart Publishing 2012)

Elgström Ole and Michael Smith (eds), *The European Union's Roles in International Politics* (Routledge 2006)

Elkins, Andrew T Guzman, and Beth A Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960 – 2000' (2006) 60 International Organization 811

Elsig Manfred, *The EU's Common Commercial Policy: Institutions, Interests and Ideas* (Springer 2018)

Emerson Michael and Eva Gross (eds), *Evaluating the EU's crisis missions in the Balkans* (CEPS 2007)

European Commission, 'A Balanced and Progressive Trade Policy to Harness Globalisation' (Communication) COM(2017) 492 final

European Commission, 'Trade Policy Review - An Open, Sustainable and Assertive Trade Policy' (Communication) COM(2021) 66 final

European Commission GSP+: Report on the status of ratification and recommendations by monitoring bodies concerning conventions of annex III of the Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences (the GSP regulation) in the countries that were granted the Special incentive arrangement for sustainable development and good governance (GSP+) by Commission Decision of 21 December 2005' (Communication) COM(2008) 656 final.

European Commission, '2003 Environment Policy Review - Consolidating the environmental pillar of sustainable development' (Communication) COM(2003) 745 final

European Commission, '6 Commission Priorities for 2019-2024' (*European Commission)* <https://ec.europa.eu/info/strategy/priorities-2019-2024_en>

European Commission, 'A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development' (Communication) COM (2001) 264 final

European Commission, 'Communication on a New Pact on Migration and Asylum' COM (2020) 609 final

European Commission, 'European Commission services' position paper on the Sustainability Impact Assessment in support of the negotiations on an Investment Protection Agreement between the European Union and the Republic of the Union of Myanmar' (2017) <https://trade.ec.europa.eu/doclib/docs/2017/april/tradoc_155500.doc.pdf>

European Commission, 'Mainstreaming sustainable development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development' (Communication) COM(2009) 400 final

European Commission, 'Report on Implementation and Enforcement of EU Trade Agreements' COM(2021) 654 final

European Commission, 'Strategic Plan 2020-2024: Directorate-General for Trade' < https://commission.europa.eu/system/files/2020-10/trade_sp_2020_2024_en.pdf>

European Commission, 'The European Green Deal' (Communication) COM(2019) 640 final

European Commission, 'Towards a Comprehensive European International Investment Policy' (Communication) COM(2010) 343 final

European Commission, 'Towards a Sustainable Europe by 2030' (Reflection paper) COM (2019) 22 final.

European Commission, 'Trade for All: Towards a more Responsible Trade and Investment Policy' (Communication) COM(2015) 497 final <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0497&from=en>

European Commission, 'Work Program 2021: A Union of vitality in a world of fragility' (Communication) COM(2020) 690 final

European Commission, Proposal for a decision on a General Union Environment Action Programme to 2030' COM(2020) 652 final

European Commission, *Report on Implementation of EU Free Trade Agreements 1 January – 31st December 2017* (Publications Office of the European Union 2018)

European Parliament, 'European Parliament Legislative Resolution of 10 March 2022 on the Proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2030' (COM(2020)0652 – C9-0329/2020 – 2020/0300(COD) <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0067_EN.html>

European Parliament, 'Report with recommendations to the Commission on corporate due diligence and corporate accountability 2020/2129(INL)' (11 February 2021) A9-0018/2021 <https://www.europarl.europa.eu/doceo/document/A-9-2021-0018_EN.pdf>

European Parliament, *Implementation of the Common Foreign and Security Policy – annual report 2020* (20 January 2021) 2020/2206(INI)

Eurostat 'Sustainable development in the European Union: Monitoring report on progress towards the SDGs in an EU context' (Publications Office of the European Union 2020)

Eurostat, 'Sustainable Development in the European Union: 2015 Monitoring Report of the EU Sustainable Development Strategy' (2015) <https://ec.europa.eu/eurostat/documents/3217494/6975281/KS-GT-15-001-EN-N.pdf/5a20c781-e6e4-4695-b33d-9f502a30383f?t=1441801933000>

Fierro Elena, *The EU's Approach to Human Rights Conditionality in Practice* (Kluwer Law International 2003)

Fitzmaurice Malgosia, Olufemi Elias, and Panos Merkouris (eds) *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhøff 2010)

Fraser Cameron, 'The Convention and CFSP/ESDP' in Martin Holland (ed), *Common Foreign and Security Policy*: *The first ten years* (2nd edn, Continuum 2004)

Friedrich Erlbacher, 'Recent Case Law on External Competences of the European Union: How Member States Can Embrace Their Own Treaty' (2017) T.M.C. Asser Institute for International and European Law, CLEER Paper Series 2017-02 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3120550>

Fugazza Marco and Claudia Trentini, 'Empirical Insights on Market Access and Foreign Direct Investment' (2014) UNCTAD Policy Issues on International Trade and Commodities Study Series No.63 <https://unctad.org/system/files/official-document/itcdtab67_en.pdf>

Futrell J William, 'Defining Sustainable Development Law' (2004) 19 Natural Resources & Environment 9

Gantz David A. and Sergio Puig, 'The Scorecard of the USMCA Protocol of Amendment' (*EJIL talk*, 23 December 2019) <https://www.ejiltalk.org/the-scorecard-of-the-usmca-protocol-of-amendment/>

Gaukrodger David, 'The Future of Investment Treaties – Possible Directions' (2021) OECD Working Papers on International Investment 2021/03 <https://www.oecd-ilibrary.org/finance-and-investment/the-future-of-investment-treaties-possible-directions_946c3970-en>

Gazzini Tarcisio, 'Authentic (or Authoritative) Interpretation of Investment Treaties by the Treaty Parties' (*EJIL Talk,* 17 August 2020) <https://www.ejiltalk.org/authentic-or-authoritative-interpretation-of-investment-treaties-by-the-treaty-parties/>

Gehring Thomas, Sebastian Oberthür and Marc Mühleck, 'European Union Actorness in International Institutions: Why the EU is Recognized as an Actor in some International Institutions, but not in Others' (2013) 51 Journal of Common Market Studies 849

Gehrke Tobias, 'EU Open Strategic Autonomy and the Trappings of Geoeconomics' (2022) 27 European Foreign Affairs Review 61

Gnesotto Nicole (ed), *European Security and Defense Policy: the First Five Years* (Institute for Security Studies - EU 2004)

Gordon Kathryn and Joachim Pohl, 'Environmental Concerns in International Investment Agreements: A Survey' (2011) OECD Working Papers on International Investment 2011/1 <https://www.oecd.org/investment/investment-policy/WP-2011_1.pdf>

Gordon Kathryn, Joachim Pohl and Marie Bouchard, 'Investment Treaty Law, Sustainable Development and Responsible Business Conduct: a Fact Finding Survey' (2014) OECD

Working Papers on International Investment 2014/1 https://www.oecd-<ilibrary.org/docserver/5jz0xvgx1zlt-en.pdf?expires=1619691238&id=id&accname=guest&checksum=32B1F079ABDA7D83D147D4A014A5ECC1>

de Búrca Gráinne and Bruno de Witte (eds), *Social Rights in Europe* (OUP 2005)

Groen Lisanne and Arne Niemann, 'EU Actorness and Effectiveness under Political Pressure at the Copenhagen Climate Change Negotiations' (2012) Mainz Papers on International and European Politics Paper No.1 <https://internationale.politik.uni-mainz.de/files/2018/12/Groen_Niemann_2012.pdf>

Haas Ernst, *The Uniting of Europe: Political, Social, and Economic Forces 1950-1957* (Stanford University Press 1958)

Hallak Issam, 'Multilateral Investment Court Overview of the Reform Proposals and Prospects' (European Parliamentary Research Service 2020) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf>

Hallward-Driemeier Mary, ''Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit ... and They Could Bite' (2003) World Bank Policy Research Working Paper No.3121 <https://openknowledge.worldbank.org/handle/10986/18118>

Hawkins Benjamin and Chris Holden, 'A Corporate Veto on Health Policy? Global Constitutionalism and Investor-State Dispute Settlement' (2016) 41 Journal of Health Politics, Policy and Law 969

Hendel Clifford J. and María Antonia Pérez, 'The Past, Present and Possible Future of the Spanish Renewable Energy Arbitration Saga' (2018) 31 NYBA International Law Practicum 96

Hendrik Fahner Johannes, 'In Dubio Mitius: Advancing Clarity and Modesty in Treaty Interpretation' (2021) 32 European Journal of International Law 835

Hilf Meinhard, 'ECJ's Opinion 1/94 on the WTO - No Surprise, but Wise? ' (1995) 6 EJIL 245

Hindelang Steffen and Markus Krajewski (eds), *Shifting paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP2016)

Hippler Bello Judith and John R. Schmertz, Jr., 'Opinion 1/94, Community Competence to Conclude Certain International Agreements' (1995) 89 American Journal of International Law 772

Hix Simon, *The Political System of the European Union* (2nd edn, Palgrave 2005)

Hodson Dermot and Puetter Uwe, 'The European Union in Disequilibrium: new Intergovernmentalism, Postfunctionalism and Integration Theory in the post-Maastricht Period' (2019) 26 Journal of European Public Policy 1153

Hoffmann Stanley, *The European Sisyphus: Essays on Europe* (Westview Press 1995)

Holdgaard Rass, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses* (Wolters Kluwer 2008)

Holland Martin (ed), *The Future of European Political Cooperation: Essays on Theory and Practice* (St. Martin's Press 1991)

Hooghe Liesbet and Gary Marks, 'Grand theories of European integration in the twenty-first century' (2019) 26 Journal of European Public Policy 1113

Hornkohl Lena, 'The Extraterritorial Application of Statutes and Regulations in EU Law' (2022) MPILux Research Paper 2022(1) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4036688>

IBA, 'Practice Rules and Guidelines: Alternative Dispute Resolution' (*IBA)* <https://www.ibanet.org/resources>

Ifestos Panayiotis, 'European political cooperation (EPC): Its evolution from 1970 to 1986, and the single European act' 11 (1987) Journal of European Integration 47

ILC, Report of the International Law Commission on the Work of its 72nd Session (26 April–4 June and 5 July–6 August 2021) UN Doc A/76/10

(European Parliament – Committee on) Institutional Affairs, *Selection of texts concerning institutional matters of the Community from 1950-1982* (European Parliament 1982)

Ippolito Francesca, Maria Eugenia Bartoloni and Massimo Condinanzi, (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2019)

James Michel, 'A Report of the CSIS Program on Prosperity and Development: The Rule of Law and Sustainable Development' (2020) CSIS Program on Prosperity and Development <https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/200626_Michel_RuleOfLaw_Web.pdf>

Jans Jan H., 'Stop the Integration Principle?' (2011) 33 Fordham International Law Journal 1533

Johnson Lise, Jesse Coleman, Brooke Güven, Lisa E. Sachs, 'Clearing the Path: Withdrawal of Consent and Termination as next Steps for Reforming International Investment Law' (2018) Columbia Center for Sustainable Development Papers <https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/154>

Johnson Lise, Lisa Sachs and Nathan Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (2019) 1 Columbian Journal of Transnational Law 58

Jordan Andrew and Viviane Gravey (eds), *Environmental Policy in the EU: Actors, Institutions and Processes* (4th edn, Routledge 2021)

Kalicki Jean and Suzana Medeiros, 'Fair, Equitable and Ambiguous: What Is Fair and Equitable Treatment in International Investment Law?' (2007) 22 ICSID Review - Foreign Investment Law Journal 24

Kallmer Jonathan, 'CFSP – a good idea that's destined to fail' *Politico* (Brussels, 26 March 2003) <https://www.politico.eu/article/cfsp-a-good-idea-thats-destined-to-fail/>

Karjalainen Katja, Tornberg Iina and Pursiainen Aleksi (eds), *International Actors and the Formation of Laws* (Springer 2022)

Kaufmann-Kohler Gabrielle and Michele Potestà, *Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options* (Springer 2020)

Kellembauer Manuel, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A commentary* (OUP 2019)

Kenig-Witkowska Maria, 'The Concept of Sustainable Development in the European Union Policy and Law' (2017) 1 Journal of Comparative Urban Law and Policy 1

Khan Irene, 'How Can the Rule of Law Advance Sustainable Development in a Troubled and Turbulent World?' (2017) 13(2) McGill International Journal of sustainable Development Law and Policy 211

Kibugi Robert, D Andrew Wardell, Marie-Claire Cordonier Segger, Caroline Haywood and Renée Gift, 'Enabling legal frameworks for sustainable land-use investments in Tanzania. Legal assessment report' (2015) Center for International Forestry Research Working Paper <https://www.idlo.int/sites/default/files/pdfs/publications/Enabling%20legal%20frameworks%20for%20sustainable%20land-use%20investments%20in%20Tanzania-%20Legal%20assessment%20report.pdf>

Kilpatrick Claire and Joanne Scott (eds), *Contemporary Challenges to EU Legality* (OUP 2020)

Kingston Suzanne (ed), *European Perspectives on Environmental Law and Governance* (Routledge 2013)

Kjos Hege Elisabeth, *Applicable Law in Investor–State Arbitration: The Interplay Between National and International Law* (OUP 2013)

Klausegger Christian, Peter Klein et al (eds), *Austrian Arbitration Yearbook 2010* (MAnzsche Verlags- unde Universitätsbuchhandlung, C.H. Beck, Stämpfli Verlag 2010)

Klein Nadia and Wolfgang Wessels. 'CFSP Progress or Decline after Lisbon?' (2013) 18 European Foreign Affairs Review 449

Koen Lenaerts, 'Some Thoughts about the Interaction between Judges and Politicians' (1992) 1 University of Chicago Legal Forum <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1111&context=uclf>

Kokott Juliane and Christoph Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' (2012) 23 EJIL 1015

Koutrakos Panos (ed), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar Publishing 2011)

Koutrakos Panos, *Trade, Foreign Policy and Defense in EU Constitutional Law* (Hart Publishing 2001)

Koutsokosta Efi, 'EU too Severe on Greece Over Debt Crisis, former Commission President Jean-Claude Juncker Concedes' *Euronews* (15 September 2022) <https://www.euronews.com/2022/09/15/eu-too-severe-on-greece-over-debt-crisis-former-commission-president-jean-claude-juncker-c>

Krajewski Piotr, 'Always as an End, never as a Means? The EU's Commitment to Free Trade and its Limits' (*European Law blog*, 12 January 2022) <https://europeanlawblog.eu/2022/01/17/always-as-an-end-never-as-a-means-the-eus-commitment-to-free-trade-and-its-limits/>

Krajewski, Markus Kristel Tonstad and Franziska Wohltmann, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?' (2021) 6 Business and Human Rights Journal 550

Krasner Stephen D. (ed), I*nternational Regimes* (Cornell University Press 1983)

Kryvoi Yarik, 'Three Dimensions of Inequality in International Investment Law' (BIICL 2020) <https://www.biicl.org/documents/117_tackling-inequalities-international-investment_law.pdf>

Kube Vivian, The European Union's External Human Rights Commitment: What is the Legal Value of Article 21 TEU?' (2016) EUI Department of Law Research Paper No 2016/10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2753155>

Kuhn Theresa, 'Grand theories of European integration revisited: does identity politics shape the course of European integration?' (2019) 26 Journal of European Public Policy 1213

Kuijper Pieter Jan, Jan Wouters, Frank Hoffmeister, Geert de Baere and Thomas Ramopoulos, *The Law of EU External Relations Cases, Materials, and Commentary on the EU as an International Legal Actor* (2nd edn, OUP 2015)

Kulovesi Kati and Marise Cremona, 'The Evolution of EU competences in the field of external relations and its impact on environmental governance policies' (2013) Transworld Working Paper 17 <https://www.iai.it/sites/default/files/TW_WP_17.pdf>

Larouer Christophe J., 'In the Name of Sovereignty? The Battle Over *In Dubio Mitius* Inside and Outside the Courts' (2009) Cornell Law School Inter-University Graduate Student Conference Papers, Paper 22 <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1050&context=lps_clacp>

Lavranos, Nikos, 'Have Member State BITs Changed since 2013?' (*Practical Law Arbitration Blog,* 11 May 2020) <http://arbitrationblog.practicallaw.com/have-member-state-bits-changed-since-2013/>

Leczykiewicz Dorota, 'Common Commercial Policy: The Expanding Competence of the European Union in the Area of International Trade' 6 (2011) German Law Journal 1674

Lesher James H., 'Saphêneia in Aristotle: 'Clarity', 'Precision', and 'Knowledge' (2010) 43 Apeiron 143

Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre'

Lütz Susanne, Leeg Tobias, Otto Daniel, and Woyames Dreher Vincent, *The European Union as a Global Actor: Trade, Finance and Climate Policy* (Springer 2021)

Maduro Miguel Poiares and Loïc Azoulai (eds), *The Past and Future of EU Law The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010)

Maduro, Miguel Poiares and Wind, Marlene (eds), *The Transformation of Europe: Twenty-Five Years On* (CUP 2017)

Mann Howard, 'International Investment Agreements, Business and Human Rights: Key Issues and Opportunities' (International Institute for Sustainable Development 2008) <www.iisd.org/index.php/system/files/publications/iia_business_human_rights.pdf >

Marc Fenwick and Stefan Wrbka (eds), *Legal Certainty in a Contemporary Context* (Springer 2016)

May Christopher and Adam Winchester (eds), *Handbook of the Rule of Law* (Edward Elgar 2018)

McAllister David, 'Speech on the CFSP report' (European Parliament plenary session, Strasbourg 19 January 2021) <https://www.david-mcallister.de/david-mcallister-plenary-speech-on-the-cfsp-report/>

Mestral de, Armand (ed.), *Second Thoughts: Investor State Arbitration between Developed Democracies* (McGill-Queen's University Press 2017)

Meunier Sophie and Kathleen McNamara (eds), *Making History: European Integration and Institutional Change at Fifty (The State of the European Union)* (vol 8, OUP 2007) 267

Meunier Sophie, Kalypso Nicolaïdis, 'Who speaks for Europe? The delegation of Trade authority to the EU' (1999) 37 JCMS 477

Michael M. Bechtel, Thomas Bernauer and Reto Meyer, 'The Green Side of Protectionism: Environmental Concerns and three Facets of Trade Policy Preferences (2011) 19(5) Review of International Political Economy 837

Miles Kate (ed), *Research Handbook on Environment and Investment Law* (Edward Elgar 2019)

Miles Kate, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013)

Missiroli Antonio, 'CFSP, Defence and Flexibility' (2000) Institute for Security Studies, Chaillot Paper 38 <https://www.iss.europa.eu/sites/default/files/EUISSFiles/cp038e.pdf>

Moloo Rachim and Alex Khachaturian, 'The Compliance with the Law Requirement in International Investment Law' (2011) 34 Fordham International Law Journal 1473

Moravcsik Andrew, *The Choice for Europe: Social Purpose and State Power: From Messina to Maastricht* (Cornell University Press 1998)

Mumme Stephen P., 'NAFTA and Environment: The North American Free Trade Agreement's impact on the trinational environment remains controversial' (*Foreign Policy in Focus,* 1 October1999) <https://fpif.org/nafta_and_environment/>

Nakanishi Yumiko (ed), Contemporary Issues in Environmental Law: The EU and Japan (Springer 2016)

Neil Winn and Christopher Lord, *EU Foreign Policy beyond the Nation-State* (Palgrave 2001)

Niemann Arne, 'EU external trade and the Treaty of Lisbon: a revised neofunctionalist approach' (2013) 9 Journal of Contemporary European Research 633

Nuttall Simon, 'The CFSP at Maastricht: Old Friend or New Enemy?' (European Union Studies Association, Biennial Conference, 29 May-1 June 1997) <http://aei.pitt.edu/2690/>

O'Brien Claire Methven, *Business and Human Rights: A handbook for Legal Practitioners* (Council of Europe 2018)

Oberthür Sebastian O and Marc Pallemaerts (eds), *The New climate Policies of the European Union: Internal Legislation and Climate Diplomacy* (VUB Press 2009)

OECD, *OECS Guidelines for Multinational Enterprises* (OECD Publishing 2011) <https://www.oecd.org/daf/inv/mne/48004323.pdf>

OECD, 'FDI in Figures: Global FDI flows rebound to exceed pre-pandemic levels' (October 2021) <https://www.oecd.org/investment/investment-policy/FDI-in-Figures-October-2021.pdf>

OHCHR <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>

Øhrgaard Jakob C., 'Less than supranational, more than intergovernmental. European Political Cooperation and the Dynamics of Intergovernmental Integration' (1997) 26 Millennium Journal of International Studies 1

Orlando Emanuela, 'The Evolution of EU Policy and Law in the Environmental Field: Achievements and Current Challenges' (2013) 21 Transworld Working Paper 21 <https://www.iai.it/sites/default/files/TW_WP_21.pdf>

Ovádek Michal, 'The Rule of Law in the EU: Many Ways Forward but Only One Way to Stand Still?' (2018) 4 Journal of European Integration 495

Papadopoulou Lina, Pernice Ingolf and Weiler Joseph H.H. (eds), *Legitimacy Issues of the European Union in the Face of Crisis. Dimitris Tsatsos in memoriam* (Nomos 2017)

Patel, Kiran Klaus, 'Widening and deepening? Recent advances in European Integration History' (2019) 64 Neue Polit. Lit. 327 <https://link.springer.com/article/10.1007%2Fs42520-019-00105-4

Paulsson Jan, 'Arbitration without Privity' (1995) 10 Foreign Investment Law Journal 232; M.Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015)

Paunio Elina, *Legal Certainty in Multilingual EU Law* (Ashgate 2013)

Peeters Marjan and Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar 2020)

Peterson John and Helen Sjursen, *A Common Foreign policy for Europe? Competing visions of the CFSP* (Routledge 1998)

Peterson Luke Eric, 'Bilateral Investment Treaties and Development Policy-Making' (International Institute for Sustainable Development 2004) <www.iisd.org/system/files/publications/trade_bits.pdf>

Petsche Markus, 'Restrictive Interpretation of Investment Treaties: A Critical Analysis of Arbitral Case Law' (2020) 37 Journal of International Arbitration 1

Pfetsch Frank R., 'Power in International Negotiations: Symmetry and Asymmetry' (2011) 2 Négociations 39

Pollack Marc A. and Aladstair Young (eds), *Policy-making in the European* Union (6th edn, OUP 2010)

Qiang Ren *Public Interests in International Investment Law: Balancing Protection for Investor and Environment* (Cambridge Scholars Publishing 2018)

Ranjah Zia Ullah, Andrew Willcocks, 'Jurisdiction of Arbitral Tribunals' (*Jus Mundi*, 25 January 2022) <https://jusmundi.com/en/document/wiki/en-jurisdiction-of-arbitral-tribunals>

Recommendation CM/Rec(2016)3 of the Committee of Ministers to member states on human rights and business (*Council of Europe*) <https://edoc.coe.int/en/fundamental-freedoms/7302-human-rights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states.html>

Regelsberger Elfriede, 'European Political Cooperation (EPC)' *Oxford Research Encyclopedia of Politics* (2020)

Regulation (EC) No 1272/2008 of 16 December 2008 on the Classification, Labelling and Packaging of substances and mixtures (CLP) [2008] OJ L 353/1

Regulation (EC) No 1907/2006 of 18 December 2006 on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) [2006] OJ L396/1 (now amended)

Regulation (EU) 2017/821 of the European Parliament and of 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 from conflict-affected and high-risk areas [2017] OJ L 130/1

Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L351/40

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 EU market [2010] OJ L 295/23

Reid Emily, *Balancing Human Rights, Environmental Protection and International Trade. Lessons from the EU experience* (Bloomsbury 2017)

Reinisch August, 'The EU on the Investment Path - *Quo Vadis Europe*? The Future of EU BITs and other Investment Agreements' (2014) 12 Santa Clara Journal of International Law 111

Reynoso Isabella, 'Spain's Renewable Energy Saga: Lessons for international investment law and sustainable development' (*Investment Treaty News*, 27 June 2019) <https://www.iisd.org/itn/en/2019/06/27/spains-renewable-energy-saga-lessons-for-international-investment-law-and-sustainable-development-isabella-reynoso/>

Rhinard Mark and Sjöstedt Gunnar, 'The EU as a Global Actor: A new conceptualization four decades after 'actorness' (2019) UI Paper No 6 <https://www.ui.se/english/publications/ui-publications/2019/the-eu-as-a-global-actor-a-new-conceptualisation-five-decades-after-actorness/>

Richard Yann and Van Hamme Gilles, 'L'Union européenne, un acteur des relations internationales' (2013) 42(1) L'espace Géographique 15 <https://www.cairn-int.info/journal-espace-geographique-2013-1-page-15.htm?WT.tsrc=cairnPdf>

Riera Marta and María Iborra, 'Corporate social irresponsibility: Review and Conceptual Boundaries' (2017) 26 European Journal of Management and Business Economics 146

Rio Declaration on Environment and Development, UN Conference on Environment and Development, 'Report of the United Nations Conference on Environment and Development' (Rio de Janeiro, 3-14 June 1992)' (14 June 1992) UN DOC A/CONF.151/26/Rev.l (Vol. l), Annex I (12 August 1992) UN Doc A/CONF.151/26 (Vol.I);

Risse-Kappen Thomas, 'Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union' (1996) 34 Journal of Common Market Studies 53

Rogers Catherine and Roger Alford (eds.) *Developments in Investment Arbitration* (OUP 2009)

Rosas Allan, 'EU External Relations: Exclusive Competence Revisited' (2015) 38 Fordham International Law Journal 1072

Ruggie John Gerard and Tamaryn Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges' (2015) 22 The Brown Journal of World Affairs 99

Sacerdoti Giorgio, Pia Acconci, Mara Valenti and Anna de Luca (eds), *General Interests of Host States in International Investment Law* (CUP 2014)

Sadeleer De Nicolas, *EU Environmental Law and the Internal Market* (OUP 2014)

Salacuse Jeswald W, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 The International Lawyer 655

Šaltinytė Loreta, 'Jurisdiction of the European Court of Justice over Issues Relating to the Common Foreign and Security Policy under the Lisbon Treaty' (2010) 1 Jurisprudencija/ Jurisprudence 261

Sands Philippe, Jacqueline Peel, Adriana Fabra, and Ruth MacKenzie, *Principles of International Environmental Law* (4th edn, CUP 2018)

Schaus Malorie G.E., 'Reviving the WTO and rules-based trading' (2022) CEPS Policy Insights No 2022-01 <https://www.ceps.eu/wp-content/uploads/2022/01/PI2022-01_WTO-and-rules-based-trading.pdf>

Schepel Harm, 'From Conflicts-Rules to Field Preemption: Achmea and the Relationship between EU Law and International Investment Law and Arbitration' (*European Law Blog,* 23 March 2018) <https://europeanlawblog.eu/2018/03/23/from-conflicts-rules-to-field-preemption-achmea-and-the-relationship-between-eu-law-and-international-investment-law-and-arbitration/>

Schill Stephan W., 'Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward' (2015) International Centre for Trade and Sustainable Development/World Economic Forum https://e15initiative.org/publications/reforming-investor-state-dispute-settlement-isds-conceptual-framework-and-options-for-the-way-forward/

Schmitter Philippe C. and Zoe Lefkofridi, 'Neo-Functionalism as a Theory of Disintegration' ('European Disintegration - A Blind Spot of Integration Theory?', 22nd CES Conference, Paris, 8-10 July 2015) <https://www.eui.eu/Documents/DepartmentsCentres/SPS/Profiles/Schmitter/Neo-F-Disintegration.final.pdf>

Schmitter Philippe C., "Neo-neofuntionalism' (2002) European University Institute <https://www.eui.eu/Documents/DepartmentsCentres/SPS/Profiles/Schmitter/NeoNeoFunctionalismRev.pdf>

Schreuer Christoph, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2014) 1(1) McGill Journal of Dispute Resolution <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2520501>

Schrijver Nico and Friedl Weiss (eds), *International Law and Sustainable Development: Principles and Practice* (Brill 2004)

Schütze Robert, *European Constitutional Law* (CUP 2018)

Severino, Rodolfo C., 'The ASEAN way and the rule of law - Address' (International Law Conference on ASEAN Legal Systems and Regional Integration, University of Malaya, Kuala Lumpur, 3 September 2001) <https://asean.org/?static_post=the-asean-way-and-the-rule-of-law>

Sjöstedt Gunnar, 'The External Role of the European Community' (Saxon House 1977)

Smith Michael, 'Does the flag follow trade? 'Politicisation' and the Emergence of a European Foreign Policy' in John Peterson and Helen Sjursen, *A Common Foreign policy for Europe? Competing visions of the CFSP* (Routledge 1998) 80

Smith Michael, 'Still Rooted in Maastricht: EU External Relations as a Third-generation Hybrid' 34 (2012)

Smith Michael, 'The EU as an International Actor' in Jeremy Richardson (ed), *European Union: Power and Policy*-making (3rd edn, Routledge 2001) 280

Smith Michael, 'The framing of European foreign and security policy: towards a postmodern policy framework?' (2003) 10 Journal of Public Policy 556

Smith Michael, 'Conforming to Europe: The Domestic Impact of EU Foreign Policy Coordination' (2000) 7 Journal of European Public Policy 613

Sornarajah Muthucumaraswamy, *The International Law on Foreign Investment* (3rd edn, CUP 2017)

Spence David and Jozef Bátora (eds), *The European External Action Service European Diplomacy Post-Westphalia* (Macmillan 2015)

Staatsblad van het Koninkrijk der Nederlanden (24 October 2019) <https://zoek.officielebekendmakingen.nl/stb-2019-401.html>

Stein Eric, 'European Political Cooperation (EPC) as a Component of the European Foreign Affairs System' 4 (1983) 43(1) ZaöRV 49

Sustainable Development Solutions Network, *Getting Started with the Sustainable Development Goals: A Guide for stakeholders* (2015) <https://sustainabledevelopment.un.org/content/documents/2217Getting%20started.pd>

The Norwegian 'Act *Lov om virksomheters arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold*) Prop 150 L (2020–2021)

Tienhaara Kyla, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7 Transnational Environmental Law 229

Tienhaara Kyla, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (CUP 2009)

Tietje Christian and Freya Baetens, 'The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership' (2014) <https://www.eumonitor.eu/9353000/1/j4nvgs5kjg27kof_j9vvik7m1c3gyxp/vjn8exgvufya/f=/blg378683.pdf>

Titi Catharine, 'International Investment Law and the European Union: Towards a New Generation of International Investment Agreements' (2015) 26 EJIL 639

Tkachuk Artsiom, 'Common Commercial Policy of the European Union and its significance to the world trade. Transatlantic Trade and Investment Partnership case study' (2016) 10 RIE 481

Tonra Ben and Christiansen Thomas (eds), *Rethinking European Union Foreign Policy* (Manchester University Press 2018)

Tonra Ben, 'Constructing the Common Foreign and Security Policy: The Utility of a Cognitive Approach' (2003) 42 Journal of Common Market Studies 731

Treaty for the Protection of Investment, Federal Republic of Germany and Pakistan, (25 November 25 1959) 457 UNTS 23

Treves Tullio, Francesco Seatzu and Seline Trevisanut (eds), *Foreign Investment, International Law and Common Concerns* (Routledge 2014)

Tsakonas Panayotis, 'EU-Turkey Relations and the Migration Challenge: What is the Way Forward?' (2021) ELIAMEP Working papers (*ELIAMEP*) <https://www.eliamep.gr/en/publication/%CE%B5%CF%85%CF%81%CF%89%CF%84%CE%BF%CF%85%CF%81%CE%BA%CE%B9%CE%BA%CE%AD%CF%82-%CF%83%CF%87%CE%AD%CF%83%CE%B5%CE%B9%CF%82-%CE%BA%CE%B1%CE%B9-%CE%B7-%CF%80%CF%81%CF%8C%CE%BA%CE%BB%CE%B7%CF%83%CE%B7/>

UN Conference on Environment and Development, 'Report of the United Nations Conference on Environment and Development' (Rio de Janeiro, 3-14 June 1992)' (14 June 1992) UN DOC A/CONF.151/26/Rev.l (Vol. l) (Agenda 21) <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>

UN World Summit on Sustainable Development, 'Report of the World Summit on Sustainable Development (Johannesburg, South Africa, 26 August-4 September 2002)' UN Doc A/CONF.199/20 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N02/636/93/PDF/N0263693.pdf?OpenElement>

UN Conference on Sustainable Development (Rio+20), 'Report of the United Nations Conference on Sustainable Development (Rio de Janeiro, Brazil, 20-22 June 2012)' UN Doc A/CONF.216/16

UN, 'Transforming our world: the 2030 Agenda for Sustainable Development' (25 September 2015) UN Doc A/RES/70/1

UNGA, 'The Future we Want' (11 September 2012) UN Doc A/RES/66/288

UNCTAD, 'Making FDI Work for Sustainable Development' (2004) UNCTAD/DITC/TED/9 <https://unctad.org/system/files/official-document/ditcted9_en.pdf>

UNCTAD, 'Working Group III: Investor-State Dispute Settlement Reform (45th Session, 27-31 March 2023, New York)' <https://uncitral.un.org/working_groups/3/investor-state>

UNCTAD, *UNCTAD, Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking (United Nations Publication 2007)* <https://unctad.org/system/files/official-document/iteiia20065_en.pdf>

UNCTAD, *World Investment Report 2021: Investing in Sustainable Recovery* (UN Publications 2021) <https://unctad.org/system/files/official-document/wir2021_en.pdf>

UNGA, 'Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights

and Transnational Corporations and Other Business Enterprises, John Ruggie' (7 April 2007) A/HRC/8/5.

UN OHCHR, Guiding Principles on Business and Human Rights: Implementing the 'Repect, Protect, and Remedy' Framework (2011) HR/PUB/11/4 <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf>

UN, United Nations and the rule of law <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>

Van Hees Sander R.W., 'Sustainable Development in the EU: Redefining and Operationalizing the Concept' (2014) 10(2) Utrecht Law Review 60

Van Meerbeeck Jérémie, 'The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust' (2016) 41 European Law Review 275

Vanhoonacker Sophie, 'From Maastricht to Amsterdam: Was it Worth the Journey for CFSP?' (1997) <https://www.researchgate.net/publication/29991520_From_Maastricht_to_Amsterdam_Was_it_Worth_the_Journey_for_CFSP>

Velluti Samantha (ed), *The Role of the EU in the Promotion of Human Rights and International Labour Standards in its External Trade Relations* (Springer 2020)

Viñuales Jorge E., 'Sustainable development' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd edn, OUP 2021)

Viriyo Aggarin, 'Principle of Sustainable Development in International Environmental Law' (2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2133771>

Waibel Michael et al (eds), *The Backlash Against Investment Arbitration. Perceptions and Reality* (Kluwer 2012)

Weatherill Stephen 'Competence Creep and Competence Control' (2004) 23 Yearbook of European Law

Weatherill Stephen, *Law and Values in the European Union* (OUP 2016)

Webb Yackee Jason, 'Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties' (2008) 33 Brooklyn Journal of International Law 405

Weiler Joseph H, 'The Community System: the Dual Character of Supranationalism' (1981) Yearbook of European Law 267

Weiler, Joseph H, 'The transformation of Europe' (1991) 100 The Yale Law Journal 2403

Wenhua Shan and Sheng Zhang, 'The Treaty of Lisbon: Half Way toward a Common Investment Policy (2010) 21 European Journal of International Law 1049

Wessel Ramses and Joris Larik (eds), 'EU External Relations Law: Text, Cases and Materials' (2nd edn, Hart Publishing 2020)

Wessels Wolfgang and Bopp Franziska, 'The Institutional Architecture of CFSP after the Lisbon Treaty – Constitutional breakthrough or challenges ahead?' (2008) CHALLENGE Research Paper No 10 <https://www.ceps.eu/ceps-publications/institutional-architecture-cfsp-after-lisbon-treaty-constitutional-breakthrough-or/>

Wiener Antje, Börzel Tanja A. and Risse Thomas (eds), *European integration theory* (3rd edn, OUP 2019)

Woolcock Stephen *The EU Approach to International Investment Policy after the Lisbon Treaty* (European Parliament 2010) <https://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/433854/EXPO-INTA_ET%282010%29433854_EN.pdf>

Woolcock Stephen, *European Union Economic Diplomacy: The role of the EU in External Economic Relations* (Ashgate 2012)

World Commission on Environment and Development and Gro Harlem Brundtland, 'Our Common Future' (1987) <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>

Wouters Jan, Hans Bruyninckx, Sudeshna Basu and Simon Schunz (eds), *The European Union and Multilateral Governance: Assessing EU Participation in United Nations Human Rights and Environmental Fora* (Palgrave McMillan 2012)

WTO, 'Mainstreaming trade to attain the Sustainable Development Goals' (2018) <https://www.wto.org/english/res_e/booksp_e/sdg_e.pdf>

Yannaca-Small Catherine and Lahra Liberti, 'Definition of Investor and Investment in International Investment Agreements' in *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD Publishing 2008) 46.

Yen Trinh Hai, The Interpretation of Investment Treaties (Brill 2014)

Yotova Rumiana, 'Compliance with Domestic Law: An Implied Condition in Treaties Conferring Rights and Protections on Foreign Nationals and Their Property?' (2018) University of Cambridge Faculty of Law Research Paper No.43/2018 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3199812>

Yundini Husni Djamaluddin, 'The Concept of the Principles of Legal Certainty, Benefit and Justice in Environmental Management' (2021) 5 IJRISS 632

Zerk, Jennifer, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (CUP 2006)