Founded in 2008, the Centre for the Law of EU External Relations (CLEER) is the first authoritative research interface between academia and practice in the field of the Union's external relations. CLEER serves as a leading forum for debate on the role of the EU in the world, but its most distinguishing feature lies in its in-house research capacity, complemented by an extensive network of partner institutes throughout Europe.

Goals

- To carry out state-of-the-art research leading to offer solutions to the challenges facing the EU in the world today.
- To achieve high standards of academic excellence and maintain unqualified independence.
- To provide a forum for discussion among all stakeholders in the EU external policy process.
- To build a collaborative network of researchers and practitioners across the whole of Europe.
- To disseminate our findings and views through a regular flow of publications and public events.

Assets

- Complete independence to set its own research priorities and freedom from any outside influence.
- A growing pan-European network, comprising research institutes and individual experts and practitioners who extend CLEER's outreach, provide knowledge and practical experience and act as a sounding board for the utility and feasibility of CLEER's findings and proposals.

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CLEER's research programme centres on the EU's contribution in enhancing global stability and prosperity and is carried out along the following transversal topics:

- the reception of international norms in the EU legal order;
- the projection of EU norms and impact on the development of international law;
- coherence in EU foreign and security policies;
- consistency and effectiveness of EU external policies.

CLEER's research focuses primarily on four cross-cutting issues:

- the fight against illegal immigration and crime;
- the protection and promotion of economic and financial interests;
- the protection of the environment, climate and energy;
- the ability to provide military security.

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CLEER carries out its research via the T.M.C. Asser Institute's own in-house research programme and through a collaborative research network centred around the active participation of all Dutch universities and involving an expanding group of other highly reputable institutes and specialists in Europe.

Activities

CLEER organises a variety of activities and special events, involving its members, partners and other stakeholders in the debate at national, EU- and international level.

CLEER's funding is obtained from a variety of sources, including the T.M.C. Asser Instituut, project research, foundation grants, conferences fees, publication sales and grants from the European Commission.

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T.M.C. Asser Instituut inter-university research centre

CLEER is hosted by the T.M.C. Asser Instituut,
Schimmelpennincklaan 20-22
2517 JN, The Hague, The Netherlands

E-mail: info@cleer.eu
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CLEER WORKING PAPERS **2013/5**

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CONTENTS

LIST OF TERMS AND ABBREVIATIONS

AAU	Assigned Amount Units
ADP	Ad hoc Durban Platform for Enhanced Action
ALBA	Bolivarian Alliance for the Americas
AOSIS	Alliance of Small Island States
AWG-KP	Ad hoc Working Group on Further Commitments under the Kyoto Protocol
AWG-LCA	Ad hoc Working Group on Long-term Cooperative Action
BASIC	Brazil, South Africa, India and China
BRICS	The Brazil, Russia, India, China and South Africa group
BSCI	Business Social Compliance Initiative
CBD	Convention on Biological Diversity
CBRD	Common but differentiated responsibilities
CCPM	Common and Coordinated Policies and Measures
CDM	Clean Development Mechanism
CERs	Certified Emission Reductions
CfRN	Coalition for Rainforest Nations
CITES	Convention on International Trade in Endangered Species
CMP	Conference of the Parties serving as the Meeting of the Parties to the Protocol
COP	Conference of the Parties
DLUC	Direct land-use change
EBRD	European Bank for Reconstruction and Development
EC	European Community
ECAC	European Civil Aviation Conference
ECCP	European Climate Change Programme
EIB	European Investment Bank
EIG	Environmental Integrity Group
ERUs	Emission Reduction Units
ESS	European Security Strategy
ETS	Emissions Trading System
EU	European Union
EU ETS	European Emissions Trading Scheme
EUA	European Union Allowances
EUAs	EU Allowances
FSC	Forest Stewardship Council
GHG	Greenhouse gas
IBSA	India, Brazil and South Africa Group
ICAO	International Civil Aviation Organization
ILAC	Latin American and Caribbean Initiative for Sustainable Development
ILO	International Labour Organization
ILUC	Indirect land-use change

IPCC	Intergovernmental Panel on Climate Change
JI	Joint Implementation
LDCs	Least Developed Countries
LULUCF	Land-use, Land-use Change and Forestry
MBMs	Market Based Mechanisms
MEA	Multilateral Environmental Agreement
MSC	Marine Stewardship Council
NASA	National Aeronautics and Space Administration
NATO	North Atlantic Treaty Organization
NGOs	Non-Governmental Organisations
OAU	Organization of African Unity
OECD	Organization for Economic Co-operation and Development
PIC	Prior Informed Consent
POP	Persistent Organic Pollutants
QELRCs	Quantified Emission Limitation and Reduction Commitments
RED	Renewable Energy Directive
REIO	Regional Economic Integration Organization
RSPO	Roundtable on Sustainable Palm Oil
SBI	Subsidiary Body for Implementation
SBSTA	Subsidiary Body for Scientific and Technological Advice
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNECE	United Nations Economic Commission for Europe
UNFCCC	United Nations Framework Convention on Climate Change
WWF	World Wide Fund for Nature
VPA	Voluntary Partnership Agreement

LIST OF CONTRIBUTORS

Dr. Stavros Afionis is Postdoctoral Research Fellow at the Sustainability Research Institute of the School of Earth and Environment.

Dr. Wybe Th. Douma is Senior Research Fellow EU Law & International Trade Law at the T.M.C. Asser Instituut and member of the CLEER Governing Board.

Suzy Huber is legal expert on emissions trading schemes. Prior to joining Climate Focus, Suzy was a legal policy advisor at the Dutch Ministry of Infrastructure and the Environment.

Prof. Dr. Ludwig Krämer is director of ClientEarth's European Union Aarhus Centre. German judge from 1969 to 2004, he served on secondment as the European Commission's Chief Counsel on the environment, working with the Commission for three decades.

Dr. Reinier de Man works as an international consultant for sustainable business development.

Dr. Leonardo Massai is Lecturer at the Catholic University of Lille.

Steffen van der Velde, LL.M. is Research Fellow at the T.M.C. Asser Instituut.

INTRODUCTION
THE EUROPEAN UNION AS A GLOBAL SUSTAINABLE DEVELOPMENT ROLE MODEL?

Wybe Th. Douma and Steffen van der Velde[1]

Un grand pouvoir implique une grande responsabilité

Voltaire[2]

Over the course of the last four decades, the European Union has developed an extensive European environmental policy. A multitude of directives and regulations ensures that EU Member States protect Europe's environment and the health of European citizens. At times, the interests of third states are taken into account as well.

EU environmental policy started off without an explicit legal basis for protection of Europe's own environmental interests, let alone those of third states, in the European treaties. It was, however, deemed necessary to complement economic development with mitigation of negative side-effects for the environment and human health, and ensure the proper functioning of the common market through harmonisation, notably in areas where the more progressive Member States were adopting unilateral environmental measures.[3]

The Single European Act entered into force on 1 July 1987, inserting an environmental title in the European Economic Community Treaty.[4] One provision stipulated that in preparing its action relating to the environment, the Community shall take account of the economic and social development of the Community as a whole and the balanced development of its regions.[5] Care for the environment of non-Member States did not feature explicitly in the EEC Treaty. The Treaty did explain that the Community could cooperate with third countries and relevant international organisations, and conclude international agreements with third parties.[6]

In spite of the absence of any explicit mentioning of the protection of the environment of third states in the European Treaties, in practice some of the

[1] The authors thank the European Union for the opportunity provided under its Lifelong Learning Programme. A special word of thanks is furthermore directed to the CLEER interns Malgorzata Moch and Panagiota Makri for their editorial assistance.

[2] Œuvres de Voltaire, Volume 48, Lefèvre, 1832, unverified. Compare Louis François Sosthène de La Rochefoucauld-Doudeauville, who stated: «Le plus digne du pouvoir est celui qui en connaît la responsabilité», *Livre des pensées*, Paris, 1835, p. 121.

[3] For instance, Directive 85/339 on containers of liquids for human consumption, *OJ* 1985, L 176, 6.7.1985, p. 18–21 came about notably because Denmark had introduced a mandatory deposit, return and re-use system for bottles and a ban on the use of cans.

[4] Articles 130R, 130S and 130T EEC (now Article 191, 192 and 193 TFEU).

[5] Article 130R (3)(iv) EEC (now Article 191(3) TFEU).

[6] Article 130R (5) EEC.

European legislation did take this factor into account. The contribution by **Ludwig Krämer** identifies numerous examples of this, and their shortcomings. It took until 1 December 2009 before the protection of the environment of third states, and their sustainable development, became an official objective of the European Union. On that date, the Treaty of Lisbon entered into force, changing the European Treaties once more. From that moment on, the EU is called upon to not only protect its own environment, but also the environment of non-Member States. What is more, Article 3(5) TEU calls upon the EU, in its relations with the wider world, to contribute to the sustainable development of the Earth, and especially developing countries. In this respect, article 21(2)(e) TEU stipulates that the EU 'shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations in order to (…) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty'.[7] This Working Paper aims at shedding light on some general and some more specific aspects of these very ambitious objectives. It forms a part of the CLEER project entitled 'EU Commercial power Europe: advancing societal and environmental goals through trade relations'. The project aims at investigating the modalities that the EU applies in its trade relations with third countries in order to achieve certain non-trade goals. The project encompassed two seminars and already resulted in one CLEER Working Paper entitled 'Linking trade and non-commercial interests: the EU as a global role model?' which dealt with interests of a non-environmental nature like human rights.[8] The present CLEER Working Paper forms the final publication in this project and focuses on environmental and sustainable development interests that the EU pursues, notably through its trade relationship with third countries. It specifically builds on the second seminar that took place on 19 April 2013 at the T.M.C. Asser Instituut in The Hague, entitled 'EU environmental norms and third countries: the EU as a global role model?' That seminar and this Working Paper benefitted from the insights of the contributing scholars and practitioners, some of whom with a lengthy experience in advancing environmental policy objectives. This certainly holds true for the two persons that kicked off the seminar and whose contributions form the first two substantial chapters of this Working Paper.

Ludwig Krämer raises provocative questions where it concerns product standards applied only to products placed on the EU market. Indeed, current EU practices are hardly reconcilable with the self-imposed EU goals of promoting sustainable development and protection of the environment not only of the EU's own territory, but also in third countries and especially in developing

[7] Other aspects of the Treaty of Lisbon changes and external competence for EU environmental policy featured in M. Klamert, 'New conferral or old confusion? The perils of making implied competences explicit and the example of the external competences for environmental policy', CLEER Working Paper 2011/8, (The Hague, 2011), available at<http://www.asser.nl/default.aspx?site_id=26&level1=14467&level2=14468&level3=&textid=39615>.

[8] T. Takács *et al.* (eds.), 'Linking trade and non-commercial interests: the EU as a global role model?', CLEER WP 2013/4, (The Hague, 2013), available at <http://www.asser.nl/Default.aspx?site_id=26&level1=14467&level2=14468>.

countries. Surprisingly enough, the EU's *own* environment would also benefit from an approach whereby the EU would impose its standards on products, irrespective of whether these are destined to be put on the EU's internal market or are heading to third countries. The EU norms regarding greenhouse gas emissions for cars form a clear example in this respect. As Krämer points out, the strict norms to limit these emissions only apply to cars marketed in the EU itself. Hence, if EU-produced cars are exported to third countries they do not need to meet these standards. Because CO_2 emissions in third countries also affect the global climate, it would be in the EU's own interest to impose its strict norms on all cars, marketed in the EU or elsewhere. Continuing to make a distinction is running counter to the EU's own environmental protection objectives. Besides the self-interest of the EU, the health of non-EU citizens, their environment and their sustainable development are to be considered as well. In that respect, it is noted that if a product is banned in the EU for human health or environmental reasons, in all likelihood it is also best not to be put on the market of third countries and especially not if these are developing countries. However, at present the EU bans the use of certain chemicals inside the EU, but not the export of the same chemicals. It can be added that the chemicals that caused the death of 23 Indian schoolchildren in July 2013[9] are among the chemicals the use of which has been banned in the EU, but production and export are allowed if prior consent from the importing country was obtained.[10] Krämer concludes that for such banned or restricted products, the Prior Informed Consent (PIC) procedure is to be replaced by export bans/restrictions with exceptions in cases where a third country requests to receive a particular product.

Where waste is concerned, he touches upon the export of used cars under the guise of second-hand goods – albeit without road worthiness certificates, and e-waste where problems occur when defect computers are exported and disassembled under conditions that endanger the health of workers. On a more general level, the author also advocates EU norms to be applied where daughter companies of EU undertakings operate in third countries. It can be added that there already exist some situations where EU environmental law applies outside the EU, namely when the EBRD, EIB and a number of other financing institutions are involved in projects of a certain magnitude.[11] These institutions

[9] A highly hazardous organophosphorus pesticide called Monocrotophos. See FAO, 'Highly hazardous pesticides should be phased out in developing countries. Tragedy of poisoned school children in India' (30 July 2013), provides another reminder at <http://www.fao.org/news/story/en/item/180968/>. See also <http://en.wikipedia.org/wiki/Bihar_school_meal_poisoning_incident> and <http://en.wikipedia.org/wiki/Monocrotophos>.

[10] Monocrotophos is listed as a dangerous chemical in Regulation (EC) 689/2008 concerning the export and import of dangerous chemicals (*OJ* 2008, L 204, 31.7.2008, p. 1–35) in part 3 of Annex I, which implies that for the export to proceed there must be a positive response in the latest PIC circular, otherwise explicit consent must be obtained. New EU rules will enter into force on 1 March 2014 and will also allow export provided the PIC procedure is applied [Regulation (EU) No 649/2012 concerning the export and import of hazardous chemicals, *OJ* 2012, L 201, 27.7.2012, p. 60–106].

[11] The institutions which have signed the EPE are: The Council of Europe Development Bank; The European Bank for Reconstruction and Development; The European Investment Bank; The

signed the European Principles for the Environment (EPE) which obliges them to ensure that the project, although located outside the EU, observes the EC Treaty guiding environmental principles and the practices and standards of EU environmental legislation.[12] At the CLEER seminar of 19 April 2013, our speaker from the EBRD **Dariusz Prasek** explained how this works out for his institution. Although it was not possible to have that presentation in this Working Paper, we hope to devote a follow-up seminar in 2014 to this fascinating topic.[13]

Krämer points out that the EU went from non-binding voluntary instruments to directives that need to be transposed by Member States into national law, and finally to directly applicable regulations. In his view, the EU should do the same where its relationship with third countries is concerned. In the following chapter, **Reinier de Man** argues that voluntary instruments are of importance where the relationship between the EU and third countries is concerned, though there are limits to what can be achieved through such non-legislative instruments. He explains that voluntary approaches can be set up easier and quicker than international agreements, and in theory are more effective since stakeholders commit themselves to act in a certain manner. At the same time, experience shows that sustainably produced goods under such voluntary regimes do not reach a market penetration percentage of the global markets of more than 20%. Two factors appear to be particularly important in this respect: a lack of global market demand, and a lack of government involvement. De Man describes how governments encompass voluntary initiatives in their legislation, using the Renewable Energy Directive as an example where biofuels are concerned.

It can be added here that indeed, if biofuels are certified to be meeting an approved system of standards, they count towards the mandatory 10% transport fuels target set by the EU. The question whether such legislation is in line with WTO law is not dealt with in this Working Paper, but has been discussed by several other authors elsewhere.[14] Although WTO law allows for unilateral measures imposing requirements regarding production methods for both the importing country and exporting countries, the conditions that need to be met are quite strict. One of the rare cases in which a country was allowed to do so was the Shrimp-turtle case. There, the USA, after adapting its legislation and negotiating a multi- or bilateral solution with shrimp exporting countries in good faith without reaching results, was allowed to demand that such exporting

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Nordic Environment Finance Corporation and The Nordic Investment Bank. See also: <http://www.eib.org/about/press/2006/2006-052-the-european-principles-for-the-environment-adopted-by-five-european-multilateral-financing-institutions-.htm>.

[12] See W. Th. Douma, 'The EBRD and Russia: stimulating European Principles for the Environment', in W.Th. Douma and F. Mucklow (eds.), *Environmental Finance and Socially Responsible Business in Russia: Legal and Practical Trends*, (The Hague, 2010) and D. Ratsiborinskaya, 'European investment projects in third countries: legally green?', 1 *ELNI Review* 2012, p. 1-7, available at <http://www.academia.edu/1618165/European_investment_projects_in_the_third_countries_LEGALLY_GREEN>.

[13] The slides of the presentations delivered at the seminar, including the one by Mr. Prasek, are available online at <http://www.asser.nl/events.aspx?archive=1&id=341&site_id=1>.

[14] See *inter alia* W. Th. Douma, 'Legal aspects of the EU biofuels policy: protection or protectionism?', in 53 *German Yearbook International Law* 2010, p. 371-420.

countries certified that measures were taken to protect highly endangered sea turtles.[15]

Several countries have questioned whether the EU policy on biofuels is in line with WTO law. We had the honour to have Ambassador **Arif Havas Oegroseno** of the Republic of Indonesia speak about aspects of the Indonesian biofuels policy and Indonesia's stance on the EU's biofuels policy at the CLEER seminar,[16] but it was not possible to include his views in this Working Paper. However, we did include **Stavros Afionis** examination of the challenges to the EU-Brazil strategic partnership where aspects of the EU's biofuels policy are concerned. Brazil is one of the EU's strategic partners, a relationship the author discusses in the light of the EU's attachment to bi- and multilateralism. This policy is aimed at recruiting major parties to become responsible powers that subscribe to the multilateral approach and a rule-based international order where challenges regarding peace and security are concerned. Brazil is described as one of the very few developing countries that is deeply committed to multilateralism, sharing this perspective with the EU, and making them almost natural partners. Trade dominates the partnership agenda but environment is also featuring prominently. A promising topic is biofuel as a means to fight climate change, and therefore it is placed high on the EU agenda. Through the Renewable Energy Directive (RED),[17] the EU stimulates the use of 'good biofuels' by insisting that they contribute to the fight against climate change, and not cause more problems than fossil fuels. The use of 'bad biofuels' is discouraged by the EU in various manners, notably by not counting them towards the obligatory 10% transport fuel target to be reached by each EU member state by 2020. What 'bad biofuels' are is (unilaterally) defined by the EU in detail for areas such as peat lands and forests, but not yet for 'highly biodiverse grasslands'. However, biofuels produced in such areas are all considered 'bad' forms of direct land use change (DLUC). The lack of a definition of 'highly biodiverse grasslands' leads to legal uncertainty for Brazil's plans to expand sugarcane plantations to former pastureland, and thus to discontent. The proposal to start tackling indirect land use change (ILUC) – replacing food production by biofuels production, while moving the food production elsewhere – leads to even larger controversies. **Afionis** explains that Brazil recognises ILUC as a legitimate concern, but at the same time claims that uncertainties, high complexity and lack of scientific agreement stand in the way of regulating this aspect of biofuels for the time being. As for the proposed 5% limit on the use of conventional first generation biofuels (which might become 6% if it is up to European Parliament), Brazil stressed that this forms an arbitrary norm that fails to take

[15] US-Shrimp, WT/DS58/AB/RW, 22 October 2001, available at <http://www.wto.org/english/tratop_e/dispu_e/58abrw_e.pdf> .

[16] Dr. Arif Havas Oegroseno, Ambassador of the Republic of Indonesia to the Kingdom of Belgium, the Grand-Duchy of Luxembourg and the European Union, Brussels.

[17] Directive 2009/28 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, *OJ* 2009, L140, p. 6.

differences between sustainable and other biofuels into account.[18] Finding a mutually satisfactory solution to these issues can be discussed under the EU-Brazil strategic partnership that set off in 2007.[19] From the start, promoting sustainable development through enhancing an 'economic, social and environmental partnership' was identified as a field of cooperative action. So-called 'dialogues' on energy and the environment are to contribute to cooperation in this area. It can be added here that at the EU-Brazil Summit in 2011 the two sides agreed to enhance coordination by launching a self-standing 'EU-Brazil Climate Change dialogue'. Such initiatives can be extremely important where multilateral efforts that need consensus of all states involved becomes more and more difficult.[20]

Biofuels produced sustainably can contribute in the fight against climate change. The last two contributions in this Working Paper deal with general and more specific aspects of the EU's efforts in this area. Is the EU a role model here, managing to lead and to instigate imitation by others? It is clear that the EU aspires to be a role model for the rest of the world in the field of environmental protection and sustainable development, and especially where climate change is concerned. This follows from the EU treaties, notably from the amendments brought about by the Treaty of Lisbon. Besides the provisions mentioned at the start of this introduction, the part of Article 191(1) TFEU about 'promoting measures at international level to deal with regional or worldwide environmental problems' was expanded with the addition 'and in particular combating climate change'.[21] Ironically, it could be argued that the EU was more successful in the pre-Lisbon era to convince other states to follow suit in this area.

The 1992 United Nations Framework Convention on Climate Change (UNFCCC) largely came about after, *inter alia*, European efforts, and the ratification and subsequent entry into force of the 1997 Kyoto Protocol was made possible, notably, by the Union's pressure on Russia. Without that country, the Protocol could not have entered into force after the USA under president Bush had decided not to ratify.[22] After the entry into force of Lisbon, obviously, the EU at the Copenhagen summit was less successful.[23] **Leonardo Massai** takes this Copenhagen summit as a point of reference in his extensive contribution. The

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[18] 'Brazil's UNICA Statement on European Parliament Vote Outcome on Biofuels/ILUC', *PR Newswire*, 12 September 2013, available at <http://www.prnewswire.com/news-releases/brazils-unica-statement-on-european-parliament-vote-outcome-on-biofuelsiluc-223316321.html>.

[19] See <http://eeas.europa.eu/brazil/> for further information.

[20] A point also raised by Ludwig Krämer in his contribution. See also <https://ghum.kuleuven.be/ggs/events/2012/05_2012/eubrazilconferencereportfinalv-1.pdf>.

[21] A change used by some to claim that the European Union was expanding its powers in this area through the Treaty of Lisbon, which was of course not true. See W.Th. Douma and H.H.B. Vedder, 'Het Verdrag van Lissabon en het Europees milieubeleid' in R.H. van Ooik and R.A. Wessel (eds.), *De Europese Unie na het Verdrag van Lissabon*, (Deventer, 2010).

[22] See W. Th. Douma *et al*. (eds.), 'Russia and the present and future international climate change regime' in S. Oberthür and M. Pallemaerts (eds.), *The Climate Policies of the European Union: Internal and External Dimensions*, (Brussels, 2009).

[23] P. Meilstrup, 'The runaway summit: the background story of the Danish Presidency of COP15, the UN Climate Change Conference', in N. Hvidt and H. Mouritzen (eds.), *Danish Foreign Policy Yearbook* 2010, Copenhagen, p. 113-135.

UN climate change conference took place there from 7 to 18 December 2009, i.e., a week after the entry into force of the Lisbon Treaty. The preparation of the conference from the side of the EU had taken place under the pre-Lisbon regime, hence the EU input was coordinated by the rotating Presidency. In spite of an early start from the side of the Danes, their efforts to reach the EU goal of a global agreement on new rules for the post-2012 period[24] failed to materialise. Instead, the EU was sidestepped by the USA, China and others.[25] The author explains how the EU performed at subsequent conferences, and sketches the prospects for a more successful approach in the future. Where Massai remarks that the latest scientific data show that the increase of greenhouse gas emissions and the rise of global temperature are closely interrelated, it can be added that at the end of September 2013, new IPCC findings[26] explain that it is 'extremely likely' (indicating 95–100% certainty) that 'human influence has been the dominant cause of the observed warming since the mid-20th century'.[27] Former UNFCCC director Ivo de Boer had expressed confidence that these new findings will stimulate reaching an international agreement on the fight against climate change,[28] though it remains to be seen whether the public opinion will be impressed by a bit more scientific certainty.

One of the most heavily disputed examples of the EU's attempts to commit non-EU Member States to its environmental standards is provided by **Suzy Huber** in her paper dealing with the expansion of the scope of the EU's Emission Trading Scheme (EU ETS) to both EU and non-EU airlines flying to and from Europe. Huber places the dispute between the EU and its counterparts in a historical perspective, and explains how a 'carbon trade war' over this EU decision arose. A description of the subsequent attempts of the EU to de-escalate the dispute is followed by a short analysis of the EU's attempt to be a global role model in international climate change policy. The paper provides a fascinating case study on the question whether the EU can be a global sustainable development role model.

Under the amendments of the ETS Directive that were adopted in 2008,[29] all emissions from aircraft landing or taking off from EU airports had to be offset through the purchase of emissions allowances as of 2012. These obligations apply to EU and non-EU airlines alike. Non-EU countries claimed that charging 'taxes' for the emissions of the entire flight was a breach of their sovereignty. In November 2012, the European Commission proposed a suspension

[24] I.e., after the first commitment period under the Kyoto Protocol.

[25] P. Meilstrup, *supra* note 23.

[26] Working Group I contribution to the IPCC 5th Assessment Report 'Climate Change 2013: The Physical Science Basis', accepted but not approved in detail by the 12th Session of Working Group I and the 36th Session of the IPCC on 26 September 2013 in Stockholm, Sweden.

[27] 'It is extremely likely that human influence has been the dominant cause of the observed warming since the mid-20th century'.

[28] Mr De Boer was speaking at the First European Environmental Law Forum (EELF) conference, *Environmental Law and Energy and Climate Law as instruments to achieve Sustainable Energy*, Groningen, 4 September 2013.

[29] Directive 2008/101/EC of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, *OJ* 2009, L 8, 13.1.2009, p. 3–21.

of the rules for flights from outside the EU in order to allow time for the International Civil Aviation Organization (ICAO) Assembly, held during the autumn of 2013, to reach a global agreement to address aviation emissions. This 'stop the clock' proposal was approved by the European Parliament and the Council in April 2013, in the form of a decision that entered into force with immediate effect.[30]

The controversial decision to include aviation in the EU ETS unilaterally caused such a political backlash in numerous countries that it is uncertain whether it will be applied to non-EU airlines at all, and questionable whether such a route will be chosen again, Huber remarks. Indeed, the original idea to also include shipping in the EU ETS in case no multilateral agreement on fighting CO_2 emissions in that sector could be reached has already been abandoned – in spite of the fact that Directive 2009/29 stipulates that the European Commission is obliged to submit a legislative proposal to introduce an EU Directive on the matter if the International Maritime Organization (IMO) does not adopt internationally binding rules on CO_2 emission reductions for the shipping industry.[31]

Since the writing of Huber's paper, new developments on the topic have taken place. In October 2013, the ICAO Assembly agreed to develop by 2016 a global market-based mechanism for international aviation that can start in 2020. Considering the fact the ICAO had been discussing this topic for years without success, the efforts of the EU did at least bring the issue back on the global agenda, and might lead to an agreement in a few years' time. Until then, countries or groups of countries should – within certain parameters – be able to deploy their own market-based measures. When designing new and implementing existing market based mechanisms (MBMs) for international aviation, ICAO members are called upon to engage in constructive bilateral and/or multilateral consultations and negotiations with other members to reach an agreement. According to some, this means that no country can include another country's airlines in their ETS without a mutual agreement between the two. The EU made a reservation disagreeing with this section of the text of the non-binding resolution.[32] Furthermore, the ICAO Members are asked to grant exemptions to developing countries whose share of international civil aviation activities is below 1% of total revenue ton kilometres of international civil aviation activities (in line with the principle of common but differentiated responsibilities).

As explained at the start of this chapter, the aim of the seminar of 19 April 2013 and this Working Paper is to investigate some of the modalities that the EU applies in its trade relations with third countries in order to achieve non-trade

[30] Decision No 377/2013/EU of 24 April 2013 derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, *OJ* 2013, L 113, 25.4.2013, p. 1–4.

[31] Kassandra, V. Koronakis, 'Shipping polluters avoid paying billions to EU', *NEWEUROPE online,* 8 January 2013, available at <http://www.neurope.eu/article/shipping-avoids-paying-billions-eu-ets>.

[32] Dave Keating, 'ICAO rebukes EU ETS', *EuropeanVoice.com*, 4 October 2013, available at <http://www.europeanvoice.com/article/2013/october/icao-rebukes-eu-ets/78346.aspx>.

goals related to the protection of the environment and promotion of sustainable development. The contributors investigated a wide range of challenges that the EU is facing in working towards realising the ambitious goals set out notably in Article 3(5) and Article 21(2) (e) TEU. They explained that voluntary approaches can be helpful, but do not seem able to achieve more than a modest (20%) market share for sustainable goods. Hence, legally binding norms seem indispensable in order to ensure sustainability more effectively. Combinations of such binding norms with voluntary initiatives are also possible, like the example of the RED's rules that stimulate certified sustainable biofuels shows.

Most contributors agree that the EU can and should step up its efforts to become a global sustainable development role model, since the extent to which external, i.e., non-EU actors accept EU's standards and values is limited, at times. Extending the EU's ETS to non-EU aviation companies, as just explained, brought about a lot of protests – but did help bringing about the recent ICAO decision to strive for a global agreement by 2016 which can become effective in 2020. In a similar vein, the general UN climate change negotiations – notably thanks to EU efforts – also are geared towards the adoption of a 'protocol, legal instrument or agreed outcome with legal force' to come into effect no later than 2015 and be implemented from 2020.

Where multilateral agreements are hard or impossible to achieve, it became clear that some forms of unilateral action could be an alternative without bringing about a risk of violating international trade law, and that they can be beneficial not only to third countries but also to the EU itself. By no longer limiting the scope of norms applicable to goods like cars or dangerous chemicals placed on the EU market only, but instead extending the scope of such norms to goods produced here, the Union could protect its own environment and the environment and human health in countries where such goods are exported to. Other forms of unilateral action do carry the risk of violating international trade law, but risks can be limited by carefully considering the conditions as set out by the WTO Panels and Appellate Body when designing such instruments. In that way, even the inclusion of provisions dealing with indirect land use change (ILUC) in the RED in order to ensure that the carbon footprint of biofuels actually help to fight climate change and not make things worse could be feasible. What is more, the example of EU ETS and aviation might mean that unilateral action can stimulate global agreements – just like unilateral action by EU Member States has been stimulating EU harmonisation at times.

In practice, the EU might be reluctant to adopt binding sustainability standards for imported and exported products for competitiveness reasons. Furthermore, the negative reception of some of the external dimensions of EU environmental policies could create second thoughts when contemplating future attempts to lead the way. In any case, a prerequisite for a more successful external policy in the field of environmental protection and sustainable development seems to be that the EU and its Member States sort out differences of opinion amongst themselves and representational issues in international fora, and speak with one voice.

EXPORTING EU ENVIRONMENTAL PRODUCT STANDARDS TO THIRD COUNTRIES

Ludwig Krämer

1. EU TREATIES AND THE ENVIRONMENT IN THIRD COUNTRIES

The EU Treaties as last amended by the Lisbon Treaty assign to the EU institutions an important role for preserving, protecting and improving the quality of the environment, not only within the EU, but also globally. Doubts might exist in so far as the central provision of Article 3(3) of the Treaty on European Union (TEU) reads:

> '*The Union shall establish an internal market. It shall work for the sustainable development in Europe based on balanced economic growth and price stability, a highly competitive social market economy,* aiming at full employment and *social progress, and a high level of protection and improvement of the quality of the environment'.*

However, other provisions clearly indicate that the environmental protection objectives of the EU are not limited to Europe. Article 3(5) TEU states that the EU, in its relations with the wider world, shall contribute to the 'sustainable development of the Earth'. Article 21(2)(e) TEU takes up these objectives, stipulating that in its external action, the Union shall 'foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty'. It shall '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' (Art. 21(2)(f) TEU). The eradication of poverty is once more fixed as an EU policy goal in Article 208 of the Treaty on the Functioning of the Union (TFEU).

Also the three articles on the EU environmental policy, Articles 191ss TFEU are not limited to environmental measures within the EU itself. Article 191(1) explicitly determines that the EU policy shall contribute to 'promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change'. And neither is the request for a high level of protection limited to the territory of the EU nor are the principles of EU environmental policy that are laid down in Article 191(2) TFEU – precaution and prevention, rectification of environmental damage at source and the polluter-pays principle – limited to an application within the EU boundaries.

2. DIFFICULTIES TO ELABORATE GLOBAL ENVIRONMENTAL AGREEMENTS

There can be little doubt that the making of meaningful global environmental agreements has become, during the last twenty years, more and more difficult. Whether it is a follow-up agreement to the Kyoto Protocol on climate change, an international agreement on forests, provisions on the protection whales, of the Arctic territory, agreements on marine pollution or global standards for cars or chemicals – everywhere the process of standard-setting is blocked. Some of the main reasons for this appear to be the reluctance of the United States to become bound by international agreements. This tendency existed already in the past, but increased over time. The United States neither ratified the Basel Convention on the shipment of waste (1989), nor the Convention on Biological Diversity (1992), they signed but subsequently refused to ratify the Kyoto Protocol (1997) and refused to sign the UNECE Aarhus Convention though they actively participated in the negotiation of that Convention for years. Even agreements where the United States might profit from global standards, such as the Cartagena Protocol on trade in genetically modified organisms or the Stockholm Convention on Persistent Organic Pollutants (POPs) were not ratified. This is not the place to examine the causes and consequences of this attitude. However, as the United States are internationally influential, due to their financial support to many international organisations and, combined with this, the influence on occupying leading or strategic posts inside these organisations, they succeed in obstructing numerous initiatives, such as the elaboration or negotiation of international agreements.

The second big obstacle to global environmental agreements is the attitude of numerous countries which prioritize economic development and growth over the 'luxury problem' of environmental protection, which should only be dealt with at a later stage.[1] Some years ago, this opinion would have applied mainly to developing countries. However, this is no longer correct, since countries such as China, India, Brazil, Mexico and South Korea can no longer be considered as developing countries. Besides that, quite a number of countries hide behind the negative attitude of the United States, but favour the same opposition to global environmental agreements.

This almost complete standstill at international level also has consequences for the European Union. The EU is the only region in the world which has, beyond the boundaries of the nation-States, explicitly laid down the pursuance of objectives of economic growth and environmental protection. Indeed, Article 3(3) TEU, quoted above, asks the EU institutions to pursue both objectives of economic growth and environmental protection, and it is not even possible to derive from the wording of that provision that growth shall prevail over environmental protection. To determine which objective shall have greater weight in daily policy is a political choice – though, admittedly, the present Barroso Com-

[1] Erst kommt das Fressen und dann die Moral (Bert Brecht).

mission (2009 until 2014) is more concerned with 'growth and jobs', than the 'greening' of EU policy.

With regard to the global environment, the EU has the following policy options:

Firstly, the EU could take the lead to negotiate and conclude global environmental agreements. For the reasons mentioned above, though, this path is everything but easy and it must not be forgotten that the EU itself has difficulties to develop global initiatives. At the international scene, the EU does not really succeed to speak and negotiate with one voice. In particular the larger Member States – United Kingdom, France, Germany, and to some extent also Poland, Spain and Italy – prefer to speak up, defend or promote their own positions and have the glamour accompanying such an attitude. The EU Commission is hardly strong enough to integrate the different Member State positions into one common position.

As a consequence, the EU is, in international discussions and negotiations, re-active rather than active: it waits for proposals for other countries which it subsequently discusses. EU Initiatives which engaged the international community in negotiations for a multilateral agreement have been a rarity so far. For all these reasons, it is unlikely that there will be, for a foreseeable time in the future, a strong set of global environmental agreements.

Secondly, the EU could take export-related measures which subordinate the export out of the EU of products to other countries to the compliance with internal EU environmental standards. At present, the international rules stipulate that the buyer should deal with the environmental problems a product might cause – the classical 'caveat emptor' doctrine. For a certain number of hazardous chemicals and waste, international conventions introduced the system of prior informed consent (PIC): the importing State is to be informed of the dangerous properties of a product and of the possible restrictions which exist in this regard in the exporting State. Imports are then only allowed when the importing State, on the basis of that information, has agreed to the import.[2] To what extent, the EU PIC-procedure really helps protecting the environment in third, in particular developing countries, is doubtful, mainly for two reasons:

(a) A chemical or a pesticide that is dangerous for the EU environment – which includes human health – is in most circumstances also dangerous in a third country. Where that product was prohibited in the EU or severely restricted in its use, it should therefore also be prohibited or restricted in countries outside the EU. Asbestos is a good example: what sense can there be to believe that asbestos should be banned within the EU, but that its export should be allowed? In exceptional cases, a product that is prohibited or restricted in use within the EU could be of value in a third country. However, these – presumably very rare – cases cannot justify to apply the PIC-procedure throughout.

[2] See for details, the Basel Convention of 1989 on the control of transboundary movements of hazardous wastes and their disposal and the Rotterdam Convention of 2011 on the prior informed consent procedure concerning certain hazardous chemicals and pesticides in international trade.

(b) Very frequently, third countries, in particular developing countries, do not have the necessary personal and financial resources to give due weight to the information which comes to them on a specific product. These countries are approached by the importer, who has a natural tendency of promoting his own business, whereas the importing countries have limited arguments to resist him.

The prior informed consent procedure works, there should be no illusion on that, in favour of the economically strong and of the exporting country, not in favour of human health and the protection of the environment in the third country.

Thirdly, the EU could request that the import of products into the EU only takes place, where these products comply with the EU's own environmental standards. It is true that the PIC-procedure also applies to such imports. However, certainly with regard to developing countries, the PIC-procedure essentially applies to exports from the EU not to imports, because such imports – of pesticides or hazardous chemicals – only rarely take place.

Fourthly, the EU could conclude regional environmental agreements.

In the following, the second and fourth options will be discussed. The discussion will necessarily be incomplete and sketchy, as very little studies have been made on this subject.[3]

3. EU ENVIRONMENTAL EXPORT STANDARDS

Cars

When the discussions on climate change started in the beginning of the 1990s, the EU Commission announced, in 1993, its intention to fix limit values for the emission of carbon dioxide (CO_2), a greenhouse gas, from cars. The car industry, with the support of the French and Italian governments, lobbied against this intention and succeeded in convincing the Commission to be satisfied with commitments by the car industry to limit the CO_2-emissions to 140 g/km by 2008. In 2006, the car industry informed the Commission that it could not comply with this commitment. This setback led to the adoption of a new regulation in 2009, according to which the CO_2-emissions would be limited, as of 2013, to 130g/km.[4] The Regulation applied to new passenger cars which were registered – i.e., brought into circulation – in the EU.

The fight against climate change is a global task: greenhouse gases from cars contribute to the warming of the climate, regardless whether the car is put into circulation within or outside the EU. As obviously the technology to limit the CO_2-emissions from cars is available, there is no reason to limit the Regulation's application to the territory of the EU. The same applies to the limitation

[3] A good example is the very valuable book by E. Morgera (ed.), *The external environmental policy of the European Union* (Cambridge 2012), which does not discuss product standards.

[4] Regulation 443/2009, *OJ* 2009, L 140 p. 1.

of the Regulation to new cars: with an average lifetime of cars of 12 to 15 years, considerable emission reductions could have been achieved by extending the Regulation to used cars also. This aspect also has a global dimension, as the EU exports large quantities of used cars.

Similarly, regulation 595/2009 on heavy duty vehicles (trucks)[5] only applies to new vehicles which are put into service within the EU; moreover, that Regulation does not even fix a limit value for CO_2-emissions, but merely introduces a monitoring system for such emissions.

It seems that a discussion on whether the emission limit values for greenhouse gases – emission limit values for other pollutants equally apply only within the EU, but are left aside here – should also apply to exported vehicles did not even take place at EU level. Of course, there is strong competition among car manufacturers worldwide. However, the question how to strike a balance between the economic interests of EU car manufacturers and the environmental concerns for climate change seem not to have been raised at all. Neither the Commission's 99-page long impact assessment on Regulation 443/2009 nor its impact assessment on Regulation 595/2009 touches upon this question with one word.[6]

Energy-related products

The fight against climate change was also the reason for adopting the Directive on the eco-design of energy-related products.[7] Although the title of the Directive is larger, it concentrates on energy consumption – which is a global topic, not limited to the EU. However, when the Commission made its impact assessment, again, the question whether the future Directive should also apply to products that are exported, was not even discussed.[8] Obviously, the authors of the impact assessment were of the opinion that producers of energy-related products might voluntarily apply the restrictions on energy consumption also to products which they exported. For the EU market, though, the impact assessment discarded the adoption of voluntary measures, as these would not lead to serious reductions of energy consumption.

The EU Directives on end of-life vehicles[9] and electrical and electronic equipment[10] restrict the use of certain heavy metals and chemicals in cars and electrical/electronic equipment. The restrictions only apply, though, when the products are placed on the EU market. Again, they do not apply to exports.

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[5] Regulation 595/2009, *OJ* 2009, L 188 p. 1.

[6] Commission, SEC(2007) 1723 (Regulation 443/2009); SEC (2007) 1718 (Regulation 595/2009).

[7] Directive 2009/125 establishing a framework for the setting of eco-design requirements for energy related products, *OJ* 2009, L 285 p. 10; this Directive replaced Directive 2005/32, *OJ* 2005, L 191 p. 29.

[8] Commission, SEC(2008) 2115.

[9] Directive 2000/53 on end of-life vehicles, *OJ* 2000, L 269 p. 34.

[10] Directive 2011/65 on the restriction of the use of certain hazardous substances in electrical and electronic equipment, *OJ* 2011, L 174 p. 88; this Directive replaced Directive 2002/95, *OJ* 2003, L 37 p. 19.

Chemicals

The REACH Regulation 1907/2006 on chemicals[11] applies to chemicals which are to be placed on the EU internal market or used within the EU (Article. 1). The Regulation defines 'restriction' as including the manufacturing of a chemical (Article. 3 no.31) which would also ban the export of such a chemical. However, annex XVII to the Regulation which contains a list of the restrictions on the manufacture, placing on the market and use of certain dangerous substances, mixtures and articles, only encompasses manufacturing restrictions for asbestos and phenylmercury compounds.[12] This means that all the other restrictions which are laid down annex XVII to REACH, do not apply to products which are placed on the market of third countries.[13]

Regulation 689/2008[14] was adopted after a long struggle between the Commission and Member States on issues competence.[15] It transposed the Rotterdam PIC-Convention[16] without referring to the restrictions laid down in annex XVII to the REACH Regulation and, as regards restrictions for pesticides, to the relevant EU pesticides legislation. Instead, it introduced a system of chemicals subject to export notification, chemicals that qualified for PIC notifications, and chemicals that were subject to PIC notification.

As regards pesticides[17] and biocides[18], the EU authorises the use of active substances in pesticides and biocides, whereas the authorisation of pesticides and biocides is granted by EU Member States. There is no list of active substances the use of which is not allowed by the EU, probably, because an applicant may repeat his application for authorisation. Instead, there is a list of active substances which may be used in pesticides.[19] As the Regulations on pesticides and biocides concern the placing of these products on the EU market, the rejection of an authorisation by the EU does not mean that the active substance – or a pesticide/biocide containing that active substance – may not be exported to third countries.

At present, the prohibition or restriction of exporting pesticides or biocides to third countries is entirely regulated by Regulation 689/2009, mentioned above. It should be repeated here, though, that export notifications and PIC procedures

[11] Regulation 1907/2006 concerning the registration, evaluation, authorization and restriction of chemicals, *OJ* 2006, L 396 p. 1.

[12] Regulation 1907/2006, *supra* note 11, as amended by Regulations 848/2012, *OJ* 2012, L 253 p. 5 and 126/2013, *OJ* 2013, L 43 p. 24.

[13] This comment leaves unconsidered the specific provisions which the EU may have agreed with third countries, such as countries of the European Economic Area.

[14] Regulation 689/2008 concerning the export and import of chemicals, *OJ* 2008, L 204 p. 1.

[15] See ECJ, Case C-178/03, *Commission* v. *European Parliament and Council*, *ECR* 2006, p. I-107.

[16] Rotterdam Convention of 1998 on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade

[17] See Regulation 1107/2009 concerning the placing of plant protection products on the market, *OJ* 2009, L 309 p. 1.

[18] See Regulation 528/2012 concerning the making available on the market and use of biocidal products, *OJ* 2012, L 167 p. 1.

[19] See Regulation 540/2011, *OJ* 2011, L 153 p. 1.

are not the most appropriate means of protecting the environment outside the EU. Rather, the basic rule should be that a chemical or a pesticide/biocide which is considered dangerous for humans or the environment within the EU, and may therefore not be placed on the EU market, is also considered dangerous for humans or the environment in other countries. Hence, its export should not be allowed or only be allowed with the restrictions that apply within the EU. A third country which is of the opinion that it needs the chemical or pesticide nevertheless, may then specifically ask for an exception.

Waste

As regards waste materials, Directive 2008/98 on waste[20] (also referred to as the Waste framework directive) provides for some specific provisions on hazardous waste. Decision 2000/532 contains an EU list of regular waste and of hazardous waste.[21] While the export of hazardous waste to third countries, be it for disposal or for recovery purposes, is in principle prohibited, Regulation 1013/2006 on shipments of waste considered this to be too harsh.[22] Therefore, it contains a list of hazardous waste the export of which is allowed for recovery purposes following the principle of prior informed consent, and another list of hazardous waste, the export of which is absolutely prohibited.[23]

Some waste materials, in particular cars and electrical/electronic waste, are exported to third countries under the name of 'second-hand goods', in order to avoid the application of the more restrictive waste legislation. For end of-life vehicles, the EU did not undertake steps to prevent such activities, for example by requiring, before the sale of a vehicle as a car, a certificate that the vehicle is still roadworthy. For electrical/electronic waste, a directive establishes, among others, certain recovery targets. Under this directive, waste exported from the Union could be counted as contributing to these targets, 'if the exporter can prove... that the treatment took place in conditions that are equivalent to the requirements of this Directive.'[24] As implementation measures were not yet adopted at EU level, it is too early to assess whether this rather general clause is effective, all the more as the sanction – exported waste is not counted for the recovery targets – is not strong.

For airplanes, a directive adopted in 1995 provided that, as of 1995, airplanes could not land any more in the EU when they did not comply with the noise levels of chapter 3 of the International Civil Aviation Organization (ICAO).[25] Before the Directive went into effect, some air companies sold airplanes which did not comply with the chapter 3 standards – and which thus, in legal terms

[20] Directive 2008/98 on waste, *OJ* 2008, L 312 p. 3.
[21] Decision 2000/532, *OJ* 2000, L 226 p. 3.
[22] Regulation 1013/2006 on shipments of waste, *OJ* 2006, L 190 p. 1, Art. 34 and 36.
[23] Regulation 1013/2006, *supra* note 22, annex V part 1 Lists A and B. This differentiation follows decisions made by the Basel Convention, *supra* note 2, though nothing would have prevented the EU from being stricter (and more consistent).
[24] Directive 2001/19 on waste electrical and electronic equipment (WEEE); *OJ* 2012, L 197 p. 38, Art. 10(2).
[25] Directive 92/14, *OJ* 1992, l 76 p. 21.

were 'wastes' – in the EU, to air companies outside the EU, in particular in Africa. After 1995 as indicated above, these airplanes could not land any more within the EU. This situation caused a political scandal which became so big that the EU adopted another directive which exempted certain specific airplanes from certain air companies of 17 developing countries from the requirements of Article 3, so that they could continue to land within the EU.[26] This process was certainly not meant to promote the protection of the environment in third countries.

Radioactive waste is, in EU law, not considered to be hazardous. While the export of hazardous waste for disposal is prohibited,[27] the export of radioactive waste is allowed and normally only subject to an agreement between the exporting EU Member State and the importing country.[28] Furthermore, since the Member States could not even agree that spent fuel is waste material and not a product, the export of spent fuel is not subject to any restrictions, other than those mentioned in footnote 30.

Installations and horizontal issues

There are no EU provisions on industrial or other installations which are established by EU undertakings in third (non-industrialised) countries. Directive 2010/75 on industrial emissions[29] applies to large installations within the EU. Yet, it is well arguable, whether, for example, waste incinerators established by EU undertakings in third countries should not comply with the same stringent requirements as incinerators that are built within the EU. The environment knows no frontier, and damage to humans and the environment will be the same everywhere. Neither is the issue of sovereignty of the third country a valuable counter-argument, nor can it be invoked that the EU and EU Member State law does not reach to third countries. The country that would not accept strict environmental standards to be respected, would still need to be found. And State aid, export credits, export guarantees and other financial instruments would enable the EU and its Member States to exercise a considerable influence on the standards which are applicable for industrial installations in third countries.

I am in favour of EU legislation which imposes some basic environmental obligations on daughter companies of EU undertakings acting in third countries, independently of the legislation of these third countries. Such provisions should, for example, include rules that waste must be disposed of in an authorised

[26] Directive 98/20, *OJ* 1998, L 107 p. 4.

[27] Regulation 1013/2006, *supra* note 22, Art. 34.

[28] Directive 2006/117/Euratom on the supervision and control of shipments of radioactive waste and spent fuel OJ 2006, L 337 p.21. Art. 16 of that Directive contains some export restrictions, though: the export shall not be authorized for exports to the Antarctica, to countries that are member of the Cotonou Agreement and to countries where the exporting country is of the opinion that they do not have the capacity to correctly manage the waste. See also Directive 2011/70/Euratom, establishing a framework for the responsible and safe management of spent fuels and radioactive waste, *OJ* 2011, L 199, p. 48, Art. 4(4).

[29] Directive 2010/75 on industrial emissions, *OJ* 2010, L 334 p. 17.

disposal installation, and not in the landscape; that waste water be discharged into rivers, lakes or coastal waters only after treatment; that there are appropriate accident prevention measures taken within the installation; that the construction or enlargement of an installation be preceded by an environmental impact assessment in order to minimise negative environmental impacts and that public procurement rules respect transparency, minimise illegal influence and allow the participation of the public in the procedure. Internationally, such and other demands are being discussed under the term 'corporate social and environmental responsibility'. Until now, voluntary action in this regard is favoured. However, it is clear that voluntary action alone is not capable of ensuring appropriate environmental protection: this is why the EU internally predominantly established binding instead of voluntary rules.

Fisheries

The EU, having overfished the EU waters, concluded a considerable number of 'fisheries partnership agreements' with developing countries.[30] These agreements provide, in a simplified form, that the EU pays to the third country a specific sum of money and supports it actively in developing the structure of the local fishery industry. In exchange, the EU fishing fleet is allowed to fish in the third country's waters.

These agreements provide that, as regards social standards for the indigenous population working on the EU vessels, the standards from the International Labour Organization (ILO) apply. However, as regards the application of EU environmental standards for fishing – for example on the mesh size, the by-catch, the discard of fish and waste treatment – the agreements refer in general terms to the legislation of the developing country.[31] This means that the provisions of the third country apply and in most cases, no specific provisions exist in this regard. It would be easy, cheap and effective, if the EU were to insert the application of all or at least some EU environmental standards into such agreements, and not only mention the catchphrase 'sustainable' fishery.

4. IMPORTING PRODUCTS

As a rule, products that are imported into the EU, must comply with existing EU legislation. Consequently, most of the concerns of the EU deal with the monitoring of compliance. Especially production methods in the third countries are of particular interest to the EU.

[30] See, for example, the Fisheries Partnership Agreements with Kiribati, *OJ* 2012, L 300 p. 12; with Madagascar, *OJ* 2012, L 361 p. 12; with Mauretania, *OJ* 2012, L 361 p. 43.

[31] Ibid., Art. 11 'The activities of the European Union vessels when operating in the Kiribati Exclusive Economic Zone under this Protocol shall be governed by the applicable laws and regulations in Kiribati, unless otherwise provided for in the Agreement, this Protocol and the Annex and Appendices hereto'.

Biofuels

For biofuels and bioliquids, an EU directive established sustainability criteria, applicable to production within and outside the EU.[32] Private operators were allowed to submit voluntary compliance schemes to the Commission which had to examine them and decide on them, for a period of maximum five years. The Commission approved a considerable number of such schemes,[33] without giving private organisations the opportunity to comment on applications. The Commission did not publish these schemes at the start, but reserved the right to fully or partially publish them.[34] To summarise, the question whether the sustainability criteria are respected in third countries and whether the bodies operating such schemes are reliable is effectively decided on in a non-transparent way by the Commission. The operators of the scheme have no reporting obligations; it is therefore not clear, how compliance with the requirements of Directive 2009/28 will effectively be ensured. Once a decision on approving a scheme is taken, only 'clear evidence' and a 'severe and structural breach' of the elements of the scheme could lead to a withdrawal of the decision.[35]

Timber

For the import of timber and derived products into the EU, a 2005 regulation established a licensing scheme system.[36] The EU is to conclude voluntary partnership agreements (VPAs) with countries, according to which timber and derived products can only be imported into the EU, when they are 'legally produced or acquired' and had a corresponding license; the import of timber without such a license is prohibited. The definition of this term includes compliance with environmental legislation.

By June 2013, such agreements were concluded with Cameroon, the Republic of Congo and the Central African Republic.[37] The voluntary partnership agreement with the Central African Republic, taken as an example, comprised 154 pages. The VPA defines 'legally produced or acquired' with reference to ten different sections, among them 'compliance with environmental legislation'. Under this heading, it is mentioned that the company, in order to obtain the license, has to execute the necessary environmental impact assessments and

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[32] Directive 2009/28 on the promotion of the use of energy from renewable sources, *OJ* 2009, L 140, p. 16.

[33] See, for example, Decisions 2011/435 to 2011/439, *OJ* 2011, L 190, p. 73ss; 2012/452, *OJ* 2012, L 205 p. 17; 2012/427, *OJ* 2012, L 198 p. 17.

[34] In its decisions mentioned in *supra* note 33, the Commission referred to a possible publication on a transparency platform 'established' under Directive 2009/28, without further specifying, where this platform could be found. The decisions and schemes can now be found at <http://ec.europa.eu/energy/renewables/biofuels/sustainability_schemes_en.htm>.

[35] See the standard clause in Article 2 of the Decisions mentioned in the previous footnotes.

[36] Regulation 2173/2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, *OJ* 2005, L 347 p. 1.

[37] See *OJ* 2011, L 92, p. 4 (Cameroon); *OJ* 2011, L 92 p. 127 (Congo); *OJ* 2012 L 191, p. 102 (Central African Republic).

comply with their findings. Furthermore, the company has to respect the existing national air and water legislation on its site (waste was not mentioned). The agreement states that, overall, 24 pieces of national environmental legislation had to be completed or revised, in order to make the licensing scheme fully operational.[38]

The slow progress and great complexity of these licensing schemes raises doubts as to the effectiveness of the approach to protect tropical and other forests outside the EU.

Organic farming

Regulation 834/2007 provides for conditions regarding organic production.[39] Article 32ss allows organic production in third countries to be considered equivalent to the EU provisions, so that organic food imports from those countries are permitted. The Commission was given the power to make on-the-spot checks regarding such equivalence. As a result, the conditions in Argentina, Australia, Canada, Costa Rica, India, Israel, New Zealand and Switzerland were considered equivalent.[40] These countries had to report annually on the situation.

A second list grouped those recognised authorities in third countries which were considered, with regard to specific product groups, to be equivalent to the EU's. This second list grouped recognised authorities of a large number of developing and industrialised countries. Until that list was completed, individual organic producers from third countries could also be allowed to import into the EU, provided they complied with certain conditions, that they were permanently and effectively controlled, disposed of certificates of inspection.

The Commission's monitoring activity on organic food imports from third countries is very tight: since 2008, not less than seven detailed amendments concerning the import of organic food into the EU were adopted.

Trade in endangered species

As regards trade in endangered species of fauna and flora, EU rules provide that, as a principle, imports into the EU may only take place when there is documentation available from the exporting country that the export does not further impair the endangered species.[41] In theory, the Conference of the Parties of the Convention on International Trade in Endangered Species (CITES) should decide when the situation in an exporting country is such that the credibility of export documentation is not guaranteed. In view of the difficult decision-making process in international forums – normally, unanimity is required – such

[38] See *supra* note 36, annex II and annex IX.

[39] Regulation 834/2007 on organic farming, *OJ* 2007, L 189 p. 1.

[40] Commission Regulation 1235/2008, *OJ* 2008, L 334 p. 52; Commission Regulation 125/2013, *OJ* 2013, L 43 p. 1.

[41] Regulation 338/97 on trade in endangered species, *OJ* 1997, L 61 p. 1.

decisions became less and less frequent. This situation contributes to the large-scale illegal trade in endangered species worldwide, with the EU as one of the main importers.

5. WAYS FORWARD

A horizontal look at the different approaches taken shows that voluntary action is not considered sufficient to protect the environment in third countries. The timber provisions, the rules on organic farming and the biofuels provisions all show that regulatory measures and – at least equally important – appropriate monitoring and control mechanism need to be laid down in binding provisions. The same finding applies to voluntary measures to protect the global environment in general: they are not effective. A post-Kyoto climate change agreement, a forest convention, provisions on the protection of the Arctic environment, the implementation of the Rio principles on environmental protection, the global millennium goals (2000), provisions on corporate social and environmental responsibility – relying solely on voluntary actions by States or economic operators does not work. Here it should be added that the enforcement mechanisms which were set up under the different international environmental agreements often do not work. And there is little hope that the international efforts for adopting and enforcing environmental protection provisions will become more effective in the future.

If the European Union were to recognise this fact and not shield behind the fact that the environment has no voice, cannot defend itself and express its concern – in particular with regard to the five big challenges mentioned above –, it might have two possible ways forward to implement the commitment of the EU Treaties with regard to the protection of the environment worldwide: the conclusion of regional environmental agreements on the one hand, and the linking of financial assistance to third states in order to enhance compliance with environmental standards on the other hand.

(a) Regional Environmental Agreements

It was mentioned already that the prospect of reaching meaningful global environmental agreements and ensure their subsequent effective application, is small. The question then is, why the EU, in order to assume a role of global leader in environmental protection, does not conclude regional agreements.

There is already a very appropriate framework agreement in existence. The Cotonou Agreement was concluded in 2000 between the EU and 79 States from Africa, the Caribbean and the Pacific (ACP countries), for a duration of twenty years; every five years it is to be reviewed.[42]

[42] Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, *OJ* 2000, L 317, p. 3.

The objective of the Agreement is 'reducing and eventually eradicating poverty, consistent with the objective of sustainable development'. For this purpose, Article 1 of the Agreement states that '(T)he principle of sustainable management of natural resources and the environment, including climate change, shall be applied and integrated at every level of the partnership'.

The Agreement contains sections on economic development, social and human development, and on regional cooperation and integration of cross-cutting issues, which explicitly include the environment.

The Cotonou Agreement could establish a valuable playing field for promoting environmental standards in third countries. The ACP partners of that agreement are economically not so strong that the EU would have to be afraid of competition. The transfer of know-how and technologies, the training of local staff, the application of modern farming, fisheries and industrial techniques, the clean mechanisms under climate change policies could be tested and applied at a scale which goes beyond the area of the industrialized EU territory. Successful cooperation could constitute a model for initiatives of international organisations such as the World Bank, the Food and Agricultural Organization or the World Health Organization in the third world. At the same time, the EU could demonstrate that it takes its commitment serious to contribute to the global protection of the environment.

More detailed studies would be necessary to put into operation such a 'Cotonou Environmental Development Plan'. At first glance, under the existing Agreement, agreements on the following aspects could be concluded

- Aarhus Convention principles (transparency, openness, participation in decision-making, role of civil society and environmental organisations, role of courts in environmental matters);
- Environmental impact assessment of projects, plans and programmes;
- Protection of habitats and fauna and flora species;
- Sustainable use of pesticides and other chemicals in agriculture;
- Public procurement;
- Waste and waste water treatment;
- Corporate social and environmental responsibility (CSR).

It does not appear that any effort has been made until now to make such agreements – or to export environmental product and production standards.

(b) Linking financial assistance to compliance with environmental standards

It might long be disputed, whether the EU as such or its individual Member States make sufficient financial means available to help eradicate poverty in the world. In my opinion, an increase of such aid will in any way become unavoidable, as the presence of nine billion people on earth will considerably increase pressure on the industrialised countries. Furthermore, environmental

protection measures in third countries will be needed, if one wants to prevent large scale migration for environmental reasons.

One way forward could be to link financial assistance to greater compliance with environmental standards for soil, water, air and nature. The example of the European Bank for Reconstruction and Development (EBRD) and the European Investment Bank (EIB), despite all criticism, could be a model for such links. When it is possible to make agreements with developing countries of fifty pages or more on fishing rights for the EU fleet which go into all details of day-to-day practice, it should also be possible to devote more attention to environmental protection requirements in the financial and economic support of EU development policy.

6. CONCLUDING REMARKS

(1) The EU is, since the Lisbon Treaty, obliged to promote environmental protection globally, as it clearly appears in Articles 3(5) and 21(2) TEU. How serious this obligation is taken is a political choice. The mere promotion of 'sustainability' is not helpful. And the 'reduction and, in the long term, eradication of poverty' appears to be equally vague and general.

(2) Any environmental measure, whether internally or externally, will raise the tension between the competitiveness of the EU and its economic operators on the one hand, and of environmental protection on the other hand. However, there is only one environment, and without the ecological foundation, economic activity cannot prosper continuously.

(3) Though the EU sees itself as a model for reconciling environmental protection and economic growth, it has not gained sufficient international credibility and leadership capacity; in particular, all too often it does not speak with one voice. It has not deployed serious efforts to export environmental product standards together with the export of its products.

(4) As global environmental agreements are difficult to conclude at present because of the resistance of the USA, China, Russia and other states, the EU should promote regional environmental agreements, for example by providing more substance to the environmental provisions in the Cotonou Agreement. There are numerous agreements possible which would not significantly affect EU's global competitiveness.

(5) Regional environmental agreements should set precise, verifiable targets which can be measured, monitored and enforced. Systematic ex-post evaluation of agreements, but also of projects, plans and programmes, where the EU participates, should be foreseen. These evaluations should be self-critical and not only self-complacent. Furthermore, they should be publicly available and allow comments from civil society in both EU and third states.

(6) EU financial assistance – credits, export guarantees etc. – should be linked to compliance with established, concrete environmental objectives. Such assistance should be accompanied by a monitoring system.

(7) EU internal product regulation – for cars, chemicals, pesticides and other products – went from optional directives to total harmonisation directives and then to regulations. This is a model for product export standards; at present, the EU is, as regards exports, at the stage of optional provisions.

PRIVATE SECTOR DRIVEN SUSTAINABILITY STANDARDS. HOW CAN THEY PROMOTE SUSTAINABILITY IN THIRD STATES

Reinier de Man

THE QUESTION

Large quantities of raw materials from agriculture and mining used in Europe are being sourced from countries outside Europe, many of them in the developing world. Moreover, Europe is exporting huge quantities of materials, products and waste to countries outside Europe. Promoting sustainable consumption and production in a globalised economy cannot stop at Europe's borders, and the European Union recognises this in its treaties.[1] In order to contribute to sustainable development in its relation to third countries, the EU should take into account the sustainability of raw materials, products and waste streams that pass the border as imports or exports. This article refers to the imports of agriculture and forestry related raw materials, such as timber, palm oil or cane sugar and how their sustainability can be promoted. There are several fundamental, practical and legal limits – mainly related to international trade law – to the extent to which European and national legislation can be effectively used to promote the sustainability of imported raw materials or even to limit imports to sustainable sources only. What is more, the use of other instruments that do not follow the classical 'command and control' regulatory approach, but rather focus on stimulating 'good' behaviour, are believed to have many advantages, notably from the point of view of effectiveness. The question, posed in this article, therefore is: to what extent can private sector driven sustainability standards – standards created by partnerships between private sector companies and their stakeholders – be seen as an alternative or a complement to the classical regulatory approach?

Before trying to answer this question, the emergence of these private sector driven sustainability standards will be placed in a historical context. One standard initiative, the Roundtable on Sustainable Palm Oil, will be used as a particular example.[2] It will then be shown what contribution such standards are currently playing in converting global markets to sustainability and how the future relationship between public government and private governance with respect to setting and implement sustainability standards for agricultural raw material might look like.

[1] As explained in more detail by L. Krämer in the previous chapter.

[2] Between 2001 and 2004, the author was actively involved in setting up the RSPO on behalf of WWF, Unilever and additional partners.

THE EMERGENCE OF PRIVATE SECTOR SUSTAINABILITY STANDARDS

During the last decades, many voluntary 'sustainability standards' for agricultural and other commodities as well as for consumer products were developed by private sector companies and their associations, more than often in close cooperation with non-governmental organisations. Well known commodity standards are FSC (Forest Stewardship Council) for sustainable forestry and forestry products,[3] MSC (Marine Stewardship Council) for fish[4] and RSPO (Roundtable on Sustainable Palm Oil) for palm oil.[5] More recently, standards and associated certification systems were set up for major agricultural commodities such as soy (RTRS),[6] cane sugar (Bonsucro)[7] and cotton (Better Cotton).[8][9] A number of competing sustainability standards have been developed for coffee and tea, of which Rainforest Alliance and UTZ Certified can be seen on many consumer end products.

Another family of sustainability related standards is not so much focusing on ecology, but rather on human rights and labour conditions. In the 1990s, labour unions and non-governmental organisations (such united in as the Clean Clothes Campaign)[10] pointed at the often appalling conditions in the international textile industry and exerted pressure on retailers and their brands to set ethical standards and to certify compliance. This resulted in a number of different initiatives, standards and certification systems, including SA8000,[11] the Ethical Trade Initiative (ETI)[12] and Business Social Compliance Initiative (BSCI).[13]

These standard setting and certification initiatives have in common that they try to fill up a vacuum in international trade regulation. Ecological (or social) standards, especially in the emerging third world economies, often are either too low or not well implemented in the production countries. Citizens, consumers and NGOs have put pressure on retailers and brand owners to set acceptable standards and to take responsibility for their proper implementation. As a

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[3] See website of the Forest Stewardship Council, available at < https://ic.fsc.org/index.htm>.

[4] See website of Marine Stewardship Council, available at < http://www.msc.org/>.

[5] See website of Roundtable of Sustainable Palm oil (RSPO), available at <www.rspo.org>.

[6] See website of Round Table on Responsible Soy Association, available at< http://www.responsiblesoy.org/>.

[7] See Bonsucro, *Bonsucro – Better Sugar Cane Initative Production Standard, Principles and Crite*ria Version 3.0, (Bonsucro March 2011) and the website of Bonsucro, available at <http://www.bonsucro.com/>.

[8] See website of Bettercotton, available at < http://bettercotton.org/>.

[9] For an overview of different commodity initiatives and standards, see R. de Man, 'Land Issues in Voluntary Standards for Investments in Agriculture, a discussion paper', in *The World Bank Annual Bank Conference on Land Policy and Administration* (Washington: World Bank, April 26 and 27 2010).

[10] See website of Clean Clothes Campaign, available at < http://www.cleanclothes.org/>.

[11] See Social Accountability International (SAI), *Social Accountability 8000*, (New York: SAI 2008) and the website of SAI, available at < http://www.sa-intl.org>.

[12] See Ethical Trade Initiative (ETI), *The ETI Base Code* (ETI: London 2001) and the website of ETI, available at < http://www.ethicaltrade.org/>.

[13] See R. de Man, *supra* note 9, Annex 1: 'A Review of Selected Voluntary Standard Initiatives'.

result, the standards defined in these private sector based initiatives are all voluntary and have not been formulated as part of any legal framework. As already indicated above, more than often these sustainability standard initiatives are based on multi-stakeholder participation in one form or another, reflected in their governance structures, in which social and environmental NGOs are being represented alongside with interests from production and trade.

THE HISTORICAL CONTEXT

Rio and Sustainability

For a better understanding of the development of the aforementioned private sector and civil society driven sustainability initiatives and standards, it is helpful to place them into their historical context. The ideas underlying the initiatives and the expectations about their effectiveness were rooted in the discussions and policy developments between the 1990s and the first decennium after the year 2000.[14] The successive United Nations conferences held in 1992 ('Rio Summit'), 2002 ('Johannesburg') and 2012 ('Rio +20') provide an appropriate historical frame of reference.

At the 1992 United Nations Conference on Environment and Development in Rio the Janeiro, 'sustainability', developed earlier by the so-called Brundtland Commission between 1983 and 1987, had become the guiding principle that united ecological and developmental goals.[15] It had also become clear that sustainable development had to go beyond government policies and that it required active roles of all stakeholders involved, including the private sector and civil society. Already at the Rio Summit it became clear that not much progress on forest protection principles and their implementation could be made. The 'Forest Principles' document, produced in Rio, was a rather weak, legally non-binding document. There was fierce resistance from developing countries against any stronger forest policy document, mainly based on arguments related to costs for setting aside forests.

The processes that followed after 'Rio' (such as the Montreal process) were slow and lacked strong ambitions to protect the world's most threatened forest areas. Disappointment about the outcome of 'Rio' was the trigger that started the process resulting in the Forest Stewardship Council (FSC) in 1993. World Wide Fund for Nature (WWF), in cooperation with private sector companies, took the initiative to set up this first major market-driven sustainable commodity initiative, based on a private 'governance' rather than a public 'government'

[14] For more historical backgrounds, see for example R. de Man and T.R. Burns, 'Sustainability: supply chains, partner linkages, and new forms of self-regulation', in 25 *Human Systems Management* 2006, Number 1, 1-12; R. de Man, 'Stoffstrommanagement: Lernprozess für Staat und Wirtschaft' [Material flow management: learning process for government and industry], in *Ökologisches Wirtschaften* (Ausgabe 5 1996), 10-12.

[15] World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press 1987).

model.[16] The choice for this novel governance model was not so much based on a belief in the private sector. It was rather born out of frustration about the lacking results in national policies and international conventions.

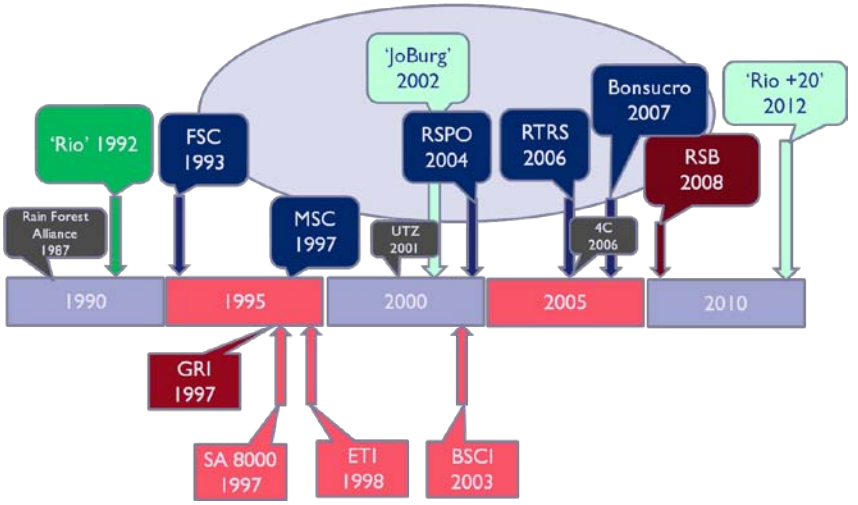

Figure 1. The Emergence of Private Sector Standards in a Historical Perspective

Johannesburg and the Belief in Voluntary Initiatives

Voluntary Partnerships

Ten years after 'Rio', the Johannesburg World Summit on Sustainable development, was almost entirely focused on so-called Type II partnerships, voluntary agreements between public and private players with an important role for civil society and business. Liberal-conservative philosophies were dominating the discussion. Voluntary partnerships were increasingly regarded as more effective than top-down government policies. Multi-stakeholder approaches were dominating the sustainability agenda. The development of many multi-stakeholder based initiatives for setting sustainability standards for agricultural commodities was a clear expression of the trend at the time.[17]

[16] See B. Cashore *et al*., *Governing Through Markets: Forest Certification and the Emergence of Non-state Authority* (New Haven: Yale University Press 2004).

[17] The author was strongly involved in organising Type II partnerships at that time, notably on creating sustainable supply chains for the timber and paper chain. The paper partnership 'Newspapers that Know their Trees' – organised for the German company Axel Springer and partners from the private sector and civil society – was rewarded one of the 10 prizes at a competition organised by the International Chamber of Commerce in the Framework of the Johannesburg summit. Apart from euphoria, there were many doubts as well, especially in government circles. See for example R. de Man, *Bruikbare Partnerschappen, Beleidsadvies aan DGM/SB* [Effective Partnerships – Policy Advice to the Environmental Directorate in the Dutch Ministry for Environment and Spatial Planning, confidential], (Leiden: Sustainable Business Development 2005).

WWF and the Emergence of Sustainable Commodity Roundtables

WWF played a central role in initiating and organising a number of multi-stakeholder initiatives for setting sustainability standards and the associated certification systems. The initiative to set up the Roundtable on Sustainable Palm Oil was made in 2002. Apart from the Marine Stewardship Council (1997), it was the first major multi-stakeholder sustainable commodity initiative after FSC. It was based on a governance model somewhat less complicated than FSC. The RSPO model was more or less copied for setting up the Roundtable on Responsible Soy (RTRS, 2006). Other initiatives like Bonsucro (for sugar, 2007) and Better Cotton (2005) were based on a similar multi-stakeholder model: an international multi-stakeholder association ('Roundtable'), with private sector members along the supply chain and from the financial sector and environmental and social NGOs representing civil society. The original focus of these sustainable commodity initiatives (forestry, palm oil, soy, sugar), all initiated by WWF and private sector partners, was primarily ecology, with an emphasis on biodiversity. However, by including social NGOs, human rights issues – such as food security and land rights – gradually became more prominent during their development.[18] More recently, the Roundtable on Sustainable Biofuels (RSB, 2008), was set up. In contrast to the aforementioned initiatives, its standard is including multiple commodities used for bio-fuel and includes a stronger focus on human rights issues.

Voluntary Standards for Social Compliance

During the same period, a number of 'social compliance' initiatives and associated certification systems were set up. Among them are SA8000 (1997), the Ethical Trade Initiative and the Business Social Compliance Initiative (BSCI), which was initiated by the German industry to provide a somewhat more cost-effective implementation of social compliance standards. These, and other, voluntary social compliance standards can be regarded as an implementation of the ILO Conventions that deal with workers' rights, child labour, labour safety and related issues.[19]

[18] On the growing importance of land rights and food security issues in voluntary sustainability standards, see my earlier publications and the references included there: R. de Man, *supra* note 9;

R. de Man, *Land Governance and Food Security Issues in Commodity Standards*, interim report to SDC Bern (Leiden: Sustainable Business Development 2011);

R. de Man, *Agricultural Commodities that Respect Land Rights and Food Security*, report of a High Level Workshop of the Swiss Agency for Development and Cooperation and the Netherlands Ministry of Foreign Affairs, The Hague February 20 2012, (Leiden: Sustainable Business Development 2012a);

R. de Man, 'Agricultural Commodities that Respect Land Rights and Food Security – How to Include Land Governance Issues in Sustainable Commodity Standards', paper presented at the *2012 World Bank Conference on Land and Poverty,* (Washington: World Bank April 23-26 2012b).

[19] See R. de Man, *supra* note 9.

Reality after Rio +20

Ten years after the Johannesburg euphoria on the blessings of voluntary partnerships and voluntary standards, around the time the Rio+20 conference was held, the world looks a bit different. Certainly voluntary partnerships and the voluntary standard initiative ('Roundtables') have been playing and are still playing important roles, but their contributions are more modest than originally hoped for. Private 'governance', in the end, does not appear to be the alternative to public 'government', but can certainly complement more classical forms of policy making and policy implementation. Success factors and limitations have become clearly visible, as will be discussed later in this article.

THE CASE OF SUSTAINABLE PALM OIL

The development of the Roundtable on Sustainable Palm Oil (RSPO) is a good example that shows both the real contributions of multi-stakeholder commodity roundtables to promoting sustainability in supply chains and their limitations.[20]

The idea of setting up a Roundtable on Sustainable Palm Oil (RSPO) was born in WWF around 2001.[21] For WWF, the trigger was the problem of deforestation in South-East Asia and the role oil palm expansion was playing in that. It was recognised that forest cannot be protected by promoting sustainable forestry only. One of the key factors in deforestation was the development of agriculture and the related clearing of valuable forests. The initiative was not an anti-palm oil initiative. On the contrary, it was meant to promote the use of 'sustainable' palm oil, to satisfy the growing demand for palm oil without destroying high conservation value forests like tropical rainforests. WWF, in cooperation with a number of private sector partners, decided to define a set of broadly supported sustainability principles and criteria and to set up a certification system. It was to be assured that certification is feasible for mainstream producers.

Among the initiating stakeholders (Figure 2) were retail companies (such as Migros and Sainsbury's), producers of consumer products (including Unilever), vegetable oil traders and processors (Anglia and Aarhus) and palm oil producers (including the Golden Hope company and the Malaysian Palm Oil Association MPOA). Both Unilever and Migros had already formulated their own sustainability criteria. Apart from some unavoidable hick-ups in the political process, it was not too difficult to create a set of reasonable sustainability

[20] More detailed information about RSPO's history can be found at the RSPO website <www.rspo.org>; and, on the author's website <http://www.rdeman.nl/site/palmoil.htm>; J. von Geibler, *Nachhaltigkeit in globalen Wertschöpfungsketten nicht-staatliche Standards als Steuerungsinstrument im internationalen Biomassehandel* [Sustainability in global value chains – non-state standards as a management tool in the international biomass trade](Marburg, Metropolis Verlag 2010), chapter 4; J. Nikoloyuk *et al.*, 'The Promise and Limitations of Partnered Governance – the Case of Sustainable Palm Oil', *Journal of Corporate Governance* 2010.

[21] The author was involved as a consultant to WWF and its private sector partners in setting up RSPO. He gained support from important stakeholders and was responsible for organising the first Roundtable Meeting in Kuala Lumpur, August 2003.

principles and criteria. After some preparations in 2001, first informal meetings were held in 2001, after which an Organising Committee was set up in January 2002.[22] The Committee prepared the first RSPO meeting, which took place in Kuala Lumpur in August 2003, for which a draft text for its future constitution – the Statement of Intent (SoI) – had been prepared. The draft text was discussed at the Roundtable and the final SoI was the basis for formalising the Roundtable as an Association registered in Switzerland with an office in Kuala Lumpur in early 2004. Already in 2005, the first version of the Principles and Criteria was published. After a period of testing, formulating national interpretations and defining requirements for traceability, the first RSPO certified palm oil arrived in Rotterdam in August 2008, five years after the constituting RSPO Roundtable meeting.[23] Nine years after its constitution, in 2012, RSPO's membership exceeded 1000 members from more than 50 countries. RSPO certified Crude Palm Oil production was about 14% of the global market.

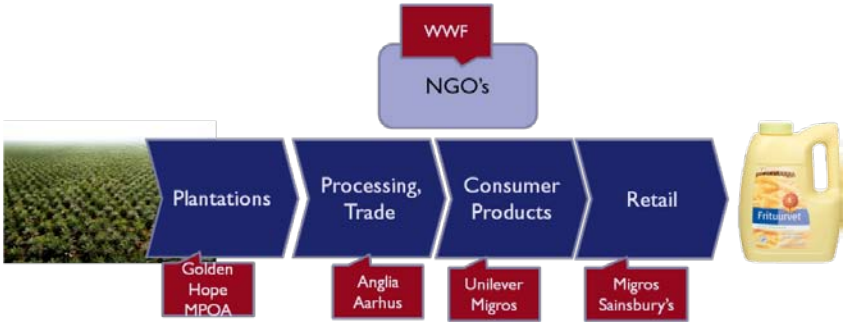

Figure 2. RSPO-Initiators (2002)

Taking the complexity of the many stakeholder interests around the table into account, the process has been extremely quick, certainly in comparison with processes driven by the national governments or multi-lateral organisations.

RSPO's Principles

1. Commitment to transparency
2. Compliance with applicable laws and regulations
3. Commitment to long-term economic and financial viability
4. Use of appropriate best practice by growers and millers
5. Environmental responsibility and conservation of natural resources and biodiversity
6. Responsible consideration of employees and of individuals and communities affected by growers and mills
7. Responsible development of new plantings
8. Commitment to continuous improvement in key areas of activity

[22] Facilitated by the author of this article.
[23] See *supra* note 5, available at <http://www.rspo.org/en/milestones>.

SECTOR CONVERSION TO SUSTAINABILITY: THEORY AND PRACTICE

What role can such private sector and civil society driven initiatives, such as the RSPO described above, actually play? Are they an alternative to more traditional forms of government intervention? Or are they at least a welcome complement to government policies and legislation? In this context, it may be useful to compare theory and practice. On the one hand, there is a theory, the explicit and implicit expectations of those who see a potentially high contribution of voluntary sustainability standards to 'sector conversion'. 'Sector conversion' means here: the global conversion of the entire sector from unsustainable to sustainable raw materials, for example the conversion of the do-it-yourself sector to FSC certified timber or the food industry to using RSPO palm oil. On the other hand, there is the development in practical reality. Below, the discrepancies between 'theory' and 'practice' will be discussed.

Theory

How could a sector as a whole convert to sustainable raw materials on the basis of voluntarily set sustainability standards such as FSC, RSPO or RTRS? Those who argue that a conversion is possible on the basis of voluntary standards, or that those standards at least play an important role in the conversion process, follow an argumentation like this. The present situation is characterised by the existence of raw materials with different degrees of sustainability. The different sustainability 'qualities' vary between worst performers (the 'bottom') and best performers (the 'ceiling'). As the 'ceiling' can usually only be reached by small niche markets (such as organic cotton with less than 1% global market share),[24] much more net sustainability can be produced by moving the worst performers to a somewhat higher level than by trying to move the middle performers to the best level. In the language of those who adhere to this theory: 'it makes much more sense to raise the floor than to raise the ceiling'[25] (see Figure 3).

In a pure commodity market – i.e., in a market where the customer asks for a well-defined uniform minimum base quality –, there is an unavoidable race to the bottom. In such a situation, only the commodity price counts. In the absence of a strict government policy, raising the floor by the market parties themselves, is critically dependent on the existence of strong pre-competitive cooperation. The theory, used for example by the WWF-led Market Transformation Initiative, is that the conversion from lower to higher sustainability inputs is critically dependent on the willingness of a few major commodity buyers, for example in food producing and retail companies, representing a major part of the demand for a certain commodity to create a critical mass that makes the

[24] See the *Organic Cotton Market report* (published by Textile Exchange), available at < http://textileexchange.org/access_to_TE_2011_OC_market_report>.

[25] One of the most prominent representatives of this school of thought is Jason Clay, WWF US. See for example his TED presentation, available at < http://www.ted.com/talks/jason_clay_how_big_brands_can_save_biodiversity.html>.

raw material producers switch *en masse* to sustainable production. Commodity roundtables, such as FSC or RSPO, could, in that theory, provide the mechanism for such a conversion process. This theory is well expressed at a WWF website:

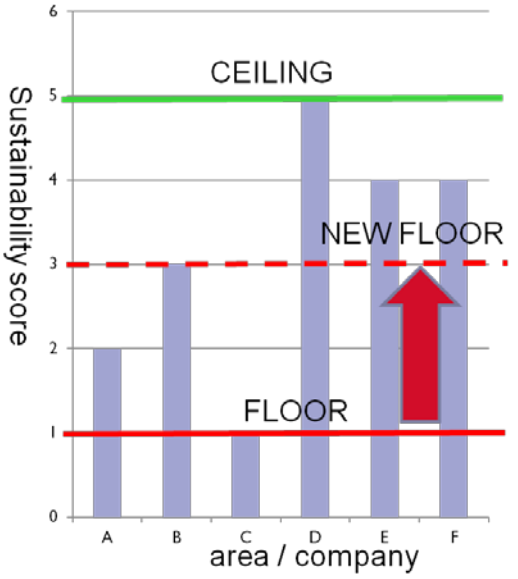

Figure 3. Raising the Sustainability Floor

> 'Rather than trying to educate 7 billion consumers or improve the practices of 1.5 billion producers, the most efficient way to effect change is to work with this handful of companies – about 100 in total. Together they buy and sell 25 percent of the commodities with the greatest impact on WWF's priority places. And this demand can shift 40-50% of global production. By engaging these companies, WWF helps them achieve positive and measurable benefits for their businesses, while creating conservation impacts where they matter most'.[26]

Practice

Partnerships between civil society and business – such as the cooperation projects between WWF and major retail and food companies – have demonstrably resulted in positive change. We do see a positive role of the different multi-stakeholder based standard and certification initiatives. However, we do not (yet) see the great conversion of entire global markets to sustainability. It is illustrative to check how three certification schemes for sustainable commodities are developing: FSC and similar certification systems for forestry and

[26] *Transforming Business*, available at <http://worldwildlife.org/initiatives/transforming-business>.

timber, RSPO for palm oil and RTRS for soy. Combining the figures for FSC with figures for comparable schemes (such as PEFC, Canadian and US systems), the share of certified timber is below 15%, more than 20 years after the establishment of these schemes. RSPO is doing better and has reached more than 15% global market share in less than 7 years. RTRS's share is still negligible (see figure 4). Better Cotton's global market share (not in the figure) was not more than 2% in 2011-2012, despite several years of development and financial support from the Dutch government.[27]

Current experience with FSC, RSPO, Better Cotton and similar voluntary market-based sustainability standards and certification systems suggests that it appears to be highly unlikely that global market transformation based on these standards and systems will develop beyond 20%. This is not a surprise. There are several factors that block a development towards 100% transformation. Two factors appear to be particularly important: lack of global market demand and lack of government involvement in implementation.

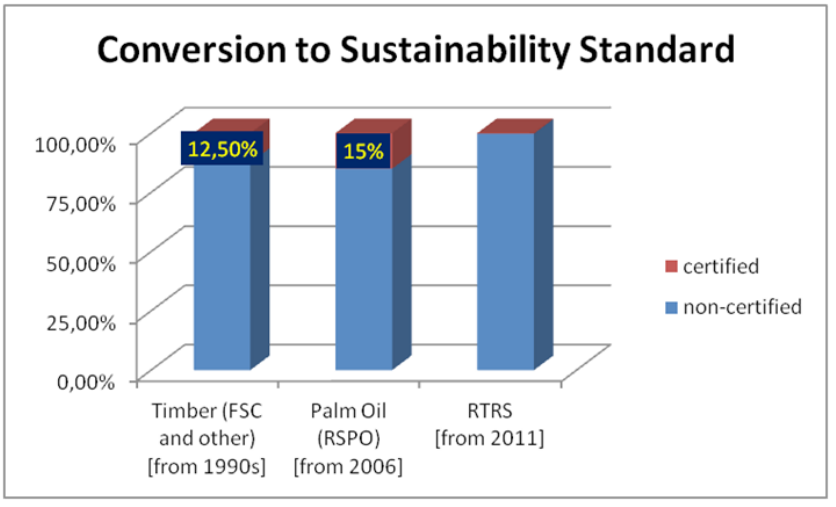

Figure 4. Conversion in Practice

- *Lack of Market Demand*

Motivation to switch to sustainable raw materials is mainly limited to companies operating in markets with critical consumers and critical citizens. The highest growth in consumption of palm oil and soy, for example, is in emerging economies with rapidly increasing demand for vegetable oils and proteins, such as India and China. For the time being, non-certified palm oil or soy can easily be sold in these markets. WWF's dream to convert 40-50% of global production by influencing 100 large companies turns out to be a bit too optimistic. In prac-

[27] Through IDH Sustainable Trade Initiative, see <http://www.idhsustainabletrade.com/cotton>.

tice, the procurement managers' willingness in these companies to switch to sustainable sourcing is often much lower than the Corporate Social Responsibility and Public Relations managers want us to believe.

- *Lack of Government Involvement in Implementation*

Principles and Criteria that define sustainable raw materials such as timber or palm oil are the basis for the associated certification systems. Certification tests whether the certified company complies with the criteria set in the standard. Certification can never refer to obligations of any other organisation or person than the company that receives the certificate. Taking RSPO certification as an example, the oil palm plantation company has to comply with a number of detailed criteria under Principle no. 4 ('use of appropriate best practice by growers and millers') and Principle no. 5 ('environmental responsibility and conservation of natural resources and biodiversity'), which can easily be tested by relatively simple auditing procedures. However, things get a bit more complicated when it comes to criteria for land use, both ecological criteria on biodiversity and social criteria on access to land. Proper implementation of such criteria is highly dependent on the existence of appropriate public land use planning systems and well organised legal and extra-judicial systems for resolving land use conflicts.[28] In order to ensure full implementation of such criteria, roundtable organisations such as FSC and RSPO are now seeking closer cooperation with governments in producing countries.

PRIVATE SECTOR DRIVEN STANDARDS: THEIR CONTRIBUTION TO REGULATION

Three Steps

Transformation on the basis of voluntary standards, developed in multi-stakeholder roundtables, is clearly not an alternative to regulation. It is more plausible to assume that the roundtable based standards and voluntary certification systems are the beginning rather than the end of a process in which eventually national and international forms of legislation and regulation will play a decisive role again. The following three-step process can be observed for a number of commodities.

- In *step 1, 'single company projects'*, single companies set sustainability standards for sourcing their raw materials. In the case of palm oil, notably Unilever and the Swiss retailer chain Migros defined their own sustainability standards before there was any generally accepted industry standard.[29] Simi-

[28] See R. De Man, *supra* note 18, (2012b); R. de Man, *The Settlement of Disputes on Land Rights – Creating a Facility that Serves Present and Future Needs,* Report prepared for Oxfam-NOVIB and IDH (Leiden: Sustainable Business Development May 2012c).

[29] J. Nikoloyuk *et al.*, *supra* note 20; J. Von Geibler, *supra* note 20.

larly, large paper users, such as the German publisher Axel Springer, defined their own sustainable forestry and traceability requirements for wood used for paper production, long before certification systems such as FSC and PEFC were operational.[30] These companies had good reasons, related to risks and opportunities of their public visibility and the vulnerability of their brands, to actively set standards and to lead the industry towards common standards. Unilever and Migros, for example, were leading, in cooperation with WWF, the development of RSPO, see step 2. Other examples are the German Otto Group's forerunner role in setting and implementing social compliance criteria (later consolidated in BSCI), Nestlé's leading roles related to coffee and milk and McDonald's leadership in the beef industry.[31]

- In *step 2, 'industry self-regulation with multi-stakeholder participation'*, single companies – usually the leaders from step 1 – and their allies from different stakeholder groups start a voluntary initiative for setting a common industry standard and organising related certification systems. In this step, the experience gained in individual company projects or specific cooperation projects between companies, NGOs and others are being consolidated and transformed into a general industry standard. This step is best described as non-competitive consolidation. It produces a standard with a high level of credibility that, in principle, can be used by any company in the sector that is motivated to do so. However, the standard is voluntary and, as has been discussed, it is not very likely that more than 20% of the global market will voluntary follow it.

- *Step 3, 'the inclusion into national or international/EU regulation'*. Although the standard has been developed in cooperation between the private sector and civil society and as such is voluntary, it may eventually become part of legislation. This is what we see happening in different sectors. A good example on the demand side is European regulation on biofuels that refers to a number of so-called voluntary standards, including RSPO and RSB.[32] Biofuels that are certified to have been produced following a voluntary standard approved by the European Commission[33] count towards the 10% goal that all EU Member States need to reach by 2020. On the supply side, we see a trend that national governments include (parts of) 'voluntary' standards into their national regulation, although some countries have decided to develop their own national standard instead, such as the Indonesia's ISPO and Malaysia's MSPO,

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[30] See R. de Man and T.R. Burns, *supra* note 14.

[31] See R. de Man and A. Ionescu-Somers, *Sustainable Sourcing of Agricultural Raw Materials – a Practitioner's Guide* (Geneva: SAI-Platform and Partners March 2013).

[32] Under the EU Renewable Energy Directive 2009/28 (*OJ* 2009, L 140, p. 16), among others, the following 'voluntary' certification schemes have been recognised: Bonsucro (cane sugar), RSB (biofuels) and RSPO (palm oil). See for example the website of European Biofuels technology Platform, available at <http://www.biofuelstp.eu/certification.html>; and 'Commission brands RSPO certified palm oil biofuels "sustainable"' on the Asser Institute website, available at<http://www.asser.nl/default.aspx?site_id=7&level1=12221&level2=12261&level3=12465&textid=40551> . Also see the contribution by Afionis on biofuels in this CLEER Working Paper.

[33] Note that L. Krämer in the previous chapter is critical about the manner in which the approval process takes place.

both national alternatives to RSPO (palm oil), which, however, do contain many elements of the original voluntary global standard.

THE PRIVATE PATH TOWARDS PUBLIC REGULATION

Four Potential Paths

We may conclude that, for the time being, market-based sustainability standards are both a success in terms of speed and credibility and a failure in terms of global market conversion. We may also conclude that the alternatives do not look much better. Let us compare four alternatives: international negotiation in the UN context, legislation in consumer countries, legislation in producer countries and the private sector and civil society based scenario: market-based governance (See Figure 5).

1. *International negotiation in the UN context*

Setting sustainability standards through international negotiation processes in the UN context is often slow and does not always lead to convincing results, as the negotiation in the context of climate change (United Nations Framework Convention on Climate Change UNFCC, Kyoto protocol and its follow up),[34] biodiversity and forest protection show. In many cases, North-South conflicts have blocked progress, as was the case in the Rio forest protection agenda, which then triggered civil society and business to set up FSC as discussed above. In many cases, outcomes have been too weak, too late and not firmly implemented through national policies.

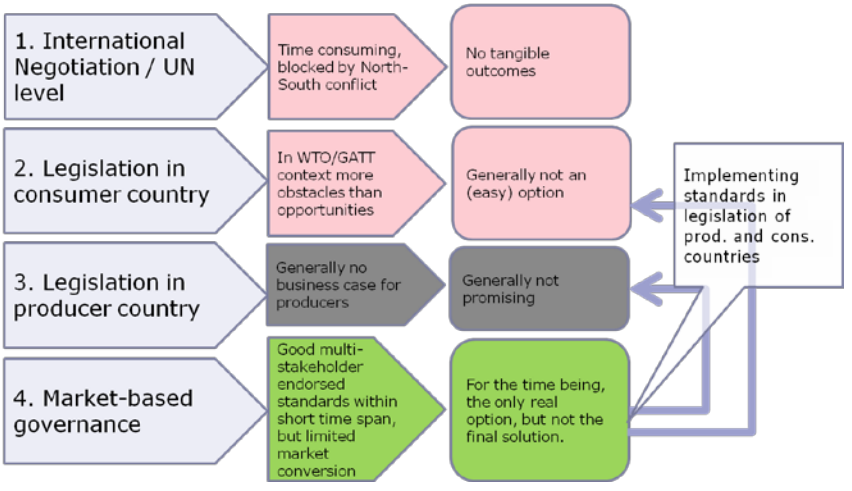

Figure 5. Four Paths to Implementing Sustainability

[34] See the contribution by L. Massai in this CLEER Working Paper on the issue of climate change negotiations and the role of the EU in this process.

2. *Legislation in consumer countries*

Legislation in consumer countries that limits the import of timber, palm oil, soy, etc. to sustainable sources only is an option, but with major difficulties. Although there are certainly options to include sustainability requirements for imported commodities, there are severe restrictions and risks in the WTO/GATT context.[35]

3. *Legislation in producer countries*

The most effective path to sustainable commodity production is through appropriate national legislation and effective implementation. However, in a global commodity market, more than often there is not a clear business case for producing countries, as long as economic rewards for implementing sustainability are not perceived. Legislation in producer countries only becomes a realistic option once there are strong sustainability requirements from the market that make such legislation economically attractive.

4. *Market-based governance*

As international negotiation processes are slow, legislation in consumer countries is complicated in the context of international trade law, motivation in producer countries is often too low, the only realistic path available is through market-based governance. It has one overwhelming advantage: speed. Good multi-stakeholder endorsed, and therefore highly credible, standards can be formulated in a very short period of time, as the RSPO example has convincingly shown. As explained above, it does not yet lead to conversion to sustainability globally, however.

FROM MARKET-BASED GOVERNANCE TO PUBLIC POLICY

Comparing the four potential paths as defined above, one can conclude that in many cases the most promising start can be made through voluntary standards as developed in multi-stakeholder settings. They provide the best opportunity for relatively rapid development of highly credible principles, criteria and certification systems. The next step towards global market conversion to sustainability, however, is to bring both governments in consumer countries and governments in producing countries back in. By making the short-cut through market-based governance, the loss of valuable time will be avoided. By bringing governments back in, conversion processes beyond current levels of 15-20% will be made more likely. This is not a theoretical proposition: these developments are currently going on.

[35] On the WTO compatibility of the EU's biofuels rules, see for instance W. Th. Douma, 'Legal aspects of the EU biofuels policy: protection or protectionism?', in 53 *German Yearbook International Law* 2010, 371-420.

Implementation through Policy in Consumer Countries

Although there are still many potential barriers in international trade law, we can observe an increasingly important trend that policies in consumer countries use sustainability standards developed in voluntary cooperation between the private sector and civil society as a basis for legislation. In addition, we see other than regulatory policies to stimulate implementation of those standards:

- *Regulatory Instruments*

The most prominent example is how the EU Renewable Energy Directive recognises existing 'voluntary' schemes in the context of certifying sustainable biofuels, as has been discussed above. Voluntary schemes are no longer purely voluntary in these publicly regulated markets.

- *Development Finance*

An important instrument to promote sustainability of raw materials from development countries are the conditions for granting development finance for (agricultural) investments. The IFC performance standards[36] and the World Bank's Operational Policies[37] are important in this context.[38] IFC and national development finance institutions (such as CDC in the UK, DEG in Germany, FMO in the Netherlands) increasingly demand FSC certification for forestry plantations or RSPO certification for oil palm developments. The European Union also plays a role in this respect by using the European Principles for the Environment as guidelines when EBRD, EIB and others (co-)finance projects in third countries.

- *Supporting Roundtables*

Another non-regulatory instrument that governments can use is (financially) supporting sustainability standard initiatives. The Dutch government, for example, financially supported the Roundtable on Sustainable Palm Oil during its initial phase. The Swiss government (Swiss Development Cooperation SDC) played a key role in setting up the Roundtable on Sustainable Biofuels.

[36] Notably IFC Performance Standards on Environmental and Social Sustainability; see IFC, *IFC Sustainability Framework, Policy and Performance Standards on Environmental and Social Sustainability* (Washington: IFC 2012).

[37] See W. Kiene, 'Enforcing Industry Codes of Conduct: Challenges and Lessons from Other Sectors', Paper Presented at the *World Bank Annual Bank Conference on Land Policy and Administration* (Washington: World Bank, 26 and 27 April 2010).

[38] See R. de Man, *supra* note 9.

- *Supporting Market Conversion*

The Dutch government is actively promoting conversion towards sustainable raw materials imported from development countries through IDH – Sustainable Trade Initiative, a government fund that provides matching funds to private sector initiatives. IDH actively is promoting sustainable cocoa, tropical timber (FSC and other), cotton (BCI), aquaculture, soy (RTRS) and other sustainable raw materials. IDH is now aiming for extending its scope to other European countries in cooperation with their governments. The Swiss government has allocated CHF 30 million to the fund.[39]

Implementation through Policy in Producing Countries

Global conversion to sustainability standards and full implementation of those principles and criteria will only be feasible once sustainability standards have become part of national legislation and enforcement is guaranteed by well-functioning public institutions in the producing countries. Voluntary standards developed in cooperation between the private sector and civil society are not the end of the process but rather the beginning. They provide effective and credible principles, criteria and certification systems accepted by major markets. It is more efficient to use these as a starting point than to develop national or European standards from scratch.

It is unlikely that producing countries are motivated to promote sustainability by legislation before market demand for sustainable commodities has developed. The only viable path is therefore that market-based initiatives ('path 4') take the lead, with some help from regulatory and non-regulatory policy instruments in consumer countries ('path 2'), before sufficient motivation for using legal instruments in producing countries has built up. Only then, there is a clear business case for producing countries. Roundtables, such as the RSPO for palm oil, can play – and do currently play – an important role in promoting best practice standards that can easily be included into government policy. Moreover, they motivate governments to create proper institutional conditions for implementing public policies, especially related to ecological and social land-use issues. Today sustainability standard organisations such as FSC and RSPO provide their own mechanisms for land dispute settlement. This can only be a temporary ad-hoc solution. These mechanisms try to fill in the gap in present institutional and legal structures, but they neither have the authority nor the resources to solve the underlying political and legal problems. It is essential that these 'privatised' tasks will eventually be taken over by governments again.[40]

Similar developments can be seen in the 'social compliance' arena. Weak national policies or weak implementation, especially in less developed textile

[39] More information on IDH-Sustainable Trade Initiative's website, available at < http://www.idhsustainabletrade.com>. IDH is the abbreviation for Initiatief Duurzame Handel, Dutch for Sustainable Trade Initiative.

[40] See R. de Man, *supra* note 28.

producing countries, have created the need for private sector driven social compliance standards and certification systems, not only in the interest of the textile workers but also in the interest of major brands and company reputations, as was again shown by the recent tragic events in Bangladesh. Social compliance standard organisations such as SA8000, ETI or BSCI are not only private sector certification organisations. They also play a role as advisers to governments in the production countries, for example on the issue of defining a so-called 'living wage', i.e., the minimum income necessary for a worker to meet basic needs.

Partnerships between governments of producing countries and governments of countries importing raw materials can contribute to implementing sustainability criteria in the producing countries, based on demands from the consumer markets. Good examples are the partnerships between the Dutch government with Indonesia, Malaysia and Vietnam on palm oil, shrimp, tropical fruits and vegetables[41] or the Voluntary Partnership Agreements (VPAs) between the European Union and wood exporting countries that are being set up in the context of the EU's FLEGT initiative.[42]

CONCLUSION

It may be concluded that sustainability standards and associated certification systems defined in multi-stakeholder settings such as FSC, RSPO, RTRS or RSB, have played and are still playing an indispensable role in promoting sustainability of commodities imported from outside the EU. Their main advantage over the more classical solutions, such as international negotiations at the UN level or regulation in consuming or producing countries, is the speed at which they arrive at highly credible and efficient solutions with considerable acceptance by markets and critical stakeholders alike. However, they should not be regarded as an alternative to regulation, but rather as a powerful input into regulation, both in consuming countries (EU and individual countries) and countries exporting commodities to the EU. Only by recognising the need for stronger government involvement in implementing the standards developed in market-based settings, will global conversion to sustainable raw materials beyond 20% penetration of markets.

[41] The Dutch partnerships were set up in the context of a larger WSSD partnership agreement that was set up in the context of 'Johannesburg': 'Market access through meeting quality standards for food and agricultural products'. See I. Visseren-Hamakers, 'The role of intersectoral north-south partnerships in sustainable fisheries', in *Conference Resource Policies: Effectiveness, Efficiency, and Equity*, (Berlin: November 17-18 2006).

[42] See website of DG Environment (European Commission), FLEGT Voluntary Partnership Agreements (VPAs), available at <http://ec.europa.eu/environment/forests/flegt.htm>. Also see L. Krämer on this topic in the previous chapter.

BRAZIL AND EUROPEAN UNION COOPERATION IN THE CONTEXT OF BIOFUELS POLICY: A SYNERGISTIC RELATIONSHIP?[1]

Stavros Afionis

INTRODUCTION

Back in 2007, Brazil entered the European Union's (EU) list of strategic partners; a token of recognition of the place Brazil occupies in current global affairs. Summit diplomacy with major global players (e.g., the United States (US), Japan or Canada) has always been very important for the Union. Given, however, the growing political and economic weight of several major developing countries, the 2003 European Security Strategy (ESS) noted that the EU should massively expand its network of strategic partners.[2] In practical terms, becoming an EU strategic partner entails boosting a foreign country's diplomatic status and organising summits, plus a plethora of minister-level and expert-level meetings. Put simply, it means meeting very frequently, cooperating more closely and, hopefully, solving problems sooner than would otherwise be the case. So far, the set of existing strategic partners includes the US, Brazil, Canada, China, India, Japan, Mexico, Russia and South Africa. In late 2010, Catherine Ashton, the EU's High Representative for Foreign Affairs and Security Policy, indicated that Egypt, Israel, Indonesia, Pakistan, Ukraine and South Korea could also potentially join the ranks of the Union's strategic partners.[3]

Apart from allowing the EU to assume a stronger and more versatile role in Russia, Africa, Asia and Latin America, such diplomatic frameworks allow the EU to also demonstrate its attachment to the concept of multilateralism. As a result of decades of internal cooperation, EU leaders tend to view international cooperation as a preferred means of meeting global challenges. Pursuing multilateralism is therefore viewed as pivotal to rule-based global governance (as opposed to power-based international relations) and to harnessing globalization for wider benefits.[4] Indeed, the EU's bilateralism policy has been viewed in the literature as a deliberate effort to 'multilaterise' EU bilateral relations by integrating universal concerns and norms into summits with major global ac-

[1] The research leading to these results has received funding from the European Community's Seventh Frame-work Programme (FP7/2007-2013) under the grant agreement no. 251132. The author would also like to thank the Centre for the Law of EU External Relations (CLEER) for publishing this research as part of the CLEER Working Paper series.

[2] European Council, 'A European Security Strategy – A secure Europe in a better world', Brussels, 12 December 2003.

[3] A. Rettman, 'Ashton designates six new "strategic partners"', *EU Observer*, (Brussels, 16 September 2010).

[4] See European Council, *supra* note 2.

tors.[5] By doing so, the EU seeks to recruit major parties into a community of 'responsible powers' that recognise the importance of ensuring that 'international organizations, regimes and treaties [are] effective in confronting threats to international peace and security'.[6]

Among developing countries, Brazil is one of the very few that is deeply committed to multilateralism and can therefore share the multilateral perspective of the EU. For Brazil, a greater voice in global governance can only be secured through multilateral means.[7] Eager to demonstrate its position as a 'soft power' in global politics, Brazil has been investing actively in the development of both South-South and wider coalitions, such as the IBSA,[8] BRICS,[9] or the trade and financial G-20s.[10] Brazilian emphasis on multilateralism and a rule-based international order has led to high expectations and implies that Brazil and the EU could in essence be regarded as natural partners.

While trade issues naturally dominate the partnership agenda, environmental protection is a stated priority, with the two actors aiming to work together to, *inter alia,* combat climate change and promote the use of biofuels in transport. The latter policy area is of focal importance for both partners and seemingly holds the best prospects for reciprocal cooperation. Such optimism stems from the fact that Brazil has a long tradition in biofuels, while the EU has also been experiencing rapid growth in biofuel consumption in the course of the past decade, due to its increased preoccupation with climate change and energy security. Despite promising prospects, bilateral cooperation in this area has not really taken off as a number of issues have emerged that have greatly polarised relations between the two partners. While trade in biofuels tops the list,[11] the purpose of this paper is to focus on disagreements in the issue area of the environment, namely those of indirect land-use change (ILUC) and highly biodiverse grasslands. ILUC means that biofuels occupy space previously used for other, notably agricultural purposes, while the original agricultural production moved elsewhere, for instance in areas that used to be rainforests. The ILUC aspect of biofuels form an issue not yet regulated in EU law, but the Commission has issued a regulatory proposal to remedy this situation. Biofuels produced on areas previously occupied by highly biodiverse grasslands (direct land use change in other words) are already being discouraged by the EU unilaterally in its 2009 Renewable Energy Directive (RED). These two issues have gained in importance following the passing of this piece of EU legislation, but little

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[5] A. Vasconcelos (ed.), 'A strategy for EU foreign policy', 7 *European Union Institute for Security Studies Report* June 2010, available at <http://www.iss.europa.eu/uploads/media/ A_strategy_for_EU_foreign_policy.pdf>.

[6] See European Council, *supra* note 2, at 9.

[7] L. E. Armijo and S. W. Burges, 'Brazil, the Entrepreneurial and Democratic BRIC', 42 *Polity* 2010, 14-37.

[8] The India, Brazil and South Africa group.

[9] The Brazil, Russia, India, China and South Africa group. Formerly BRIC, it is now the BRICS club, following the accession of South Africa in 2011.

[10] K. Hopewell, 'New Protagonists in Global Economic Governance: Brazilian Agribusiness at the WTO', *New Political Economy* (in press); see also L. E. Armijo and S. W. Burges, *supra* note 7.

[11] See S. Afionis and L. C. Stringer, 'European Union leadership in biofuels regulation: Europe as a normative power?' 32 *Journal of Cleaner Production* 2012, 114-123.

scholarly attention has been paid in identifying the nature of the controversies and the manner in which they have affected bilateral cooperation.

In terms of methodology, secondary data from government documents, published reports and scientific studies are employed, as well as interviews and personal communications with Brazilian and EU officials. In terms of structure, the following section provides an overview of the EU-Brazil strategic partnership and the experiences of the two partners with biofuels. Then the specificities of the two aforementioned environmental issues (ILUC and highly biodiverse grasslands) are discussed, focusing in particular on the manner in which they have complicated current relations and impeded bilateral cooperation on biofuels.

PROSPECTS FOR EU-BRAZIL COOPERATION ON BIOFUELS

The current legal and political framework for EU bilateral relations with Brazil is the Strategic Partnership agreement, established in 2007 at the initiative of the EU Portuguese Presidency. In 2008 and 2011 two successive Joint Action Plans (JAPs)[12] were adopted, calling, *inter alia,* for increased cooperation on trade, science/technology, renewable energy and the environment. Trade dominates the agenda, with the conclusion of an Association Agreement between the EU and Mercosur[13] currently being the highest – albeit stalemated – interregional priority.[14] Yet, a trade asymmetry exists between the two partners, as the EU is more important to Brazil than Brazil is to Europe. In numerical terms, Brazil is Europe's 10th trading partner (2.2%), while the EU is Brazil's top trading partner, representing close to a quarter of its total trade.[15] Apart from the establishment of an EU-Mercosur trade agreement, another highly contentious bilateral debate revolves around Brazilian petitions for the EU to remove trade barriers and open up its common market to Brazilian agricultural and agro-energy products.[16]

Biofuels in particular are central with respect to the latter category, mirroring the substantial investments both partner have undertaken in such renewable energy sources for transport. Starting with Brazil, back in 1975 the national government initiated the PROALCOOL program as a response to the first oil crisis, which has nowadays turned into the world's largest and most successful biomass to energy program. Ethanol accounts for 18% of Brazil's energy ma-

[12] The first JAP was adopted during the second EU-Brazil Summit in Rio de Janeiro in 2008, while the second one, to last until 2014, was adopted during the summit in Brussels in November 2011.

[13] South America's leading trading block, comprising Brazil, Argentina, Uruguay and Paraguay.

[14] See P. Messerlin, 'The Mercosur–EU Preferential Trade Agreement: A view from Europe', 377 *CEPS Working Document* 2013, available at <http://aei.pitt.edu/40233/>.

[15] See A. Vasconcelos, *supra* note 5.

[16] S. Afionis and I. Bailey, 'Ever Closer Partnerships? European Union Relations with Rapidly Industrializing Countries on Climate Change', in I. Bailey and H. Compston (eds.), *Feeling the Heat: The Politics of Climate Policy in Rapidly Industrializing Countries* (Houndmills: Palgrave 2012).

trix, while PROALCOOL culminated with the industrial development in 2003 of flex-car engines that could run on just gasoline, 100% bioethanol or any proportion mix of the two without any effect on vehicle performance.[17] Nowadays, there is no pure gasoline in Brazil, as besides pure ethanol, all gasoline in the country contains more than 20% bioethanol. What is particularly notable is that nowadays the Brazilian bioethanol program requires no government funding or subsidies at all. Finally, also note that since 2010 all diesel sold in Brazil contains 5% biodiesel.[18]

Turning to Europe, the EU has supported the promotion of biofuels during the past decade for a wide range of reasons (climate change mitigation, energy security concerns and rural development stimulation). So far, the Union has adopted two Directives on biofuels. The first, the Biofuels Directive 2003/30[19] contained a set of *indicative* targets for the minimum proportion of biofuels and other renewable fuels, calculated on the basis of energy content, of all petrol and diesel for transport purposes placed on the markets of the EU member states (2% by 2005, rising to 5.75% by 2010). Only seven member states were able to meet the 5.75% figure (Sweden, Austria, France, Germany, Poland, Portugal and Slovakia), with the EU overall achieving a 4.7% share in 2010.[20]

The second piece of legislation, the Renewable Energy Directive (RED) 2009/28,[21] contains a *mandatory* 10% renewable energy target for transport fuels to be reached by 2020. In practice, most of the renewable transport fuels consist of biofuels. The new Directive includes (following widespread NGO criticism) a number of sustainability criteria on the (EU and non-EU) production and use of biofuels that are aimed, *inter alia*, at limiting negative direct land use change (DLUC) effects of biofuels. Among these criteria, the following stand out:

1) Greenhouse gas (GHG) emission savings from biofuels should be at least 35% (rising to 50% in 2017) compared to fossil fuels;
2) Biofuel feedstock is not to be derived from land with high biodiversity value, notably 'highly biodiverse grassland';
3) Feedstock is not to be derived from land with a high carbon stock.

Indirect land use change (ILUC) effects were flagged as a point of concern at the time of adoption of the RED (notably because these could bring about biofuels with a carbon footprint worse than that of fossil fuels), but no measures were included apart from a duty for the Commission to investigate the matter and come up with proposals where necessary. In order to address both ILUC

[17] See W. Alonso-Pippo *et al*., 'Practical implementation of liquid biofuels: The transferability of the Brazilian experiences' *Energy Policy* (in press).

[18] See A. D. Padula *et al*., 'The emergence of the biodiesel industry in Brazil: Current figures and future prospects', 44 *Energy Policy* 2012, 395-405.

[19] *OJ* [2003], L 123/42, 17.5.2003.

[20] EurObserv'ER, 'Baromètre Biocarburants – Biofuels Barometer', July 2011, available at: <http://www.eurobserv-er.org/pdf/biofuels_2011.pdf>.

[21] *OJ* [2009], L 140/16, 5.6.2009.

and food security concerns, the European Commission tabled a draft proposal in October 2012 according to which, *inter alia*, first generation (i.e., food-based) biofuels be used only to meet half of the 10% EU biofuels target.[22] Subsequent versions have been watered down, with the overall proposal being currently under discussion among the Commission, the European Parliament and the member states (see below). The following section outlines the main controversies between the EU and Brazil with respect to existing and envisaged sustainability criteria. As already mentioned, the focus will be on the two issues that have attracted most bilateral attention, namely ILUC[23] and highly biodiverse grasslands.

BIOFUELS AND ENVIRONMENTAL SUSTAINABILITY

Though a relatively recent policy area, biofuels have triggered one of the most highly contentious debates on the current international sustainability agenda. Among the greatest concerns is that increased biofuel use could cause considerable land use change (LUC), both direct (DLUC) and indirect (ILUC) – and in this way cause more environmental harm than conventional fossil fuels would do. While the Directive specifies mechanisms for dealing with DLUC, scientific uncertainties on how best to estimate ILUC impacts have prevented the EU from reaching a final decision on how to include it in its GHG emissions methodology.[24]

In response to the EU's public consultations on 'Indirect Land Use Change of Biofuels,'[25] Brazil emphasised in a number of submissions to the Commission that considering the uncertainties, high complexity and lack of scientific agreement, ILUC should not at present be applied in regulation.[26] The Brazilian government recognises that ILUC is indeed a legitimate concern and that science has achieved substantial breakthroughs in this field over the past few years. However, it also points to the fact that the various models that have been developed so far to measure ILUC have come up with ranges that are quite disparate.[27] Brazilian officials, therefore, stress the need for more scientific information before a decision is taken on how to address ILUC emissions within legislation.

As mentioned earlier, the European Commission has proposed a 5% limit on the use of conventional first generation biofuels (food-based biofuels) that

[22] COM(2012) 595.

[23] As noted earlier, if biofuel feedstock is grown in previously uncultivated land, this will cause direct land-use change. If, however, existing agricultural land is employed instead, this means that the crop that was previously cultivated there will now be displaced and will have to be moved elsewhere, e.g., in rainforest land.

[24] See European Commission, 'Report from the Commission on indirect land-use change related to biofuels and bioliquids', COM(2010) 811 final.

[25] See <http://ec.europa.eu/energy/renewables/consultations/index_en.htm>.

[26] Brazilian Mission to the European Union, 'EC's Consultation on Indirect Land Use Change – Brazil's Comments', 29 November 2010, available at <http://ec.europa.eu/energy/renewables/consultations/2010_10_31_iluc_and_biofuels_en.htm>.

[27] Interview with Petrobras official in Rio de Janeiro (February 2013).

will count towards the EU's renewable energy target for transport. For Brazil though, such an approach is both ineffective and unfair as it puts all biofuels currently in the market into the same basket, thus failing to take into consideration their widely different ILUC impacts. For instance, the ILUC impact of biodiesel is far greater than that of bioethanol, a point that is recognised by EU authorities as well. In particular, Annex V of the draft directive that is to amend the 2009 RED sets estimated emission values for the three main feedstock groups.[28] Oil seeds have an ILUC impact of 55 g CO_2eq/MJ,[29] while that of sugars and cereals is 13g and 12g respectively.[30] Consequently, Brazilians argue that a potential way forward for the EU in addressing ILUC would be for it to abstain from promulgating arbitrary legislation and instead reward countries – like Brazil – that have put in place sound land use planning policies (e.g., agro-ecological zoning for sugarcane) that have resulted in deforestation rates declining markedly since 2005.[31]

A second environmental issue that has seen much debate between the two partners is with respect to highly biodiverse grasslands. While the Directive defines primary forests and natural protected areas, the Commission has yet to clarify what it considers as constituting highly biodiverse grasslands.[32] The concept of highly biodiverse grasslands is a rather recent innovation and was first coined as a result of an intra-EU compromise in the run-up to the adoption of the 2009 RED. Back then, the European Parliament was in favour of designating all grasslands as 'no-go' areas for biofuel feedstock cultivation, with the European Commission holding an antipodal position. Following prolonged negotiations, a compromise was struck according to which only 'highly biodiverse' grasslands would qualify as 'no-go' areas. Several definitions have since been tabled and rejected by either the Commission or the member states, many of which (e.g., Germany or Austria) still have sizable expanses of grasslands left and therefore have a stake in the negotiating outcome.

The provisions on grasslands came as a surprise to Brazil, which then feared that its plans to expand sugarcane plantations in former pastureland in central and southern Brazil would be severely compromised.[33] Such fears were intensified following the release in 2009 of a proposed definition according to which the areas under discussion were defined as those 'whose condition as grasslands is maintained [for at least 5 years] as a result of human intervention

[28] These values are only for reporting purposes and are not binding on fuel suppliers.

[29] Grams of CO2 equivalent per megajoule.

[30] European Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources', COM(2012) 595 final.

[31] Interview with UNICA official in Brussels (March 2013); On Brazil's performance with respect to combating deforestation see J. Tollefson, 'A Light in the Forest: Brazil's Fight to Save the Amazon and Climate-Change Diplomacy', 92 *Foreign Affairs* 2013, 141-151.

[32] According to a personal communication with an EU Commission official, the definition was expected during 2012. As of May 2013, it remains unknown when an intra-EU agreement will be finally reached.

[33] Interview with Brazilian diplomat in Brussels (October 2011).

such as ploughing, sowing, mowing or livestock grazing'.[34] Since the 2000s, more than two-thirds of sugarcane plantation expansion has taken place in pastures, which comprise about 60% of all arable land in Brazil. Consequently, Brazil is quite wary that EU authorities might come up with a final definition that could potentially prove detrimental to Brazilian sugarcane expansion plans. As a result, the Brazilian government and institutions dismiss intra-EU attempts to reach an agreement on a definition as highly arbitrary and argue that given the lack of scientific consensus, the Convention on Biological Diversity (CBD) should be regarded as the only legitimate forum for agreeing an operational definition.[35]

CONCLUSIONS

Undeniably, the 2007 strategic partnership has clearly 'revolutionised' overall bilateral relations.[36] In the area of sustainable development, for instance, Dialogues on Energy and the Environment have been set up that convene at regular intervals. While the two partners hold diverging positions on an array of issues (e.g., on ILUC or highly biodiverse grasslands), such diplomatic channels provide them with an opportunity to at least discuss conflicting issues in good faith and in a systematic manner.

Most scholarly attention on EU-Brazil biofuels relations has focused on trade antagonisms, thereby largely overlooking other areas that have generated conflict among the two partners. This study has aimed to shed some light on environment-related policy concerns that have dominated bilateral deliberations since the adoption of the 2009 RED. While both the EU and Brazil have recognised environmental collaboration as indispensable, the former's legislative initiatives to ensure the sustainability of biofuels production and consumption have been dismissed by the latter as arbitrary and counter-productive. Consequently, while on first reading cooperation on biofuels between the EU and Brazil should represent an example of a synergistic relationship, diverging opinions on how to tackle the sustainability complications of biofuels have impeded the fostering of a closer bilateral partnership. Therefore, apart from trade considerations, environmental factors should also be taken into consideration when deciphering the reasons why bilateral cooperation in the policy area of biofuels has not really matured.

[34] European Commission, 'Draft Consultation paper definition highly biodiverse grasslands', at 1, available at <http://ec.europa.eu/energy/renewables/consultations/2010_02_08_biodiverse_grassland_en.htm>.

[35] Brazilian Mission to the European Union, 'Draft Consultation paper – definition highly biodiverse grasslands – Comments from Brazil', 8 February 2010, available at <http://ec.europa.eu/energy/renewables/consultations/2010_02_08_biodiverse_grassland_en.htm>.

[36] Interviews with various EU and Brazilian diplomats and policymakers.

IS THERE ANYBODY OUT THERE? EU CLIMATE DIPLOMACY BEFORE AND AFTER COPENHAGEN

Leonardo Massai[1]

1. BACKGROUND OF INTERNATIONAL AND EUROPEAN CLIMATE LAW

The international climate change regime is founded on two international treaties, both designed and embedded under the United Nations rule system. They are the United Nations Framework Convention on Climate Change (UNFCCC or Convention) and the Kyoto Protocol.

The legal and institutional infrastructure created by the Convention and the Kyoto Protocol provides for a clear snapshot of how environmental protection is pursued under international law. Nowadays, the major legal responses to modern global and transboundary environmental threats are provided in the form of multilateral treaties, whatever form they may take.[2] Other sources such as soft law instruments, international principles and jurisdictional decisions play a less important role, in particular when complex problems such as climate change are to be tackled by the international community.

Climate change and global warming are nowadays almost undisputedly recognized as the major environmental hazards the global humanity is facing. According to the Intergovernmental Panel on Climate Change (IPCC), the main international scientific body dealing with global warming, climate change is principally caused by anthropogenic sources, such as the burning of fossil fuels or the emissions of other greenhouse gases. Climate change negative impacts are, amongst others: sea level rise, ice melting, shifts in plant and animal ranges, and variations in the frequency of rains and hydrological cycle. To combat climate change and its consequences, the international community has decided to intervene both in terms of mitigation and adaptation.Finally, the latest scientific data show that the increase of greenhouse gas emissions and the rise of global temperature are closely interrelated. This is confirmed by both the IPCC and national scientific entities such as, for instance, the NASA in the USA and the Australian Climate Commission.[3]

[1] Views expressed in this paper belong exclusively to the author and cannot be associated with the position of any Party in the multilateral negotiations on climate change under the UNFCCC.

[2] Traditionally, this can take the form of a convention, protocol, agreement or any other legal term recognized by international law.

[3] See for instance 'The Critical Decade 2013', Australian Climate Commission and 'Global Temperature Update Through 2012', 15 January 2013, J. Hansen, M. Sato, R. Ruedy, NASA.

1.1 **Convention**

The United Nations Framework Convention on Climate Change was opened for signature in 1992 in Rio de Janeiro during the Earth Summit, together with two other key international conventions on the environment (the Convention on Biological Diversity and the Convention to Combat Desertification). The UNFCCC is a perfect example of a multilateral framework treaty dealing with international environmental protection. It entered into force in 1994 and it now embraces 195 Parties (194 States and 1 regional economic integration organization – the EU). It set a broad and general objective, notably 'the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'. The Convention also codifies important principles of international law and environmental protection. In addition to the precautionary principle and the principle of sustainable development, respectively Article 3.3 and 3.4, the Convention recalls two other fundamental principles, which are at the foundation of the international climate change regime. They are the principle of common but differentiated responsibilities and the principle of equity. While the former is, amongst others, at the core of the current division between Annex I (industrialised countries according to the UNFCCC) and non-Annex I Parties, the latter has been quoted often recently by big developing country Parties such as India or China, to justify their opposition to undertake legally binding reduction obligations.

Differentiated commitments for Parties are included in the Convention under Article 4, which emphasizes the leadership role of developed countries both in terms of mitigating climate change and providing financial support.

The institutional structure of the Convention reflects the structure of all major international conventions on the environment, namely a pyramid where the Conference of the Parties (COP) is the supreme body responsible for the implementation and application of the Convention, and is supported by the subsidiary bodies, the subsidiary body for scientific and technological advice (SBSTA) and the subsidiary body for implementation (SBI), and finally the secretariat of the Convention located in Bonn, Germany. In addition to the permanent bodies embedded in the text of the Convention, Parties are free to establish other temporary auxiliary bodies. This is exactly what happened in the current negotiations on the future of the international climate change regime after 2012, as will be explained below.

1.2 **Kyoto Protocol**

The Kyoto Protocol is the related instrument to the Convention that Parties adopted in COP 3 in accordance with the procedure identified under Article 17 of the Convention. As such, the Kyoto Protocol is an independent international treaty that, like any other international text, does not expire unless Parties agree on this to happen. The Kyoto Protocol is directly related to the Convention, it shares the same infrastructure, with the only difference that the COP is

replaced by the Conference of the Parties serving as the Meeting of the Parties to the Protocol (CMP). Furthermore, the Protocol shares the main objectives and principles of the Convention, as well as the division between developed and developing countries. The Kyoto Protocol established legally binding quantified emission limitation and reduction commitments (QELRCs) for the developed countries listed in Annex B, expressed in percentages and valid for the period 2008-2012 (first commitment period). The Kyoto Protocol also established one of the most advanced and powerful compliance regimes for an environmental treaty. The Compliance Committee of the Kyoto Protocol is an ad-hoc regime designed to ensure that the obligations created by the Protocol are fully respected by all Parties. Another important novelty created by the Kyoto Protocol are the flexibility mechanisms inscribed in Articles 6, 12 and 17, respectively Joint Implementation (JI), Clean Development Mechanism (CDM) and Emissions Trading (ET). The flexibility mechanisms were designed to allow Annex I Parties to meet their reduction targets in the least costly manner possible, by purchasing so-called carbon reduction units in the carbon market or through investments in climate friendly projects.[4] Finally, under the Kyoto Protocol a special place is reserved for land-use, land-use change and forestry (LULUCF) activities that can be used by Annex I Parties as to their capacity to absorb greenhouse gas emissions from the atmosphere.

1.3 **EU Climate Policy and Law**

The origins of European climate policy and law can be traced back to the early nineties, when strong scientific evidence emerged at the international level supporting the notion that climate change is one the major global problems the planet is facing. In 1990 the IPCC released its first assessment report where scientific evidence and data on the level of global greenhouse gas concentration, its causes and effects, as well as future emissions scenarios were provided for the first time. Climate change was recognized as a global phenomenon.

The first relevant piece of EU climate policy is the European Climate Change Programme (ECCP) launched in the year 2000 as the guiding instrument for the European Community and its Member States to tackle climate change and to identify a series of cross cutting policies and measures aimed at the reduction of greenhouse gas emissions. The ECCP work was based on thematic working groups composed of representatives of the European Commission, interested directorate generals, representatives of existing and new Member States, private sector, NGOs and other stakeholders. The first phase of the ECCP I (2000–2001) focused on cost-effective policies and measures to reduce greenhouse gas emissions to be introduced in the energy, transport and industry sectors. The six working groups established within the ECCP were: flexible

[4] Units that can be used for compliance under the Kyoto Protocol are: assigned amount units (AAUs), removal units (RMUs), emission reduction units (ERUs), certified emission reductions (CERs).

mechanisms, energy supply, energy consumption, transport, industry and research. A range of 40 EU-wide common and coordinated policies and measures (CCPMs) were identified by ECCP I. In the second phase of ECCP I (2001–2003) the following 11 working groups were established: linking JI and CDM with the EU Emissions Trading System (ETS), agriculture, forest-related sinks, sinks in agricultural soils,[5] fluorinated gases, energy supply, energy demand, transport, industry, waste and research.

Many words have been spent on the so-called EU leadership on the fight against climate change. This paper provides some considerations on the participation of the EU in the international negotiations on climate change and on the various results achieved by the international community in this area. In this regard, two major facts cannot be disputed, at least up to 2013. First of all, EU legislation on reducing greenhouse gas emissions is very advanced and determined. Secondly, the results achieved by the international community on the fight against global warming are very poor.

Already back in 1990 the Dublin European Council referred to the leading role of the EU on global climate change. It took the European Community[6] until 2001 make concrete advanced legislative proposals on climate change. This was after the declared intention of the United States to step out of the Kyoto Protocol process. Indeed, prior to COP7 in Marrakech the European Commission tabled the following key proposals on climate change in 2001:

- Proposal for a Council Decision concerning ratification of the Kyoto Protocol by the European Community, COM(2001) 579;
- Communication from the Commission on the implementation of the first phase of the European Climate Change Programme, COM(2001) 580;
- Proposal for a directive of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, COM(2001) 581.

Besides care for the environment and human safety, the reasons behind the choice of the European Community to focus on and invest in climate change policies are related to the intention to show political leadership at the international level, to foster external relations in this important area and, finally, to address economic and efficiency concerns. The European Community identified climate policies and instruments designed to reduce greenhouse gas emissions as one of the main drivers to develop competitiveness and market opportunities for both the Member States and European companies.

The main instrument of EU climate policy, adopted on the basis of the proposal COM(2001) 581 mentioned above, is Directive 2003/87/EC on the establishment of the European Allowance Trading System (EU Emissions Trading Scheme – EU ETS) and will be discussed in detail in the next paragraph.

[5] In the international climate change regime, sinks are all activities in the agriculture and forestry sectors that result in a net reduction of greenhouse gas emissions.

[6] Thanks to the changes to the EU Treaties introduced by the Treaty of Lisbon, since 2009 the European Community is superseded by the European Union.

Through the adoption of Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the UN Framework Convention on Climate Change and the joint fulfilment of commitments thereunder, the Protocol becomes part of the acquis communautaire. The European Community and the Member States jointly committed to the obligations of the Kyoto Protocol, a so-called mixed agreement that binds internationally both the European Community and the Member States, notably to jointly reduce greenhouse gas emissions by 8% in the period 2008-2012 compared to 1990 levels. With decision 2002/358/EC the Kyoto Protocol reduction obligation becomes part of the acquis communautaire. The EC joint commitment is distributed internally among the old 15 Member States through the so-called burden sharing agreement. In accordance with Article 4 of the Protocol, this joint commitment is fixed and cannot be changed until the end of the first commitment period, so as to preserve the environmental integrity of the 8% European reduction obligation. The reason behind this specific rule is to avoid that any potential greenhouse gas emissions surplus from the former communist countries of Central and Eastern Europe but intending to become EC Member States could be used by the EC to comply with the 8% joint commitment.[7]

Right after 2001, the EU played a key role in convincing those states which were reluctant or hesitant to ratify the Kyoto Protocol, such as Canada, Japan and Russia. The lobbying activities of the EU started in 2001, especially with regard to Japan and the Russian Federation, and continued until 2004, when the latter decided to ratify the Protocol and allowed for its entry into force.[8] The price paid in Marrakech, where the operational rules of the Protocol were decided (COP7), by the EU and all Parties to the Kyoto Protocol for convincing Japan and the Russian Federation to join the Protocol process is quite high. Firstly, the compliance procedure under the Kyoto Protocol was adopted through a CMP decision, rather than through an amendment to the Protocol as established under the procedure identified in its Article 18; Secondly, the cap on the possibility to use forest management activities under Article 3.4 for those countries, including Canada, is much higher than the rest of Annex I Parties.[9]

In 2007, notably on 8 and 9 March, the European Council Conclusions referred explicitly to 'the leading role of the EU in international climate protection'.

1.4 **EU ETS**

The EU ETS is one of the key instruments adopted by the European Union to reduce greenhouse gas emissions and to comply with the obligations of the

[7] In 2004, ten countries joined the EU, among which Poland, the Czech Republic and Hungary.

[8] For a detailed account on the EU efforts *vis-á-vis* Russia, see W.Th. Douma, 'The European Union, Russia and the Kyoto Protocol', in M. Peeters and K. Deketelaere (eds.), *EU Climate Change Policy. The Challenge of New Regulatory Initiatives* (Cheltenham 2006), pp. 51-66.

[9] See decision 12/CP.7, Canada, Japan and Russian Federation, respectively 12.00, 13.00 and 33.00 Mt C/Yr.

Kyoto Protocol. The first ideas to develop such a trading scheme was launched in the Green paper COM(2000) 87 developed by the Working Group 1 of the European Climate Change Programme. The subsequent step was the legislative proposal presented by the European Commission in 2001.[10] Proposal COM(2001) 581 for a directive establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC introduced the first regional wide cap and trade scheme for the most energy intensive installations. The proposal went through the European legislative process for a period of almost two years. It became law on 13 October 2003 when European Parliament and the Council formally adopted directive 2003/87/EC. The EU ETS is entity based. Operators of the installations covered by the directive shall receive an authorization to operate from the national authority, usually the Ministry of Environment, as well as a specific amount of EU allowances (expressed in tonnes of CO_2 equivalent) that represents the limit to the authorized emissions of greenhouse gases annually. The distribution of allowances fell under the responsibility of the Member States, which were required to submit to the European Commission a National Allocation Plan subject to the reviews by the Commission. Directive 2003/87/EC also included specific rules for penalties in the event that operators did not surrender the EUAs accordingly, for opting in and out of installations and certain gases and, finally, for a system for monitoring, reporting and verification. Directive 2003/87/EC identified two phases: a 'learning by doing' phase between 2005 and 2007 and a trading phase between 2008 and 2012, running parallel to the first commitment period of the Kyoto Protocol.

Directive 2003/87/EC was amended by directive 2004/101/EC of 27 October 2004 establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms. Directive 2004/101/EC regulates the inclusion of reduction units from the project based mechanisms established by the Kyoto Protocol, namely the Clean Development Mechanism (CDM), generating Certified Emission Reductions (CERs), and the Joint Implementation (JI), generating Emission Reduction Units (ERUs). The rules for the inclusion of those credits in the EU ETS established severe limits for reduction units generated by nuclear projects, land-use and forestry activities, hydro projects as well as double counting.

The implementation of the EU ETS in the first two phases showed that the environmental benefit of the caps imposed to the single installations was very limited. The over allocation of EUAs by the relevant national authorities not only generated a collapse of the prices for EUAs, but also did not create the necessary incentive for green investments by the various installations. Indeed, 99% of installations fulfilled their obligations with regard to 2005 reporting emissions. Finally, the implementation of the EU ETS showed the need for greater harmonisation of national legislation in the future.

[10] On March of the same year the United States of America announced the decision to not ratify the Kyoto Protocol.

2. NEGOTIATING THE FUTURE INTERNATIONAL CLIMATE CHANGE REGIME

The international negotiations on the future multilateral climate change regime can be seen as a perfect example of how international relations are shaped and how sovereign states relate with each other on environmental issues at the international level. Climate change is one of the main concerns of mankind and it was, at least until the global summit of Copenhagen in 2009, very high on the agenda of a large number of heads of state and government. Through describing the international negotiations on the climate change regime, we are therefore better able to understand what the distribution of power and the importance of States in the international community amount to.

2.1 **Actors and procedures**

The actors taking part in international negotiations on climate change can be divided in three main categories:

- Groups of states
- Observers
- Conference officers and facilitators and Secretariats

Sovereign states are directly involved in the negotiations, notably by participating in the meetings and taking decisions accordingly. In international law, states who have ratified an international treaty are usually called Parties. Parties are usually states, but at times regional economic integration organisation (REIO) like the European Union (EU; before Lisbon the Community) can also become a party. The EU participates in international treaties and multilateral negotiations as a single actor, with the same rights and obligations as sovereign states. The EU is the only regional organisation within the international community with such powers. Therefore, when we refer to Parties in the context of international negotiations on climate change, we consider almost the entirety of the international community and one REIO.

Parties negotiate with the assistance of negotiating groups. The most complex and numerous is the Group of 77 that by now encompasses 132 developing countries, including China. This group is divided in regional and policy oriented groups, such as the African Group, the Alliance of Small Island States (AOSIS), the Least Developed Countries (LDCs), oil exporting countries, the Bolivarian Alliance for the Americas (ALBA) countries, the Coalition for Rainforest Nations (CfRN), etc. Recently new groups have been formed, such as the BASIC (Brazil, South Africa, China and India), the group of likeminded countries, the group of Latin American and Caribbean Initiative for Sustainable Development (ILAC) etc. Besides the G77, and the EU (with its currently 28 Member States), it is important to highlight the Umbrella Group (USA, Canada, Australia, New Zealand, Norway, Russian Federation, Ukraine, Japan) and the Envi-

ronmental Integrity Group (EIGs, consisting of Mexico, South Korea and Switzerland).

The role of the international organizations and institutions and the civil society in multilateral negotiations on climate change is less visible and direct than the role of states. International organizations active in the field of environmental protection are UN specialized agencies such as IMO, ILO, FAO and ad-hoc bodies at the global level such as UNEP and UNDP. At the regional level, apart from the EU, important international organizations are, amongst others, the Council of Europe and the Organization of African Unity (OAU). Cross-continental groupings are, amongst other, the OECD and NATO. Recently, along with international organizations, it is worth mentioning the development of international institutions. These can take the form of either institutions such as the G8 or G20 where climate change issues are very high on the agenda of the participating states, or institutions created by multilateral environmental agreements (MEAs). For example, the Conference of the Parties is an institution created by a MEA and is the supreme body responsible for adopting decisions and for the implementation of that specific convention.

International organizations and institutions play a key role in environmental policy making and in the development of international environmental law. The latter is achieved either by facilitating international meetings and relations among States, or by producing some forms of binding or non-binding documents, depending on the type of institution.

The role of civil society in international negotiations, usually participating through non-governmental organizations (NGOs) divided according to sectors such as environmental, research, business, etc., is limited. NGOs participate in the negotiations as observers only in open sessions. The participation of NGOs is regulated by an accreditation procedure based on specific modalities which can differ from one convention to another. An important way NGOs can influence the negotiations is by participating directly in national delegations or through the domestic process which, especially in developing countries, is often tailored to all ranges of local stakeholders.

Negotiations take place in both formal and informal setting. More precisely, most negotiations among Parties takes place in informal settings, behind closed doors, where participation of civil society is limited and government representatives can discuss and exchange views and ideas without any external influence.

Negotiations are opened and closed in plenaries, where all delegations are present, usually represented by the head of delegation. The closing plenary is the place where formal decisions are adopted. Negotiations are usually not conducted in plenaries and experience shows that once this happens it is often very difficult to get to a positive conclusion of the meeting.

Plenaries decide to establish specific contact groups where the different issues on the agenda are tackled on a case by case basis. The Contact group is a group formed during negotiations to reach consensus on an issue proving particularly contentious. It is open to all Parties and observers. Most negotiations among Parties are conducted in informal consultations, convened by the

contact group. Informal consultations are exchange of views among delegations which take place outside the formal setting of negotiations. Usually they are undertaken with the aim of identifying a compromise position. Informal consultations can often end up in friends of the chair or drafting groups where a draft decision text is agreed. All results of the informal consultation go back to the contact group and then to the plenary for adoption.

Multilateral environmental negotiations are conducted by delegations with the assistance of specific tools such as non-papers, working and conference room papers and negotiating texts. The status and relevance of these tools as produced by the secretariat and the different facilitators as mandated by the Parties, depends on maturity of the negotiations and on the issues upon consideration.

The goal and outcome of the negotiations depend on the mandate and can take different forms, such as resolutions, treaties, declarations or decisions. The main difference between the adoption of international treaties or conventions or protocols and other results such as resolutions, declarations and decisions lies in the way they enter into force. While for the former a process of national ratification is required for their entry into force, for the latter there is no need for ratification and the result is directly applicable once adopted.

Every multilateral negotiation is conducted on the basis of specific rules of procedures (ROPs). In the case of climate change negotiations, the rules of procedures have never been adopted. Rather, they are applied since the first Conference of the Parties (1995) with the exception of rule 42 since Parties were unable to reach consensus on the procedure to take decisions. Since 1995 all decisions are adopted on the basis of consensus, meaning with the approval of all Parties or at least without any explicit objection by any Party. Actually, what happened on a few occasions was that the COP president has adopted decisions in spite of the opposition of some Parties. This is what happened in Cancun (2010) and Doha (2012).

2.2 **The EU participation**

Until the entry into force of the Treaty of Lisbon, legal personality was conferred to the European Community (EC) by Article 281 of the Treaty of the European Community (TEC). Thus, the EC had the power to conclude international agreements with one or more states and international organisations (as confirmed by Article 300 TEC). These specific articles in the Treaties were also supported by the jurisprudence of the European Court of Justice that referred to the legal personality of the EC and the capacity of the Community institutions to represent the EC in international treaties.[11]

Since the changes introduced by the Treaty of Lisbon on 1 December 2009, the EU has replaced and succeeded the European Community (EC). As of that moment, it is the EU that 'shall have legal personality' (Article 47 TEU).

[11] ECJ, Case C-6/64 *Flaminio Costa* v. *ENEL* [1964] *ECR* 585.

The external competence of the Union in the field of environmental protection is provided by Article 191(1) and Article 191(4) of the Treaty on the Functioning of the European Union (TFEU). Article 192 TFEU is often used as legal basis for decisions regarding international agreements adopted by the EU. These provisions stipulate that the policy of the Union should aim at 'promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change' and that 'within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations', respectively.

The legal personality of the EU, means, among others, that in international law the EU has the same rights and obligations as a sovereign state. In accordance with Article 4(2)(e) TFEU, environmental policy is a shared competence between the European Union and the Member States. Therefore, the EU and the Member States participate jointly to international treaties and negotiations. That is why, according to established practice, the majority of international environmental agreements are also called mixed agreements, ratified by and create obligations for both the Union and the Member States.

In international negotiations, the EU and its Member States formally speak with one voice, and moreover work and cooperate very closely in the identification of a common position. Behind the formal representation of the EU in international negotiations, the division of powers and work between the EU institutions and the Member States is much more complex. In reality, when the negotiations or representation are at the highest political level, namely at the level of heads of state and government, the unity of the EU is still a big mirage and Member States have the chance to intervene in their national capacity. That is what happened for instance in the final hours of the conference of Copenhagen which will be discussed below, or during the final days of almost every COP when negotiations on crunch political issues are left to ministers. This is also clearly visible from the so-called high level segment organized by each COP when each Party makes a formal statement in the plenary. While for all Parties, the statement is read by the highest political representative present at the meeting, usually, a head of state or minister, the statement of the EU is read jointly, 1,5 minutes each, by the representative of the rotating presidency of the Council (a Member State) and by the Commissioner for Climate Action (European Commission). Surprisingly enough, this practice has not changed after the entry into force of the Treaty of Lisbon. The pre-Lisbon practice is so far maintained in multilateral climate change negotiations, thus meaning that the Commission and the Member States (through the Presidency) still have an equal role in terms of EU representation in multilateral environmental affairs. Articles 17(1) and 27(2) that mandate the Commission to represent the EU externally are far from being concretely applied in the case of international climate change negotiations.[12]

[12] Matthias Buck, 'The EU's representation in multilateral environmental negotiations after Lisbon', in Elisa Morgera (ed.), *The external environmental policy of the European Union* (Cambridge University Press, 2012), pp. 76-95.

Historically, the position of the EU in international negotiations is based on the mandate provided by the Council which, prior to an international event, such as the Conference of the Parties of the UNFCCC, adopted a so-called common position. The common position of the EU agreed by the Environment Council representing the Member States is a compromise between the different interests of the Member States but it is also influenced by other factors such as judgements of the Court of Justice or the lobbying activity of key stakeholders, such as industries. Nowadays, given the immense political importance of the climate change issues, the European Council gives the highest political direction to EU climate policy.

In the international climate regime, even after the entry into force of the Treaty of Lisbon, the EU delegation is formally represented by the so-called troika: a representative of the Commission and representatives of both the present and next Council Presidencies. In reality, the negotiations on the different agenda items discussed at the COP and COP/MOP meetings are left to key experts of the European Commission and the Member States. Behind the scenes, the principle of close cooperation is ensured through regular meetings between the representatives of the Member States and the EU institutions and regular EU coordination meetings held either in the EU prior and after the negotiations or at the specific location of international talks.

On each key agenda item, the preparatory work is done by informal expert groups and by the Working Party on International Environmental Issues (WPIEI) chaired by the Environment Council rotating presidency. Within this machinery the competence and work of the European Commission is fundamental. The result of the work of the Expert Groups are considered for approval by the WPIEI and consequently by the COREPER I before formal endorsement by the Environment Council.

Finally, it must be said that both the evolution of EU legislation, namely the adoption of a very extensive climate and energy package in 2009, and the developments in the international negotiations, with a clear shift and focus on cooperation and finance issues, may affect the internal discussion between the EU and the Member States on the external representation. Again, the fact that climate change negotiations are focusing more and more on finance and cooperation, where internal competences differ, increases the uncertainty around the changes introduced by the Lisbon Treaty in terms of international affairs.

2.3 **The Bali Action Plan**

The negotiations for the future international climate change regime are usually referred to as ‘post-2012’ discussion. Post-2012 refers to the period after the first commitment period of the Kyoto Protocol has ended. Article 3(9) requires negotiations for the details of the future commitment periods to start at the latest in 2005. Indeed, thanks to the ratification of the Kyoto Protocol by the Russian Federation in November 2004 and its subsequent entry into force, the negotiations for the second commitment period of this Protocol were launched by CMP1 in Montreal in 2005 with the establishment of a new subsidiary body

under the Kyoto Protocol; the Ad-hoc Working Group on Further reduction commitments under the KP (AWG-KP).

The establishment of the AWG-KP was made agreed to under the condition that another parallel track was established as soon as possible with a view to craft a future global international response to climate change embracing all Parties under the Convention. In other words, the launch of the negotiations on the second commitment period of the Kyoto Protocol by many important developed countries was subordinated to the start of a discussion on how to engage big emitters like the USA and some of the developing countries in similar greenhouse gas emission reduction commitments.

Consequently, in 2007 in Bali, COP13 decided to establish another subsidiary body under the Convention, the Ad-hoc Working Group on Long-term Cooperative Action (AWG-LCA), to study and provide for a new international solution on mitigation and adaptation to climate change after 2012. Decision 1/CP.13 included the so-called Bali Action Plan (BAP), 'a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012, in order to reach an agreed outcome and adopt a decision at its fifteenth session'. The BAP identified the following 5 key areas of negotiation:

- Shared vision for long-term cooperative action, including a long-term global goal for emission reductions;
- Mitigation (including action by developed and developing countries, reducing emissions from deforestation and forest degradation, various approaches including market and response measure);
- Adaptation;
- Finance;
- Technology and capacity-building.

Furthermore, in order to comply with the deadline set by COP13 (2009) the Bali Roadmap was launched by COP13, including 2 years of intense negotiations, with 8 international high-level meetings under both tracks, the AWG-LCA and the AWG-KP. In 2008, Parties soon realised that four meetings in 2009 would not be sufficient to reach a meaningful agreement by COP15. Therefore, two additional sessions were scheduled.

The programme of negotiations for the post-2012 regime is summarized here below.

- COP14 & CMP4: Bali
- 2008: Bangkok, Bonn, Accra, Poznan
- 2009: Bonn I, II and III, Bangkok, Barcelona
- COP15 & CMP5: 7-18 December 2009 Copenhagen
- 2010: Bonn I and II, Tianjin
- COP16 & CMP6: Cancun
- 2011: Bangkok, Bonn, Panama
- COP17 & CMP7: 28 Nov – 9 Dec Durban

- 2012: Bonn, Bangkok
- COP18: 26 Nov – 7 Dec Doha
- 2013: Bonn (I and II)
- COP19 in Warsaw

3. THE EUROPEAN UNION AND COPENHAGEN

As will be explained in more detail below, the 2009 deadline for the adoption of a future climate change regime was not met by the international community. Parties in Copenhagen were unable to close the negotiations on the post-2012 regime, nor did they provide clarity on the future of these negotiations. The EU played a key role before and after Copenhagen (COP15), but unfortunately this was not sufficient to avoid the big disappointment of many Parties when the result of the 2009 meeting was formally presented.

3.1 **On The way to Copenhagen**

The EU climate diplomacy was very active in the preparation of COP15, both from a diplomatic and legal and policy perspective. The summit of Copenhagen was prepared by the EU officials hand in hand with both the COP presidency in place in 2009 (Poland) and the incoming COP presidency (Denmark), both Member State of the EU.

From a diplomatic point of view, Copenhagen was the climate change summit with the highest level ever of political participation ever for a climate change conference with almost 2oo heads of state and governments expected to participate. EU diplomats were therefore committed to its preparation and travelled all over the globe for regular bilateral and similar high level meetings with the most important countries in the world.

The political basis for the EU commitment was provided by the European Council of 8 and 9 March 2007 when the heads of state and government of the, then, 27 Member States agreed on a set of unilateral and independent targets on climate change and clean energy. Many still considered such a decision as premature and too hazardous. The Council conclusions indicated the following:

- 20% reduction of greenhouse gas emissions by 2020 in respect of 1990 levels, with the possibility to increase to 30% reduction if other developed countries take similar commitments;
- 20% increase in the share of renewable energies in the EU final energy consumption by 2020;
- 20% increase of energy efficiency by 2020.

Typically, in the EU legal system the political guidance given by the European Council was followed by action from the European Commission. On 23 January 2008 the European Commission presented Communication COM(2008) 30,

'20 20 by 2020: Europe's climate change opportunity'. This document included the integrated package of legislative proposals on climate and energy and provided for the long-term strategy of the future EU climate and clean energy policy. Communication COM(2008) 30 encompassed six legislative proposals aimed at bringing the political agreement of March 2007 into action.

One of the key concepts behind the adoption of the integrated climate and energy package is the differentiation of the target for the reduction of GHG emissions between EU ETS and non-EU ETS sectors (transport, housing, agriculture, waste and non- CO_2 gases) with a view to ensure an adequate balance among the different EU industrial sectors affected by the measures as well as among the Member States.

Only in December 2008 the European Council reached a unanimous agreement on the integrated climate and energy package, which became EU legislation on 6 April 2009. The following legislation is included in the integrated climate and energy package:

- Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC;
- Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the GHG emission allowance trading scheme of the Community;
- Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce GHG emissions and amending Council Directive 1999/32/EC as regards the specification of fuel used by inland waterway vessels and repealing Directive 93/12/EEC;
- Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006;
- Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their GHG emissions to meet the Community's GHG emission reduction commitment up to 2020;
- Regulation (EC) No 443/2009 of the European Parliament and of the Council of 23 April 2009 setting emission performance standards for new passenger cars as part of the Community's integrated approach to reduce CO_2 emissions from light-duty vehicles.

On 28 January 2009 the European Commission released Communication COM(2009) 39 'Towards a comprehensive climate change agreement in Copenhagen', which started to identify the EU position for the Copenhagen summit at the end of the year. In particular, this Communication focused on

mitigation and finance, respectively describing expected actions by developing and developed countries as well as the inclusion of aviation[13] and shipping in the final agreement, and a request for the creation of a global climate financing mechanism for developing countries.

On the way to Copenhagen, an important point to be mentioned is the ruling of the European Court of First Instance of 23 September 2009 when the Court annulled two Commission decisions on the National Allocation Plans (NAPs) under Directive 2003/87/EC (EU ETS).[14] The two decisions concerned the Polish and Estonian NAPs for the period 2008-2012 which, according to the Commission, failed to meet the criteria under the EU trading scheme for greenhouse gas emission allowances. The Commission requested a reduction of the total amount of allowances. In its judgement, the Court declared that the Commission had exceeded its powers and that Member States should retain the right to decide how to allocate emissions allowances among different economic operators. These events all took place exactly in a period in which the EU was struggling to find a common position for the upcoming climate summit in Copenhagen. The ruling was released exactly during the attempts by the European Commission and the Swedish presidency of the Council of the EU to forge a united position for Copenhagen. In particular, the EU was trying to get a common position ahead of Copenhagen on several different issues such as the extent of the funding to be provided to developing countries on climate change. Another important issue was that the Commission was trying to get a common position and resist attempts by EU member states in Central and Eastern Europe to get recognition in whatever form of the carbon units not used in the first commitment period of the Kyoto Protocol to reflect their actions in mitigating climate change.

Despite the differing interests of the Member States and the difficulties to reach a common agreement on the Copenhagen summit during the Czech Presidency of the Council of the EU (January – June 2009), the EU position on the Copenhagen climate change conference was outlined by the conclusions adopted by the Environment Council of 21 October 2009 in Luxembourg. The EU position for the Copenhagen summit focused on the following main pillars:

- Mitigation;
- Adaptation;
- Reduction of Emissions from Deforestation and Forest Degradation (REDD), promotion of conservation, sustainable management of forests and enhancement of forest carbon stocks (REDD+), accounting of land use, land use change and forestry (LULUCF), assigned amount units (AAUs) and commitment periods;
- Low carbon development strategies/growth plans (LCDS/LCGP) and nationally appropriate mitigation actions (NAMAs);
- Carbon market;

[13] A topic covered by Ms S. Huber in this Working Paper.

[14] Judgments no. T-263/07 of Court of First Instance of the European Communities, 23 September 2009.

- Climate finance, governance and delivery;
- Technology;
- Legal issues.

While COP15 started on 7 December 2009, the European Council of 10 and 11 December 2009 adopted its conclusions that reiterated the EU position agreed in the Council of October 2009. Most notably it was stated that '[t]he agreement should lead to finalizing a legally binding instrument, preferably within six months after the Copenhagen Conference, for the period starting on 1 January 2013'. Also, 'the need for a significant increase in public and private financial flows to 2020' was reiterated. Furthermore, the EU commitment to provide a fair share of international public support was confirmed.

3.2 **Copenhagen Accord**

From 7 to 18 December 2009, more than forty thousand individuals attended the Copenhagen climate change conference where seven bodies met simultaneously. These were the high level segment, COP 15, CMP 5, SBI, SBSTA, AWG-LCA and AWG-KP. The complexity of the summit was reinforced by the multiplicity of issues to be resolved by the different bodies. Consequently, already months before the actual summit took place, it appeared to many that a successful conclusion of the summit was very unlikely.

In particular, in Copenhagen the two additional bodies created in 2005 and 2007, respectively the AWG-KP and AWG-LCA, were supposed to conclude their work and leave the COP and CMP to adopt the final conclusion on the future international climate change regime.

Unfortunately, these two groups were unable to finish their business in the second week of the summit, and no formal conclusion on the next steps was formally taken. The two track negotiations neither merged nor concluded in Copenhagen and this lack of clarity allowed for the political leaders present in Copenhagen to step up and engage directly in intense negotiations behind closed doors that concluded with the Copenhagen Accord in the early hours of Saturday morning, 19 December 2009.

The Copenhagen Accord was negotiated, drafted and agreed in the final hours of COP15 by approximately 28 countries in representation of all major regional groups, but led in particular by the USA and the BASIC countries.

The Copenhagen Accord was formally presented to the plenary of COP15 and CMP5 after several procedural irregularities of the Danish presidency. Explicit objections were raised by a few Parties, so that the plenary could not formally adopt the Accord as planned but was forced to adjourn the meeting several times.

The Accord was finally rescued by decision 2/CP.15, which reads: 'the COP takes note of the Copenhagen Accord of 18 December 2009'. The Copenhagen Accord is not the result expected by the mandate given to the AWG-KP and AWG-LCA, respectively in 2005 and 2007, both in terms of contents and form.

The Copenhagen Accord is more a political declaration where all main elements of the Bali Action Plan are recognized.[15]

In Copenhagen, the EU was still represented by both the Commission and the Member States but the final hours of the meeting, when the heads of state and government of the major countries gathered together to design the Accord, clearly showed the lack of EU political leadership at such a high political level to the international community. The EU could not speak with one voice in the final night of Copenhagen when the heads of state and government of UK, Germany, France and Spain were not, and could not be, represented by the President of the European Commission, the highest political voice from the European Union present in the room. The negotiations in Copenhagen also showed the failure of EU diplomacy and the EU ended up in a marginalized role at the end of the summit. Leadership was assumed there by the US and China, and also by the newly created BASIC group. One of the reasons for the EU's marginalised role also was that different interests among Member States were emerging, in particular in relation to the increased number of EU Member States.

The changes introduced by the Treaty of Lisbon in terms of political representation of the EU in international negotiations did not and could not help, although there are still many hopes that in terms of political leadership the reform of Copenhagen may have some added value in the future.

3.3 **The EU reaction to Copenhagen**

On 28 January 2010, Spain and the European Commission on behalf of the EU and its Member States submitted a joint letter to the UNFCCC Secretariat as an expression of willingness to be associated with the Copenhagen Accord. The EU's 20% quantified economy-wide emissions reduction targets for 2020 was notified with the specification that 'the EU reiterates its conditional offer to move to a 30 per cent reduction by 2020 compared to 1990 levels, provided that other developed countries commit themselves to comparable emission reductions and that developing countries contribute adequately according to their responsibilities and respective capabilities'. Since the joint letter, a never-ending discussion on whether the move to a 30% reduction in the future is anyhow feasible started in the EU. The division among the Member States is clear, as well as their different interests on the issue.

On 9 March 2010 the European Commission released the policy paper COM(2010) 86 'International climate policy post-Copenhagen: Acting now to reinvigorate global action on climate change'. The paper was designed with

[15] For more information on the Copenhagen Accord, please see Massai L., 'The Long Way to the Copenhagen Accord: Climate Change Negotiations', 19 *Review of European, Comparative and International Environmental Law RECIEL* 2010, issue 1, p. 104-121 and Leonardo Massai, *The Kyoto Protocol in the EU: Legal Obligations of the European Community and the Member States under International and European Law* (The Hague: Asser Press/Springer 2011); Leonardo Massai, *European Climate and Clean Energy Law and Policy (ECCE) – Texts and Materials*, (London: Earthscan Publishing 2011).

the aim to maintain the focus of the international community on climate change. The Commission reiterated the call for the adoption of a legally binding agreement as soon as possible and the need to integrate the Copenhagen Accord into the UNFCCC process.

The European Council conclusions of 26 March 2010 referred to the post-2012 climate change talks and invited Parties to adopt a step wise approach so that international negotiations should build on the Copenhagen Accord and aim at the conclusion of a global and comprehensive legal agreement to reach the objective of staying below the 2 °C increase in global temperatures compared to pre-industrial levels.

On 26 May 2010 the European Commission released Communication COM(2010) 265: 'Analysis of options to move beyond 20 per cent GHG emission reductions and assessing the risk of carbon leakage', which showed that it is economically and technically affordable for the EU to move to a 30 per cent cut of GHG emissions by 2020.

4. POST-COPENHAGEN (AND LISBON) NEGOTIATIONS

One of the major improvements of the EU's climate policy and approach in the negotiations after Copenhagen was the increased partnering with other Parties. The EU started to engage more and more directly with developing countries, either through regular bilateral meeting on the side of official negotiations, or forming coalitions and producing common texts and proposals in some of the key areas under discussion.

The post-Copenhagen negotiations coincide with the entry into force of the Treaty of Lisbon but unfortunately many of the institutional changes introduced by that Treaty did not see any concrete application in the climate change negotiations. Both the President of the Council and the High Representative for Foreign Affairs and Security Policy have not played any role in the participation of the EU in multilateral climate negotiations.

4.1 **Cancun, Durban and Doha**

In Cancun (COP16, 2010) the main objective of all Parties, including the EU, was to restore trust in the multilateral process after what had happened in Copenhagen one year earlier. The main results of the Cancun meeting were the Cancun Agreements (decision 1/CP.16) which integrated the Copenhagen Accord into the UNFCCC process. In particular, the Cancun Agreements formalized the developed country emission reduction targets communicated in accordance with the procedure identified in Copenhagen and addressed developing countries mitigation plans and other cost-effective means to achieve global mitigation goals. On financial support, technology transfer and capacity building, the Cancun Agreements provided the following results:

- Fast-start finance up to 2012;

- New long-term funding arrangements;
- Increased cooperation on technology for both mitigation and adaptation;
- Helping to build capacity in developing countries;
- Raising global awareness about climate change.

The major results of the Durban climate change conference (COP17, 2011) were:

- Design of the Green Climate Fund;
- Mandate for a new working group (Ad Hoc Working Group on the Durban Platform for Enhanced Action) to 'complete its work as early as possible but no later than 2015 in order to adopt this protocol, legal instrument or agreed outcome with legal force at COP21 and for it to come into effect and be implemented from 2020';
- AWG-LCA to terminate its work by COP18.

The EU played an important role in achieving those results, in particular in the establishment of the new ad-hoc body ADP with the aim to design the future international agreement on climate change. In particular, due to the efforts of the EU and India a final compromise was reached in Durban on the mandate of the ADP. The EU position in Durban was represented in the final decision of the conference. The EU managed to reach an agreement on the launch of the second commitment period of the Kyoto Protocol, as well as a process for a legally binding outcome of the negotiations including all Parties by 2015.

One of the reasons behind the EU success in Durban is the cooperation with smaller developing countries, in particular with AOSIS and LDCs, so that big developing countries, such as China, Brazil and India experienced more difficulties to reach a common G77 position that would accommodate the concerns of all members.

The main results of CMP7 were:

- Second commitment period under the Kyoto Protocol, although still uncertainty about the exact numbers of Annex B Parties' Objectives (QELROs) and the length of the commitment period (5 or 8 years?);
- Parties took note of the quantified economy-wide emission reduction targets to be implemented by Parties and of the intention of these Parties to convert these targets to quantified emission limitation or reduction objectives (QELROs) for the second commitment period under the Kyoto Protocol;
- Parties information on QELROs for 2nd Commitment Period Kyoto Protocol by 1 May 2012;
- CDM confirmed and no decision on JI;
- New flexible mechanism to be elaborated in the near future.

In Doha (COP18, 2012) the second commitment period of the Kyoto Protocol was finally launched for a period of 8 years (2013-2020) with the adoption of the Doha amendment to the Kyoto Protocol which also established specific

limits on the use of the flexible mechanism and on the use of surplus AAUs and carry overs, notably the possibility for Annex I Parties to use part of their surplus of emission reductions units in subsequent commitment periods. At the COP level, important decisions were adopted on loss and damage, finance and mitigation. The ADP also advanced with a discussion on the range of actions to close pre-2020 ambition gap and the planning of work. In this respect, the EU position is very much in favour of a successful conclusion of the ADP negotiations and to this aim the EU is supportive of the formal inclusion of any pre-2020 mitigation action in the work of the ADP, as well as the creation of a legally binding agreement including reduction obligations for all developed countries and major developing countries for post-2020.

5. THE WAY FORWARD

There is no doubt that some of the major innovations introduced by the Treaty of Lisbon, both in terms of institutions and substance, are related with the field of EU external relations. Strengthening the position and role of the EU in international law and diplomacy is a must if the EU wants to compete with all major economies and states in the world. The creation of the positions of President of the European Council and the High Representative of the Union for Foreign Affairs and Security Policy were designed specifically for this objective. The Union's external action and specific provisions on the common foreign and security policy may have benefited from these changes. Unfortunately, in the field of environmental protection, and in particular on climate change, external relations and the role of the EU worldwide have not witnessed many improvements. On the contrary, since Copenhagen the EU is often marginalized during negotiations. That is the case with the Kyoto Protocol, whose second commitment period will probably see only a few ratifications from Annex I countries. At the moment of writing this paper, only the United Arab Emirates have submitted to the secretariat their instrument of acceptance. Moreover, important developed countries such as Canada, Japan, New Zealand and the Russian Federation have already expressed their reluctance to engage in a new series of binding commitments under the Kyoto Protocol. This leaves the EU to take binding obligations to reduce GHG emissions under the Protocol, together with Norway, Switzerland, Iceland and a few other countries.

The focus of EU climate diplomacy is therefore very much oriented towards an independent long term framework for climate and clean energy and the new international agreement to be agreed by 2015.

The Commission Green Paper COM(2013) 169 on a 2030 framework for climate and energy policies follows the EU roadmap to 2050 and focuses mainly on the type, nature and level of climate and energy targets to be set for 2030, how coherence between different policy instruments can be attained, how can the energy system best contribute to EU competitiveness and to what extent Member States' different capacities are taken into account. In addition, the green paper addresses the issue of fostering competitiveness EU economy and identifies the following key areas of action:

- Internal market legislation;
- Future exploitation of indigenous oil and gas resources in environmentally sound manner;
- Diversification of energy supply routes;
- Engage further with third countries;
- ETS measures to limit impacts on competitiveness of energy intensive sectors.

On the 2015 agreement, it is worth mentioning Commission Communication COM(2013) 167 'The 2015 International Climate Change Agreement: Shaping international climate policy beyond 2020' released on 26 March 2013. According to the Commission the new agreement shall:

- Be inclusive, by containing commitments that are applicable to all countries, developed and developing alike;
- Focus on encouraging and enabling countries to take on new and ambitious commitments to cut their GHG emissions;
- Include commitments ambitious enough to limit global warming to 2°C;
- Be effective, by enabling the right set of incentives for implementation and compliance;
- Be perceived as equitable in the way it shares out the effort of cutting emissions and the cost of adapting to unavoidable climate change;
- Be legally binding;
- Learn from and strengthen the current international climate regime;
- Respond to scientific advances and be sufficiently dynamic and flexible to adjust as scientific knowledge develops further and as technology costs and socio-economic circumstances change;
- See a broader range of countries share responsibility for providing financial support to help poor countries tackle climate change.[16]

The reasoning of the European Commission in the Communication is also often reflected in the position of the EU in the multilateral negotiations. To this aim, since Copenhagen the EU is advocating for more ambitious goals, a single comprehensive regime including all major economies with an equitable distribution of mitigation commitments, reinforce sustainable development at the global level and improving international accounting.

Finally, when addressing the preparation of the 2015 agreement, Communication COM(2013) 167 touches upon the shortcomings of the UN negotiating process, thus representing one of the first official documents where considerations on how to promote the efficiency of the UN model are expressed so openly. In particular the Communication refers to the UN negotiating process as an 'open-ended participation and decision-making by consensus [that] often results in only agreeing on the lowest common denominator'. The Communica-

[16] Commission Communication COM(2013) 167 'The 2015 International Climate Change Agreement: Shaping international climate policy beyond 2020', Brussels, 26 March 2013, p. 3.

tion provides for some ideas on how strengthen the effectiveness and efficiency of UN negotiations:[17]

- 'developing rules of procedure to better facilitate reaching decisions than through the consensus rule applied under the Convention;
- revisiting the frequency of the annual COPs, where the Convention is one of the few that provides for an annual conference. In doing so, it will be important to find a balance between the continued need for political attention for climate change and avoiding the expectation of ground breaking new progress at every meeting;
- rather than working with a single annually rotating COP Presidency, options such as grouping countries into joint Presidencies over more than one year or having two year Presidencies;
- keeping the current frequency of formal meetings for technical work, the intensity of which is likely to increase in the coming years;
- streamlining and consolidation of the large number of specific agenda items, more informal exchanges ahead of formal technical meetings as well as setting clear priorities in order to contain the overall cost of meetings;
- opportunities to further strengthen the contributions of stakeholders, including expert views from business and non-governmental organisations;
- a strengthened role for the Convention Secretariat.'

What is outlined above is clearly the position of the European Commission, which has never been so loud on the need to reform and improve the system and rules governing the UNFCCC. These concerns are obviously not shared by all Member States and therefore do not represent the position of the EU at the moment of writing. There is no doubt though, that both within and outside the EU, interest in some of those ideas is increasing and that many see them as a way to resolve the current deadlock of climate change negotiations.[18]

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[17] Commission Communication COM(2013) 167 'The 2015 International Climate Change Agreement: Shaping international climate policy beyond 2020', Brussels, 26 March 2013, p. 9 and 10.

[18] For further reading see: I. Creitaru, 'How Keen on Being Green? The EU Climate Change Strategy under the Lens of Multi-level Governance', Institut Européen de L'Université de Genéve Collection Euryopa 60/2009, (2009); E. Murrell, 'The European Union's Role in the Formation of India's Climate Change Policy', 2 *Bruges Regional Integration & Global Governance Papers* 2012; S. Oberthür, 'EU Leadership on Climate Change: Living up to the Challenges', in European Commission, *The European Union and World Sustainable Development: Visions of Leading Policy Makers & Academics,* Luxembourg: Office for Official Publications of the European Communities, p. 41-54; S. Schunz, 'Explaining the evolution of European Union foreign climate policy: A case of bounded adaptiveness', European Integration online Papers (EIoP), Vol. 16, Article 6, (2012), available at <http://eiop.or.at/eiop/texte/2012-006a.htm>; S. Vanhoonacker, *The EU's Impact in International Climate Change Negotiations – The Case of Copenhagen*, Diplomatic System of the European Union (DSEU) (Loughborough University 2010); L. van Schaik, 'The EU and the progressive alliance negotiating in Durban: saving the climate?', ODI and CDKN, Working Paper 354, (October 2012); B. Yan and Ch. Zhimin, 'The European Union, China and Climate Change', in *China and EU in the World Project (CEWP)* (Fudan University 2011); S. Oberthür and M. Pallemaerts (eds.), *The New Climate Policies of the European Union: Internal Legislation and Climate Diplomacy* (Brussels: VUB Press 2010).

THE EU, INTERNATIONAL AVIATION AND CLIMATE CHANGE – A CASE STUDY FOR THE EU AS A GLOBAL ROLE MODEL?

Suzy Huber

1. INTRODUCTION

The European Union's decision to extend the scope of the European emissions trading scheme (EU ETS) to include aviation emissions has provoked fierce opposition from many countries across the world. The reactions this decision has elicited lay bare the fundamental challenges international climate policy is facing. The dispute centres on the clash of international norms – that of the international commitment to address climate change versus the principle of national sovereignty and that of the international aviation principle of non-discrimination versus the international environmental law principle of 'common but differentiated responsibilities' (CBDR). Environmentally speaking, the EU's decision makes sense as aviation emissions are increasing rapidly while emissions in other sectors are being reduced. The EU's decision is perhaps legally and politically justified in the context of a multilateral failure to curb these emissions. So why has the EU been unable to convince the rest of the world of this?

In this paper I will begin by placing the dispute in a historical perspective. Why did the EU feel the need to regulate aviation emissions? I will go on to explain how aviation is included in the EU ETS and what it is that made many non-EU countries threaten the EU with a 'carbon trade war'.[1] Then, I will briefly present some examples of the Chinese, Russian and American threats elicited by the EU's decision as the dispute reached a stand-off early 2012. Finally, the EU's efforts to de-escalate the dispute will lead us to a short analysis of the EU's attempt to be a global role model in international climate change policy. In fact, this is what the EU has tried to be, so the aviation dispute presents us with a fascinating case study to answer the question – *can* the EU constitute a global role model?

2. FAILURE AT THE MULTILATERAL LEVEL TO ADDRESS AVIATION EMISSIONS – THE KYOTO PROTOCOL AND ICAO

International negotiations to curb the effects of climate change have developed under the multilateral framework established by the United Nations Framework Convention on Climate Change (UNFCCC) since 1992.[2] Under this agreement, the Kyoto Protocol was adopted in 1997, by which certain industrialised coun-

[1] A term used in a few newspaper headlines. See for example, P. Clark, 'Carbon trade war edges nearer', *Financial Times Online*, 17 February 2012.

[2] United Nations Framework Convention on Climate Change, New York, 9 May 1992.

tries, amongst them the European Union and its (then) 15 Member States, Russia, Australia, Japan, but not the United States, agreed to reduce their greenhouse gas emissions by an average of 5,2% below 1990 levels in the period 2008-2012.[3] The Kyoto Protocol places a heavier burden on developed countries (the 'Annex I countries'), in the recognition that they are principally responsible for the high level of (historical) greenhouse gas emissions and the fact that they have greater capacity to take actions to mitigate emissions. This division of the burdens, enshrined in the UNFCCC, is an expression of the principle of 'common but differentiated responsibilities and respective capabilities' or CBDR.[4] It is considered 'one of the core challenges of the global climate regime'[5] due to differing views on how the differentiation should be determined, and, as will be discussed later on, it is one of the main objections voiced by developing countries against the EU aviation ETS.[6]

Although domestic aviation emissions are taken into account under the binding emission reduction targets of the Kyoto Protocol, states failed to agree on how to tackle international aviation emissions – the biggest sticking point being the allocation of responsibility for these emissions. Under article 2.2 of the Kyoto Protocol, however, Annex I countries agreed to pursue the 'limitation or reduction of emissions of greenhouse gasses from aviation working through the International Civil Aviation Organization'.[7]

Currently, aviation emissions account for only around 2 per cent of global CO_2 emissions, but it is one of the fastest growing sources of emissions. ICAO estimated that CO_2 emissions from the aviation sector almost doubled in the period 1996 to 2006.[8] Furthermore, global aviation emissions are projected to more than triple under all scenarios for 2050 according to ICAO.[9] It is in this context of rapidly growing aviation emissions that the negotiations in the International Civil Aviation Organization (ICAO) must be viewed.

The International Civil Aviation Organization[10] is a specialised UN agency and serves as a forum of cooperation in all fields of civil aviation for its 191 member states. Environmental protection and the limitation of CO_2 emissions from aircrafts through market based measures have been discussed within

[3] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997.

[4] In the preamble to the UNFCCC, it is stated that 'the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions'. See also article 4 of the UNFCCC.

[5] J. Brunnee and C. Streck, 'The UNFCCC as Negotiation Forum: Towards Common but *More* Differentiated Responsibilities', to be published in *Climate Policy*.

[6] In this paper, the inclusion of aviation in the EU ETS will be referred to interchangeably as the 'EU decision', 'aviation ETS' or 'EU aviation ETS' for lack of an agreed terminology.

[7] Article 2, Kyoto Protocol.

[8] J. Leggett *et al.*, 'Aviation and the European Union's Emission Trading Scheme', Congressional Research Service Report, R42392, 2012.

[9] ICAO Environmental Outlook 2010, available at <http://www.icao.int/environmental-protection/GIACC/Giacc-4/Giacc4_ip01_en.pdf>.

[10] The Convention on International Civil Aviation, Chicago, 7 December 1994.

ICAO since the 1990s.[11] In 1996, shortly before the Kyoto Protocol was signed, the ICAO Council concluded that an international environmental tax on aviation emissions was impracticable due to irreconcilable views on the matter from state parties.[12] By 2004, seven years after the Kyoto Protocol was signed, ICAO did not come any closer to reaching agreement on how to limit or reduce the emissions from aviation through market based measures. In the resolution adopted that year, ICAO endorsed the development of a global emissions trading scheme for aviation, and at the same time, endorsed the idea of the inclusion of aviation in existing emission trading schemes.[13]

Given the slow progress being made in the ICAO on market based measures and faced with rapidly growing aviation emissions, the EU decided it could wait no longer and took the opportunity the 2004 ICAO resolution presented to begin planning the inclusion of international aviation emissions in its recently established emissions trading scheme. The European Commission released a Communication in 2005 titled 'Reducing the Climate Change Impact of Aviation',[14] which was to form the basis for discussion on the internalisation of the environmental costs of aviation emissions into the EU ETS. The Commission presents compelling arguments for the need to control emissions from aviation – 'the impact of aviation on the climate is on the rise' and the 'growth in the [EU's] international aviation emissions would offset more than a quarter of the reductions required by the [EU's] target under the Kyoto Protocol'.[15] In the Communication, different options for measures are shortly assessed, such as increasing research into cleaner air transport, improving air traffic management and taxation, but ultimately, the inclusion of aviation into the EU ETS is found to be 'the most promising way forward'.[16] Therefore, in 2006 the Commission made a legislative proposal, which envisaged including aviation in the EU ETS.[17]

Developments in Europe did not go unnoticed by the international community. In April 2007, a US-led diplomatic coalition in Brussels including Australia, Canada, China, Japan and South Korea, wrote to the representatives of the Member States to the EU, urged the EU to 'exclude operations from non-European aircraft[s]' from the scope of the EU ETS and 'to reconsider the Com-

[11] For an overview, see the ICAO website on environmental protection, available at <http://www.icao.int/environmental-protection/Pages/default.aspx>.

[12] ICAO Council Resolution on Environmental Charges and Taxes, 9 December 1996.

[13] ICAO Assembly Resolution A35-5 (2004), Appendix I, paragraph 2(c).

[14] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'Reducing the Climate Change Impact of Aviation', 27 September 2005, COM(2005) 459 final.

[15] Ibid., at 2.

[16] Ibid., at 8.

[17] Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, 20 December 2006, COM(2006) 818 final.

mission's unilateral proposal'.[18] At the ICAO Assembly[19] in September 2007 a resolution passed that urged its members 'not to implement an emissions trading system on other Contracting States' aircraft operators *except on the basis of mutual agreement* between those States'.[20] The EU made a formal reservation to this resolution, stating that:

'the programme put forward for agreement at this Assembly is unambitious, piecemeal and lacking in credibility on market-based measures … Europe is resolved to go forward with a comprehensive approach to reducing aviation emissions and contribute effectively to the international response to addressing climate change. It remains convinced that the inclusion of aviation in the EU Emissions Trading Scheme would be fully consistent with its international obligations in particular the key principles of sovereignty and non-discrimination.'[21]

This formal reservation made by the EU in 2007 encapsulates the tone of the EU's position in this dispute. It clearly shows that the EU was fully convinced of its legal right to include international aviation emission in the EU ETS. Unfazed by protests from the international community, the European Union continued with its plans to include aviation in the EU ETS.

3. THE EU HONOURS ITS INTERNATIONAL OBLIGATIONS, OR, HOW IS AVIATION INCLUDED IN THE EU ETS?

European Emissions Trading Scheme

To meet their commitments under the Kyoto Protocol, the EU and its Member States have enacted a package of climate and energy policy measures. The cornerstone of this package (often referred to as the flagship of EU climate policy) is the EU ETS,[22] the first and biggest emissions trading scheme in the world, which was launched in 2005. By now, it covers greenhouse gas emissions in 31 countries (the 28 EU Member States, Iceland, Liechtenstein and Norway) from approximately 11,000 installations from energy-intensive industry such as power stations, combustions plants, oil refineries and iron and steel works, as well as factories making cement, glass, lime, bricks, ceramics, pulp,

[18] B. Mayer, Case note C-366/10, *Air Transport Association of America and Others* v. *Secretary of State for Energy and Climate Change,* Judgment of the Court of Justice (Grand Chamber) of 21 December 2011, in 49 *Common Market Law Review* 2012, 1113-1140, at 1113.

[19] The ICAO Assembly convenes every 3 years and is the sovereign body of the organization.

[20] ICAO Assembly, A36-22: Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection in *Assembly Resolutions in Force (as of 8 October 2004)*, Appendix L, operative clause 1(b)(1), available at <http://www.icao.int/environmental-protection/Documents/A36_Res22_Prov.pdf > [emphasis added].

[21] Written statement of reservation on behalf of the Member States of the European Community (EC) and the Other States Members of the European Civil Aviation (ECAC) [made at the 36th Assembly of the International Civil Aviation Organization in Montreal, 18-28 September 2007], available at< http://europa.eu/rapid/press-release_MEMO-07-391_en.htm>.

[22] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003, establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (EU ETS Directive).

paper and cardboard. Between them, the installations in the scheme account for almost 45% of the EU's greenhouse gas emissions.

The EU-ETS works on the 'cap and trade' principle. This means there is a 'cap', or a quantified limit placed on the amount of greenhouse gases that may be emitted by installations subject to the system. Within this cap, the participating installations receive emission allowances (European Union Allowances or 'EUAs', each representing 1 metric tonne of CO_2 equivalent) which they can sell to or buy from one another as needed. Installations must measure and report their emissions and subsequently surrender one allowance for every tonne of CO_2 (or equivalent) they emit during annual compliance periods. The number of allowances, or the cap, is reduced over time so that total emissions fall. In 2020 the available allowances and therefore the maximum allowed emissions will be 21% lower than in 2005.

The inclusion of aviation

In 2008, the Directive by which the scope of the EU ETS was extended to include aviation activities[23] (hereinafter the Aviation ETS Directive) was adopted. This meant that from 1 January 2012 onwards, all aircraft operators flying to or from an aerodrome in the European Union, Iceland, Liechtenstein or Luxembourg must monitor, report and surrender allowances for their annual emissions from these flights. The cap set on aviation emissions[24] has the potential, based on projected growth scenarios of aviation activities, to achieve a relative reduction of 46% by 2020.[25] Most of the allowances under the cap, namely 85% in 2012 and 82% in the period 2013-2020, are distributed for free among aircraft operators, while 15% of the allowances will be auctioned. From 2013, 3% of the allowances will be set aside for a new entrants' reserve. Studies have shown that the inclusion of aviation in the EU ETS is likely to have a modest impact on airline ticket prices.[26] The revenues generated by the auctions of aviation allowances are to be used by Member States for purposes of climate change mitigation and adaptation, particularly in developing countries.[27] The EU accommodates actions taken by a third country to reduce the climate change

[23] Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community.

[24] Which has been set at 97% of the average aviation emissions emitted in the period 2004-2006 for 2012, and for the period 2013-2020, it is reduced to 95% of the average aviation emissions emitted in the period 2004-2006.

[25] Commission Staff working Document, 'Summary of the Impact Assessment: Inclusion of Aviation in the EU Greenhouse Gas Emissions Trading Scheme (EU ETS)', COM(2006) 818 final, Brussels, (20 December 2006).

[26] In the impact assessment accompanying the proposal, calculations were made of the impact on ticket prices with a high allowance price of €30 (the current EUA price hovers around €4). The price increase was calculated to be a maximum of €39 on a return ticket for an intercontinental ticket (Impact assessment of the inclusion of aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, 22 December 2006, p 34).

[27] Article 3d (4) of the EU ETS Directive (consolidated version).

impact of aviation, otherwise known as 'equivalent measures', by considering exemptions for flights from that third country.[28]

When presented with these figures, the inclusion of aviation activities in the EU ETS appears to be a reasonable and effective measure to curb aviation emissions. The European message of insufficient progress in ICAO, coupled with the EU's commitments under the Kyoto Protocol and the cost-effectiveness and equitable design of the EU aviation ETS has been consistently repeated by the European Commission.[29] Yet the EU has failed to convince its opponents to embrace this scheme.

The crux of the dispute is that the EU chose to include *all* flights arriving or departing from an EU aerodrome in the scheme, irrespective of the origin or destination of the flight and irrespective of the nationality of the aircraft operator, and by calculating the emissions over the whole trajectory of the flight, including those that are emitted outside EU airspace. By doing so, the ETS has the potential to cover almost 60% of international aviation emissions,[30] an admirable chunk of greenhouse gas emissions that are still unregulated internationally and growing fast. However, other countries argue this infringes their sovereignty and unilaterally seeks to impose (financial) obligations on them.

4. INTERNATIONAL STAND-OFF: A HIGH LEVEL GAME OF CHICKEN

Although it was clear from 2007 that the EU's plans were controversial, the international objections really started to gather steam around 2010, when the possibility of recourse through national courts became available for private parties to contest the validity of the amended ETS Directive. The first (and the last) to do so was a joint effort of the Air Transport Association of America and United, Continental and American Airlines in UK courts.[31] The High Court of Justice for England and Wales made a reference for a preliminary ruling to the European Court of Justice.[32] Three main arguments were put forward by the American airlines, that in turn sum up the main arguments of all the opponents against the scheme: firstly, the EU went beyond its jurisdiction by taking into account the part of the flights outside EU airspace; secondly, the EU does not have the mandate to regulate international aviation emissions, this should have been agreed mutually through ICAO; and thirdly, EU ETS amounts to a tax or a charge on fuel, which is prohibited by aviation treaties. One more objection which was not put forward by the claimants in the US airlines' court case, but

[28] See Article 25a, Directive 2003/87/EC (consolidated version).

[29] See for example, the presentation given by the European Commission to the ICAO Council on 29 September 2011, which you can find on the Commission website, available at <http://ec.europa.eu/clima/policies/transport/aviation/docs/presentation_icao_en.pdf>.

[30] J. Scott and L. Rajamani, 'EU Climate Change Unilateralism', 23 *The European Journal of International Law* 2012, 469-494, at 474.

[31] The UK is the administering state of the three American airlines under EU ETS and therefore was the chosen forum. Aircraft operators are administered by the Member State that issued their operating license, or in the case of aircraft operators not based in the EU, by the Member State that the aircraft operator flies to the most (greatest attributed emissions).

[32] S*upra* note 18.

constitutes a very important objection for developing countries such as China and India, should be mentioned here as well. Including aviation into the EU ETS is said to violate the CBDR principle by treating developing countries airlines and developed countries airlines equally, although this is in line with the non-discrimination principle of international aviation law.

On 21 December 2011, just in time for the start of the first compliance year of aviation ETS, the European Court rejected all three arguments and found that the inclusion of international aviation activities in the EU ETS consistent with applicable customary international law and treaties.[33]

The judgment of the European Court of Justice was hailed as a legal victory by the Europeans. It quickly became apparent however, that the opponents were nonplussed by the legal validity of the Aviation ETS Directive and refocused on political and economic countermeasures. The Chinese, Russian and American governments have been particularly vocal objectors to the EU's aviation ETS, engaging in a diverse range of, often far-reaching measures to retaliate what they see as the unilateral extension of the EU's jurisdiction.

In 2011 it was reported that the Chinese government 'blocked' a billion dollar order of Airbus aircrafts (A380s) by Hong Kong Airlines, citing it as a retaliatory measure against the EU ETS.[34] However, it seems that the Chinese were called on their bluff as a few months later, the Airbus order by Hong Kong Airlines was confirmed.[35] The Chinese government, seemingly frustrated that their economic retaliatory measure did not have the desired effect on the EU to back down from its aviation ETS, has forbidden its airlines to comply with their EU ETS obligations[36] and continues to make threats that it will impound EU aircrafts.

The Russian Federation sought to exert pressure on the EU by withholding an agreement on reducing the EU payments to fly over Siberia,[37] which had been a precondition set by the EU to agree to Russia's accession to the World Trade Organisation.[38]

Protest against the inclusion of international aviation in the EU ETS also came from the US Congress. In 2011 a bill was introduced in the House of Representatives and later in the Senate that, if passed, would block US airlines

[33] The CJEU's judgment did not satisfy many lawyers as it failed to address the clash of norms, instead, sidestepping the question in a rather technical way and declaring the Chicago Convention on International Civil Aviation (the Convention establishing ICAO) not applicable. For more on the court case, see the case note cited *supra* note 18.

[34] 'China blocks billion dollar Airbus order', *Financial Times*, 24 June 2011, available at <http://www.ft.com/intl/cms/s/0/c4ce5aa0-9e4b-11e0-8e61-00144feabdc0.html#axzz2V3XzN3xa>.

[35] See for example, 'Hong Kong Airlines confirms order for 10 A380s', *Flight Global*, 9 January 2012, available at <http://www.flightglobal.com/news/articles/hong-kong-airlines-confirms-order-for-10-a380s-366646/>.

[36] 'China bans airlines from paying EU carbon tax' 7 February 2012, available at <http://centreforaviation.com/news/china-bans-airlines-from-paying-eu-carbon-tax-139841>.

[37] EU Press Release, 'Commission welcomes agreement on Siberian overflights' 1 December 2011, available at <http://europa.eu/rapid/press-release_IP-11-1490_en.htm>.

[38] 'EU, Russia in stalemate on Siberian Overflight Fees', *Aviation Week*, 1 April 2013, available at <http://www.aviationweek.com/Article.aspx?id=/article-xml/AW_04_01_2013_p32-563613.xml>.

from complying with their EU ETS obligations. Most commentaries at the time stated that the bill would probably stay in Congress and emphasised that it would not go into effect unless the President signed it. It was deemed 'unlikely' that the Obama Administration would 'engage in an international fight against Europe.'[39] The Obama Administration did warn the EU in a letter sent in December 2011 by the American Secretary of State and Secretary of Transport, stating that the EU is 'increasingly isolated' in this matter and threatening to take 'appropriate measures' against the EU if they continue with their aviation ETS.[40]

The EU's isolated position became most apparent when in September 2011, India took the initiative to unite the opponents of the EU aviation ETS in a coalition dubbed the 'Coalition of the Unwilling.' This coalition of strange bedfellows consists of, amongst others, the United States, China, the Russian Federation, India, Brazil, Japan and Saudi Arabia. They gathered on two separate occasions to issue Joint Declarations. The first meeting was held in September 2011, and resulted in a first Joint Declaration condemning the EU ETS as illegal under international law and urging the EU to exclude flights from non-EU carriers from the scheme.[41] The second meeting took place on 20-21 February 2012 in Moscow and was intended to come to an agreement on coordinated countermeasures for maximum pressure on the EU. The 'Coalition of the Unwilling', unsurprisingly considering its composition, could not agree on one coordinated countermeasure. Instead, the Joint Declaration that was issued threatened the EU with a 'basket of measures' that Coalition members could consider taking. The measures ranged from holding meetings with EU carriers to threaten them with retaliatory measures, to imposing additional levies or charges on EU carriers as a form of countermeasure.[42]

The EU has certainly met intense international opposition against the aviation ETS, and for a while the EU held its position in the high level game of chicken it was engaged in with the opposing countries. The European Commission repeatedly tried to engage opponents by either explaining the reasonableness of the EU aviation ETS, or by trying to revert the focus of the discussion back to the main issue – tackling the increasing growth of aviation emissions. Objectors were reminded of their own role and were asked to come up with constructive alternatives within ICAO.[43] The steadfast position of the

[39] See for example, a news item on the bill from 24 October 2011, which states that: 'the bill has little chance of passing the Senate', and 'the Obama administration is unlikely to engage in an international fight against Europe', available at <http://www.climate-policy-watcher.org/?q=node/221>.

[40] A copy of the letter sent to the 27 EU Member States, available at<http://www.nbaa.org/ops/environment/eu-ets/20111216-eu-ets-us-state-department-clinton.pdf>.

[41] See the Press Release from the Indian Ministry of Civil Aviation, 30 September 2011, available at <http://pib.nic.in/newsite/erelease.aspx?relid=76388 >.

[42] A copy of the Moscow Declaration from 21 February 2012 is available at <http://www.greenaironline.com/photos/Moscow_Declaration.pdf>.

[43] See for an example of the EU Commission's communication offensive: A. Wiener, 'Airline Trade War? Global Opposition Grows Against EU Emissions Law', *Der Spiegel online*, 24 February 2012 and the EU Commissioner for Climate Action's website, available at <http://ec.europa.eu/commission_2010-2014/hedegaard/index_en.htm>.

EU and the increasingly political dispute caused the ICAO Council President to act. An Ad-hoc Working Group was set up to investigate six possible market based measures, which were quickly whittled down to four (and later to three).[44] These encouraging developments pointed towards tentative momentum within ICAO to progress on a global market based measure, caused by the pressure the EU was exerting by not backing down from its aviation ETS. Whether opponents to the EU aviation ETS were on board was not yet clear, but preparatory work for negotiations was proceeding. The firm stance the EU was taking was possibly resulting in progress in ICAO.

5. THE EU BACKS DOWN (TEMPORARILY): STOP THE CLOCK

It was somewhat unexpected when the EU Commissioner for Climate Action, Connie Hedegaard, announced on 12 November 2012 that the European Commission would ask Member States to 'stop the clock' on aviation ETS for one year to allow for a constructive dialogue within the framework of the international negotiations in the ICAO.[45] This highly unusual move, to suspend enforcement of EU ETS obligations on international flights for one year, came after 'progress' was made within ICAO to take steps towards an international regulation on emissions from aviation. The 'progress' referred to was the setting up of a high level policy group tasked with reducing the number of market based measure options from three to one option and an explicit reference to a global market based measure. The 'stop the clock' proposal came with the following precondition: if the international negotiations do not proceed and deliver results by the end of 2013, the EU ETS aviation obligations will 'snap' back automatically. It is also important to note that the suspension of the enforcement of EU ETS obligations only applies to international flights. EU ETS obligations for intra-European flights still exist and will be enforced, also where non-EU based airlines are concerned.

The 'stop the clock' proposal was met with support from Member States and the European Parliament who were relieved that a 'trade war' was (temporarily) averted. The European Parliament rapporteur, Peter Liese, in reaction to the accusations of aviation ETS opponents that the EU stance was blocking negotiations in ICAO stated: 'The Commission proposal gives the opportunity

[44] 'Concerns over CBDR fail to halt important ICAO Council agreement to move forward on evaluating market-based measures', *GreenAirOnline*, 16 March 2012, available at <www.greenaironline.com>.

[45] To watch a video of Connie Hedegaard's statement, see her website, available at <http://ec.europa.eu/commission_2010-2014/hedegaard/headlines/news/2012-11-12_01_en.htm>. See also the EU Press Release 'Stopping the clock of ETS and aviation emissions following last week's International Civil Aviation Organization (ICAO) Council', 12 November 2012, available at <http://europa.eu/rapid/press-release_MEMO-12-854_en.htm>. For proposal COM (2012) 697, see <http://ec.europa.eu/clima/policies/transport/aviation/docs/com_2012_697_en.pdf>. It was eventually adopted on 24 April 2013, Decision No. 377/2013 of EP and the Council derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, *OJ* 2013, L 113, p. 1.

to make unambiguously clear that it is not the EU which stands in the way of an international agreement.'[46]

The international reaction to this gesture of the EU to 'create a positive atmosphere around these negotiations', in the words of Connie Hedegaard, must have been disappointing to the Europeans. China acknowledged the EU's gesture, but refocused the dispute on another issue – the fact that the EU dares to regulate emissions from Chinese aircraft carriers *within* European airspace. The Chinese Ministry of Foreign Affairs states: 'China welcomes the EU's decision … but does not accept the practice of applying the system to foreign flights within Europe. China expects the EU to take a constructive attitude and work with other parties to settle differences properly.'[47] This new objection from the Chinese contradicts their earlier objections on the ground of national sovereignty. The European Union and its Member States are completely within their right to regulate airlines operating in EU airspace.

The US also did not seem impressed by the EU's gesture to create a positive atmosphere for negotiations, as two weeks after the 'stop the clock' announcement, President Obama, earlier being assessed as unwilling to engage in an international fight with the EU, signed the 'European Union Emissions Trading Scheme Prohibition Act of 2011.'[48]

Clearly there are complex political factors at play in this dispute, but the reactions to the 'stop the clock' proposal arguably expose the disingenuous claims of the EU's opponents of seeking constructive negotiations through ICAO. The effect that the 'stop the clock' proposal has had on the tentative momentum within ICAO cannot yet be fully assessed at the time of writing. The question is whether the 'stop the clock' gesture from the EU will create a positive atmosphere for constructive negotiations to take place, or whether it will, perversely, alleviate the pressure put on the ICAO process?

6. IS THE EU A GLOBAL ROLE MODEL?

What does the dispute over EU ETS show us? First, urgency is lacking when addressing climate change. Even when faced with the prospect of rapidly increasing greenhouse gas emissions from aviation, and after 15 years of negotiations, the international community cannot agree because states are unwilling to compromise on notions such as national sovereignty and common but differentiated responsibilities. Second, taking a unilateral path in a multilateral

[46] European Parliament Draft Report on the proposal for a decision of the European Parliament and of the Council derogating temporarily from Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community (21 December 2012), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-502.041+01+DOC+PDF+V0//EN&language=EN>.

[47] 'China welcomes EU delay of ETS for int'l flights: FM', *English news*, 03 April 2013, available at <http://news.xinhuanet.com/english/china/2013-04/03/c_132282974.htm>.

[48] Statement by the Press Secretary, 27 November 2012, available at <http://www.whitehouse.gov/the-press-office/2012/11/27/statement-press-secretary-hr-2606-hr-4114-s-743-and-s-1956>.

framework, no matter how justified, is risky business when your opponents include China, Russia, India and the United States.

Third, and the focus of this paper – the European Union has tried to be a global role model by setting an example as to how international aviation emissions can be addressed, but so far it has failed to inspire or convince the rest of the world to follow its lead. Including aviation in the EU ETS has unified the rest of the world against this plan, but may have created momentum towards progress in ICAO. As Connie Hedegaard said when announcing the stop the clock proposal, 'it seems that because of some countries' dislike of our scheme many countries are prepared to move in ICAO, and even more towards a Market Based Mechanism … at global level.'[49] In order to harness this momentum, the EU must stand firm on its threat that the 'stop the clock' is temporary unless the ICAO process 'delivers'.[50] At the same time, the EU has knowingly engaged in an 'ambitious, controversial and high-stakes experiment'[51] and must know when to employ its fall-back position.

What the EU expects from the ICAO Assembly in September 2013 has been stated: an immediate and meaningful applicable framework that guides national and regional market-based mechanisms, a realistic timetable for a global market-based mechanism and an ambitious set of technological and operational measures.[52] Whether the ICAO Assembly will be able to achieve these to the satisfaction of the EU by September 2013 remains to be seen. My own prediction is that regardless of the content of the ICAO Assembly results, the EU will have to reduce the scope of the aviation aspects of the EU ETS to appease its objectors. It is to be hoped that the EU will not be forced to render the system completely ineffective by reducing the scope to intra-EU flights only. A more reasonable compromise would be to halve the international scope, in other words, to apply the EU ETS to all flights departing from an EU aerodrome (instead of all arriving and departing flights).

A role model is defined as 'a person whose behaviour in a particular role is imitated by others.'[53] Although for the time being, the EU cannot be said to have been successful as a role model in the case of aviation ETS, I would argue that the EU aspired to be a global role model and that it should continue to do so in addressing climate change. The dispute over aviation ETS has shown that the EU is a global actor who can push the agenda in multilateral forums. In the case of aviation ETS, this was done by taking a highly controversial decision. Considering the political backlash it has created, it is questionable whether the EU will choose such a route again in the near future.

[49] See EU Press Release, 'Stopping the clock of ETS and aviation emissions following last week's International Civil Aviation Organization (ICAO) Council', MEMO/12/854, 12 November 2012.

[50] Ibid.

[51] J. Scott and L. Rajamani, *supra* note 30, at 1.

[52] 'Hedegaard sets out conditions on ICAO agreement as EU legislators approve EU ETS 'stop the clock'' measure', available at <GreenAirOnline.com>.

[53] Merriam-Webster Dictionary.