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Sustainable Europe and its Global Reach

Eva Kassoti and Andrea Ott (eds.)

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EVA KASSOTI AND ANDREA OTT (EDS.)

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INTRODUCTION

Eva Kassoti and Andrea Ott*

1. INTRODUCTION: A FOGGY CONCEPT AND A CONTENTIOUS PRINCIPLE

The contributions in this special issue result from a workshop organized at Maastricht University on 16 October 2020 in the framework of the NOVA-EU (Innovating and Transforming the European Union) research project. NOVA, financially supported by the Jean Monnet action of the European Commission between 2019 to 2021, aimed at stimulating discussion about and enhance the research into four key challenges that heavily impact the European Union's governance structure, regulatory framework, identity and, most importantly, its future. The sustainable future of the European Union was identified as one of these challenges and legal researchers reflected on the EU's contribution to achieving sustainable development globally.

From the start, understanding what exactly sustainable development entails formed a key conundrum in our research. Although popular as a concept, regularly referred to by politicians, policy-makers and legislators alike, it means different things to different people and it may even be employed as a 'diplomatic trick'[1] to unite the interests of developed and developing nations. Furthermore, the concept is underpinned by tensions between the detrimental objectives of development, advancing economies and trade relations, achieving conservationist objectives and protecting the environment. Sustainable development has been accused of operating in a "conceptual fog"[2], described as being more akin to a process than a target[3] – thereby creating unclarity as to how it should be implemented concretely.[4] The contentious nature of its definition and its multi-facetted nature[5] are already vividly present in the two levels emerging when discussing sustainable development, namely as a policy concept to be

* Eva Kassoti is Senior Researcher in EU and International Law, T.M.C. Asser Institute, The Hague; Andrea Ott is Professor of EU External Relations Law and also holds a Jean Monnet Chair in EU Law at the University of Maastricht. Both authors are members of the Governing Board of the Centre for the Law of EU External Relations (CLEER) in The Hague.

[1] J. E. Viñuales, The rise and fall of sustainable development, RECIEL 22(1) 2013, pp.3-13 (at p.4).

[2] J. E. Viñuales, 'Sustainable Development', in L. Rajamani, J. Peel (eds.), The Oxford Handbook of International Environmental Law (Oxford University Press, 2nd edn. 2019)

[3] U. Beyerlin, Sustainable development, paras. 9-11, in Max Planck Encyclopaedia of International law.

[4] S. R. W. van Hees, Sustainable development in the EU: Redefining and Operationalizing the Concept. Utrecht Law Review, 2012.

[5] V. Barral, Sustainable development in International Law: Nature and operation of an evolutive legal norm, EJIL 2012, pp. 377-400.

integrated into national and EU policies and as a legal commitment or principle to steer the direction and action of state and non-state actors.

Sustainable development as a policy concept has emerged in the context of international environmental governance since 1987 and it was reinforced at the UN level with the establishment of the 17 Sustainable Development Goals (SDGs) in 2015.[6] Dating back to the 1987 UN Brundtland Commission Report where it is defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs,"[7] four dimensions of the concept have been identified. The ambitious global agenda aims to reconcile the economic, social and ecological dimensions of sustainable development, and places the fight against poverty – including the need for economic growth – next to environmental protection. The policy concept of sustainable development goes back to the Second UN Founex Report of 1971 and the 1972 UN Stockholm Declaration on the Human environment, confirmed by the 1992 Rio Declaration, by the 2012 Rio+20 Summit and the 2030 Agenda for Sustainable Development,[8] emphasizing that economic development and environmental protection have to be understood as compatible and mutually reinforcing goals.[9]

2. SUSTAINABLE DEVELOPMENT AS A NORMATIVE AND LEGAL CONCEPT IN INTERNATIONAL LAW

The concepts and definitions of sustainable development, however – apart from being *qua* nature heterogeneous – do not answer the questions of which legal obligations flow from it and of how these diverse aims can be streamlined. Philippe Sands explained that sustainable development appeared in international agreements since the 1980s and that it was introduced as a general principle into the preamble to the European Economic Area Agreement between the European Communities and the EFTA States in 1992.[10] He also extracted the core elements of sustainable development reflected in international treaties as follows:

1. the need to preserve natural resources for the benefit of future generations (the principle of intergenerational equity);

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[6] https://sdgs.un.org/goals (last accessed 30 January 2022)

[7] Report of the World Commission on Environment and Development: Our Common Future Transmitted to the General Assembly as an Annex to document A/42/427 – Development and International Cooperation: Environment, at Our Common Future: Report of the World Commission on Environment and Development (un.org) (last accessed 26 November 2021).

[8] https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf (last accessed 25 November 2021)

[9] U. Beyerlin, Sustainable development, in Max Planck Encyclopaedia of International law; J. E. Viñuales, Sustainable development, in L.Rajamani, J.Peel (eds.), The Oxford Handbook of International Environmental Law (Oxford University Press, 2nd edn. 2019).

[10] P. Sands, Principles of International Environmental Law. Vol. 2nd ed, (Cambridge University Press, 2003), p.252.

2. the aim of exploiting natural resources in a manner which is 'sustainable', or 'prudent', or 'rational', or 'wise' or 'appropriate' (the principle of sustainable use);
3. the 'equitable' use of natural resources, which implies that use by one state thereof must take account of the needs of other states (the principle of equitable use, or intragenerational equity); and
4. the need to ensure that environmental considerations are integrated into economic and other development plans, programmes and projects, and that development needs are taken into account in applying environmental objectives (the principle of integration).[11]

Yet, assessing sustainable development as a legal commitment or principle is highly contentious. Vaughan Lowe raises the point that no clear definition of this term exists and therefore it cannot form a norm of international law but instead it is a "convenient umbrella term to label a group of congruent norms."[12] Balancing the policy goals of economic and social development with environmental protection carries some normative weight[13] and forms an element in judicial and legal reasoning as it becomes visible in international disputes and jurisprudence.[14] This has some effect on the ground but the equation between development and the environment is seen as part the problem and without prioritising environment over prosperity no real progress in environmental protection can be achieved.

Hence, while sustainable development is far from being considered as a binding norm in international law in its own right, one may wonder whether it is a normative concept nonetheless – namely, a concept bearing some normative significance although not constituting *per se* a binding norm. After all, normativity is a broader concept than legality[15] and in international legal theory it is widely accepted that "a normative proposition can be legally relevant without being legally binding."[16] Both the ICJ and the CJEU have acknowledged in their respective practice the normative contours of conduct that is not, technically speaking, binding. The operation of the principle of estoppel in international

[11] Sands, p.253.

[12] V. Lowe, Sustainable development and unsustainable arguments, pp.25-26, in A. Boyle and D. Freestone (eds.), International Law and Sustainable Development (Oxford University Press, 1999).

[13] Viñuales speaks about the normative impact and jurisprudential relevance, in Sustainable development.

[14] ICJ, case concerning the Gabcikovo-Nagmaros project (Hungary/Slovakia) judgment of 25 September 1997 and defined as a concept and ICJ, case concerning Pulp mills on the river Uruguay (Argentina v. Uruguay) judgment of 20 April 2010 classified as an objective. See further references in fn.17 of J. E. Viñuales, 'Sustainable Development', in L. Rajamani and J. Peel (eds.), The Oxford Handbook of International Environmental Law (Oxford University Press, 2nd edn. 2019).

[15] J. D'Aspremont, Epistemic Forces in International Law: Foundational Doctrines and Techniques of Legal Argumentation, (Edward Elgar, 2015) pp. 86-87. J. Klabbers, International Courts and Informal International Law, in J. Pauwelyn, R. A. Wessel, J. Wouters (eds.), Informal International Lawmaking, (Oxford University Press, 2012), pp. 230-234.

[16] G. Abi-Saab, Lex Lata and Lex Ferenda, in A. Cassese, J. Weiler (eds.), Change and Stability in International Law-Making, (Walter de Gruyter, 1988), pp. 76-77

law[17] and its equivalent in EU law,[18] namely that of legitimate expectations,[19] as well as the fact that both courts have accepted that informal instruments may be of normative value in the context of interpretation of another binding act[20] attest thereto.[21]

While there is no evidence to the effect that the concept of sustainable development may create self-standing obligations in international law and thus, it cannot be regarded as an international law norm *per se*, it does function as a normative penumbra which may shape the creation of a treaty, or more generally it may influence policy (norm-aspiring function), as well as the interpretation of other binding norms (interpretive function).[22] So far as the first is concerned, there is no doubt that the concept has shaped (at least part of) a number of important international instruments (both binding and non-binding), including the Kyoto Protocol,[23] the 2012 RIO Declaration on Environment and Development,[24] the UN Framework Convention on Climate Change the 2015 UN Sustainable Development Goals (UNDGs), the 2030 Agenda for Sustainable Development, and the 2015 Paris Agreement.[25]

Turning to the interpretive function of the concept, Lowe observes that sustainable development seems to be a meta-principle which exercises "a kind of interstitial normativity, pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other."[26] Indeed, practice shows that in this context, sustainable development has been invoked: a. in order to clarify and update another norm; and b. in order to resolve normative conflicts (as part of the broader systemic integration principle). The relevance of sustainable development in updating the content of a norm as well as in

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[17] See generally D. Bowett, Estoppel before International Tribunals and its relation to Acquiescence, (1957) 33 BYIL 176.

[18] E. Castellarin, General Principles of EU Law and General International Law, in M. Andenas, M. Fitzmaurice, A. Tanzi, J. Wouters (eds.), General Principles and the Coherence of International Law, (Brill, 2019), p. 131, at p. 141.

[19] Joined cases C-189/02, C-202/02 P, C-205/02 P to C-208/02 P *Dansk Rørindustri et al v Commission of the European Communities* [2005], ECR I-05425, paras. 210-213. See also Case T-176/01 *Ferriere Nord SpA v Commission of the European Communities* [2004], ECR II-03931, para. 134.

[20] *Case concerning Kasikili/Sedudu Island (Botswana/ Namibia),* Judgment, ICJ Reports 1999, paras. 47-50. *Case concerning Ahmadou Sadio Diallo* (*Republic of Guinea/ Democratic Republic of the Congo),* Judgment, ICJ Reports 2010, para. 66. Case C-322/88 *Salvatore Grimaldi v Fonds des Maladies Professionnelles* [1989], ECR I-04407, para. 18. See also the European Parliament resolution of 4 September 2007 on institutional and legal implications of the use of "soft law" instruments, 2007/2028 (INI), point U, available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2007-0366.

[21] For an overview, see E. Kassoti, Beyond State Consent? International Legal Scholarship and the Challenge of Informal Law-Making, 63 Neth. Int. L. Rev. 99 (2016), at pp. 114-116.

[22] Viñuales, (n 9), p. 13. See also J. E. Viñuales, The Rio Declaration on Environment and Development: Preliminary Study, in J. E. Viñuales (ed.), The Rio Declaration on Environment and Development: A Commentary, (Oxford University Press, 2015), pp. 20-21.

[23] UNFCCC (1997) Kyoto Protocol to the United Nations Framework Convention on Climate Change adopted at COP3 in Kyoto, Japan, on 11 December 1997

[24] Rio declaration on environment and development, 3-14 June 1992, A/CONF.151/26 (Vol. I).

[25] 2015 Paris Agreement, UN Doc. FCCC/CP/2015/10/Add.1 Decision 1/CP.21.

[26] Lowe, pp. 30-31.

reconciling competing norms in the context of interpretation was confirmed by the ICJ in the *Gabčíkovo Nagymaros* case. The ICJ stated that

> Owing to new scientific insights and to a growing awareness pf the risk for mankind for present and future generations … new norms and standards have been developed, set in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development[27]

Judge Weeramantry in his Separate Opinion expressly referred to sustainable development as having normative value in modern international law.[28] The judgment at hand has led (at least part of the literature) to argue that indeed the concept has entered the corpus of international law "requiring different streams of international law to be treated in an integrated manner".[29]

The Arbitral Tribunal in the 2005 *Iron Rhine* case expressly referred to the ICJ's *Gabčíkovo Nagymaros* dictum and endorsed the dual interpretive function of the concept. According to the Arbitral Tribunal. [30]

Against this background, the next section will focus on the role and function of sustainable development in EU external relations law.

3. THE EU AS A SUSTAINABLE GLOBAL ACTOR: RHETORIC OR REALITY?

The previous section showed that in international law sustainable development creates a normative impact by serving two functions, namely a norm-aspiring function and an interpretive function. This section continues by showing that the concept fulfills a similar role in EU law. While not a fully-fledged legal norm, it has normative significance since it undeniably shapes policy and law. On the other hand, its jurisprudential relevance in the context of EU relations law is much more limited – though not totally absent, as section 4 below illustrates. However, while, at first glance, the wide range of policy and legal instruments making a reference to sustainable development may suggest that (at least in its norm-aspiring function) the concept has been quite influential, one should be careful not to overstate its achievements, especially in relation to the EU's external policies. More particularly, as it is shown below there is a growing discrepancy between EU rhetoric on sustainable development and the reality on the ground of practice. The inherent vagueness of the concept coupled with a certain degree of unwillingness on behalf of the Union to utilize it when it is

[27] Para. 140

[28] Separate Opinion Weeramantry, paras. 88, 95.

[29] Sands, p. 255.

[30] Para. 59. The interpretative value of the concept as one of reconciling diverging values underpinning different norms applicable in a particular case was also highlight again by the ICJ in the 2010 *Pulp Mills* case, paras. 76, 177.

politically inconvenient severely affect its potential and undermine the narrative of the EU as 'global trail blazer' in sustainable development. The strong rhetoric of the EU's global trail blazer role is reflected in the EU's persistence in open and rule-based trade in bilateral and multilateral frameworks.[31]

This vision is reflected in the EU's commitment to introduce sustainable development (Trade and development) chapters into EU FTAs.[32] Sustainable development has been enshrined in EU international treaties since the 1980ties (the 1989 Lomé IV Convention between the European Communities and the ACP countries).[33] Primary law refers to sustainable development in Article 3 (3) TEU[34], and Article 11 TFEU.[35] The link to the external dimension is provided in the values guiding the EU's external action (Art.21 (2) d: foster the sustainable economic, social and environmental development of developing countries, with the primary aim of the eradicating poverty, f: help develop international measures to preserve and improve the quality of the environment, and sustainable management of global natural resources, in order to ensure sustainable development). It is also summarised by Article 3 (5) TEU emphasizing free and fair trade.[36] This overload of references to the amorphous term underlines its importance. Nevertheless, sustainable development struggles with the same conceptional and normative issues at the EU level as at the international law level. Up until 2006 an EU regulation defined sustainable development as amounting to "the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity of the ecosystems by maintaining natural assets and their biological diversity for the benefit of present and future generations."[37] Again, this legislative attempt does not answer the question of whether sustainable development is merely limited to a mainstreaming exercise

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[31] European Commission, Reflection paper toward a sustainable Europe by 2030, A Sustain able Europe by 2030 | European Commission (europa.eu).

[32] K. Hradiolva and O. Svoboda, Sustainable development chapters in the EU FTAs: Searching for effectiveness, Journal of World Trade 52 (6) 2018, pp.1019-1042; G. Marin Durán, Sustainable development chapters in EU free trade agreements; Emerging compliance issues, CMLRev 57(2020), pp.1031-1068.

[33] Art.33 Lomé IV: "In the framework of this Convention, the protection and the enhancement of the environment and natural resources, the halting of the deterioration of land and forests, the restoration of ecological balances, the preservation of natural resources and their rational exploitation are basic objectives that the ACP States concerned shall strive to achieve with Community support with a view to bringing an immediate improvement in the living conditions of their populations and to safeguarding those of future generations."

[34] "It shall work for the sustainable development of 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 environment."

[35] "Environmental protection requirements must be integrated into the definition and implementation of Union policies and activities, in particular with a view of promoting sustainable development."

[36] Fair trade found entry into the Cotonou Agreement in 2000 but then kept a more low-key profile until it found its revival in the post-Lisbon FTAs.

[37] Regulation 2493/2000/EC of the European Parliament and of the Council on measures to promote the full integration of the environmental dimension in the development process of developing countries (end of validity date: 31/12/2006; See Art. 11), OJ L 288, 15.11.2000, pp. 1-5, Art. 2.

without any concrete consequences.[38] The European Commission is conducting impact assessments to evaluate environmental, social and economic impacts so that sustainability is duly considered and factored in.[39] It also includes ex post evaluations of legislation, including of the EU's FTAs.

The EU is confronted with two gaps, namely the expectation and implementation gap. The expectation gap raises expectations by declaring ambitious aims which cannot be realistically achieved. The European Commission, emphasizes in its European Green Deal the ambition on the one hand to achieve carbon neutrality in Europe by 2050, and on the other hand posting the EU as a global leader by promoting implementing "ambitious environment, climate and energy policies across the world".[40] These ambitious goals are set at the same time as reports come out that the EU Member States will miss the 2030 SDGs targets and that some Member States face difficulties with complying with their binding climate and energy targets for 2020.

Another aspect is the current implementation or compliance gap of existing legal commitments on sustainable development. Article 11 TFEU has been identified to go beyond a programmatic statement but has not yet been found to have been breached because the Court provides a wide margin of discretion to the EU political institutions – striking a balance between environmental concerns and other objectives incorporated in the Treaties.[41] In all EU FTAs post-Lisbon and starting with the FTA with South Korea, Trade and Sustainable Chapters (TSD) have been introduced.[42] They all provide commitments to the promotion of sustainable development, address a set of international law conventions on labour rights and multilateral environmental agreements which should be ratified by both parties, they include a commitment to a level playing field and to sustainable management of natural resources[43] However, their lack of impact and enforcement has been continuously criticized[44] – not only by

[38] Commission Staff working document, Brussels, Better regulation guidelines, 3.11.2021 SWD(2021) 305 final, p.10. See for an ex-post evaluation, for instance the EU-Andean states FTA: Ex post evaluation of the implementation of the Trade Agreement between the EU and its Member States and Colombia, Peru and Ecuador Draft Final Report – Vol. I: Main Report October 2021, http://andean.fta-evaluation.eu/images/reports/I_Draft_Final_Report_ex_post_eval.pdf.

[39] https://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/.

[40] European Green deal, https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

[41] G. Marin Duran, EU external environmental policy, pp.387-388, in R. A. Wessel and J. Larik (eds.), EU external relations law, 2nd edn. Hart Publishing 2020.

[42] D. Prévost and I. Alexovičová, Mind the compliance gap: managing trustworthy partnerships for sustainable development in the European Union's free trade agreements, International Journal of Public Law and Policy (IJPLAP), Vol. 6, No. 3, 2019.

[43] Non-paper of the Commission services, Trade and Sustainable (TSD) chapters in EU Free trade agreements, 1.7.2017. See, for instance, the TSD chapter of the FTA between the EU and Vietnam.

[44] K. Hradilova and O. Svoboda, Sustainable development chapters in the EU FTAs: Searching for effectiveness, Journal of Worlds Trade 52 (2018), p.1020; G. Marín Durán, Sustainable development chapters in EU tree trade agreements: Emerging compliance issues, CMLRev 2020, pp.1031-1068 (at p.1033).

scholars and civil society but also by some of the EU Member States.[45] These chapters do not form part of the dispute settlement mechanism introduced in the FTAs. The attempts to position the TSD chapters more centrally by the CJEU and anchor them in the EU's exclusive trade policy in its Singapore Opinion [46] have not only been praised for the attempt of a modern trade policy in line with other societal values. One of the problematic legal arguments of the Court was that a breach of the provisions concerning social protection of workers and environmental protection, could result in the termination or suspension of trade under Article 60 of the Vienna Convention of the Law of Treaties.[47] In contrast, adopted sanction-based enforcements mechanism cannot be based on the TSD chapter, the parties have no right to adopt trade sanctions in cases of non-compliance nor can trade benefits be made conditional upon compliance with environmental and labour standards.[48] Such action would raise, instead, the question of legality under international trade and WTO law. Finally, it might too early to draw conclusions on the effectiveness of these chapters. (comparison to essential clauses and the unilateral GSP+ regime.) To improve the effectiveness of these chapters, concrete suggestions to enable formal complaint procedure for civil society have been advocated.[49]

Also, the TSD chapters are rather recent and their impact needs more time to be fairly evaluated. A panel of experts established under the EU-South Korea FTA, the first FTA including a TSD chapter, came to the conclusion on 21 January 2021 that South Korea was in breach of the FTA's sustainable development chapter.[50] In this legally non-binding decision, the experts confirmed that South Korea was in breach of labour commitments under the FTA. This could be seen as a modest start. In a different case, Ukraine applied restrictions on exports of certain wood products to the EU which were challenged by the EU. The arbitration panel which ruled on it on 11 December 2020 addressing this 2005 Ukrainian export ban concerning 10 specific rare and valuable wood types and a 2015 export ban on unprocessed timber for ten years.[51] These protective measures were defended by Ukraine under environmental protection but it has been also proven that these Ukrainian laws on forest protection are open to abuse, so it has been certified that timber comes from sustainable sources when it is not the case. The panel in principle did accept that trade prevails over environmental protection as Ukraine could not advance any arguments on the basis of

[45] Dutch and French Non-paper from the Netherlands and France on trade, social economic effects and sustainable development, https://open.overheid.nl/repository/ronl-40f4521c-d545-486d-ae29-4423f207baa1/1/pdf/non-paper-from-the-netherlands-and-france-on-trade-social-economic-effects-and-sustainable-development.pdf.

[46] Singapore Opinion, 2/15.

[47] Singapore Opinion, 2/15, para.161.

[48] Marin Durán, p.1046.

[49] Prévost and Alexovicová, p. 255.

[50] Panel of experts confirms Republic of Korea is in breach of labour commitments under our trade agreement, Brussels, 25 January 2021, https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf (last accessed 2 February 2022).

[51] Restrictions applied by Ukraine on exports of certain wood products to the European Union, Final Report of the Arbitration Panel, Lugano, 11 December 2020, https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159181.pdf (last accessed 2 February 2022).

'sustainability'. Ukraine defended its ban based on environmental reasons but the arbitration panel did not consider the provisions on sustainable development (Chapter 13) as self-standing exceptions and then it went on to analyse the existing GATT exceptions under the chapeau clause.[52] In practice, Ukraine exports more illegally logged trees to the EU countries than any other country in the world.[53] This emphasises the risk that environmental arguments can be abused to disguise protectionist reasoning. These two examples reinforce that sustainable development in external relations struggles with an implementation gap which asks for careful and creative responses.

4. SUSTAINABLE DEVELOPMENT AND EU EXTERNAL RELATIONS VALUES

The discussion of the normative impact of 'sustainable development' in EU external relations law also feeds into a much broader debate regarding the normative effect of the EU's external action values and objectives on the basis of Articles 3(5) and 21 TEU. In recent years, there is a growing body of literature enquiring into the normative contours of the abovementioned provisions.[54] For some, these provisions are mainly programmatic in nature – a rhetorical device used by the Union, and by way of extension by its Courts, to reinforce the constitutional narrative of the EU – and hence, they are devoid of any significant impact.[55] However, the view from the CJEU is much more nuanced. In a series of cases pertaining to the Union's sanction policy, the Court has relied on the 'rule of law' objective in order to broadly interpret its limited jurisdiction in the CSFP for the purpose of ensuring effective judicial protection for individuals – an inherent aspect of the rule of law.[56] In a similar vein, a cartography of the different functions that 'respect for international law' has in the case-law of the Court illustrates that, far from merely being an abbreviated way of referring to the substantive treaty or customary international law obligations binding the EU in each case, this objective also has a clear normative dimension. It functions as

[52] See Final report of the Arbitration panel, op.cit.

[53] Ukraine exports illegal timber to the European Union, 30 July 2018, https://warsawinstitute.org/ukraine-exports-illegal-timber-european-union/.

[54] See for example E. Cannizzaro, The Value of the EU's International Values, pp. 3-18 in W. Douma, C. Eckes, P. Van Elsuwege, E. Kassoti, A. Ott, The Evolving Nature of EU External Relations Law, Springer, TMC Asser Press, 2021. Rupert Dunbar, Article 3(5) TEU a Decade on: Revisiting "strict observance of international law" in the Text and Context of other EU Values, MJECL 2021, pp. 479-497. I. Vianello, The Rule of Law as a Relational Principle structuring The Union's Action towards its External Partners, pp. 225-240 in M. Cremona, Structural Principles in EU External Relations Law, Hart Publishing, 2018. E. Kassoti and R. A. Wessel, The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union, in P. Garcia Andrade, Interacciones entre el Derecho de la Unión Europea y el Derecho Internacional Público, Tirant lo Blanch, 2022 (forthcoming).

[55] Cannizzaro, pp. 7-9; Dunbar, p. 480.

[56] Case C-455/14 P *H v Council and Commission*, ECLI:EU:C:2016569, para. 41. Case C-72/15 *Rosneft*, ECLI:EU:C:2017:236, paras. 72-74. Case C-134/19P *Bank Refah Kargaran v Council*, ECLI:EU:C:2020:793, paras. 34-44.

a standard for judicial review;[57] as an interpretive tool in different contexts;[58] and as a way of mediating the tension between the need to retain the EU's autonomy and the need to facilitate the participation of the EU in the international scene as an efficient global actor.[59]

However, it could be argued that adherence to international law and the rule of law are of another qualitative value than 'sustainable development' – the latter being a much-contested concept as explained above. The limited jurisprudence on the external dimension of sustainable development only allows for a few general remarks to be made in this context. The concept featured in the pre-Lisbon *ECOWAS* judgment.[60] Here, the Court established a link between security and development by stressing that "there can be no sustainable development and eradication of poverty without peace and security and that the pursuit of the objectives of the Community's new development policy necessarily proceed via the promotion of democracy and respect for human rights."[61] This dictum makes a salient point about the *inherently contextual operation* of the EU's external action objectives. This means that, apart from a minimum core content, the different contours of the concept in the external relations domain depend on the specificities of the external policy in which it is operationalized.[62] Thus, while sustainable development as an external relations objective may, at a minimum, be linked to the eradication of poverty or the protection of the environment, its broader content is malleable and context-specific – as the linkage made by the Court between security and sustainable development in the field of development cooperation attests to.

Sustainable development was also mentioned in the Singapore Opinion.[63] Here, the Court, in the context of discussing the features of 'new generation' free trade agreements, noted that one of these features is the obligation of the European Union to integrate the objectives and principles of the EU's external action – which include sustainable development – into the conduct of its com-

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[57] See for example case C-266/16 *Western Sahara Campaign UK v Commissioners for her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs*, ECLI:EU:C:2018:118, paras. 41, 85. Opinion of Advocate General Jääskinen in case C-507/13 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union,* ECLI:EU:C:2014:2394, para. 41. Case T-279/19, *Front Polisario v Council of the European Uni*on, ECLI:EU:T:2021:369, paras. 277-292.

[58] Case C-366/10, *Air Transport Association of America and others v Secretary of State for Energy and Climate Change*, ECLI:EU:C:2011:864, para. 101; Case C-363/18 *Organisation juive européenne and Vignoble Psagot Ltd v Ministre de l'Économie et des Finances*, ECLI:EU:C:2019:954, paras. 48-51; Opinion of Advocate General Sharpston in Case A*, B, C and D v Minister van Buitenlandse Zaken*, ECLI:EU:C:2016:734, paras. 99-101; Opinion of Advocate General Mengozzi in Case C-285/12 A*boubacar Diakité v Commissaire général aux réfugiés et aux apatrides*, ECLI:EU:C:2013:500, paras. 23-24.

[59] Opinion of Advocate General Spuznar in Case C-641/18 *LG v Rina SpA and Ente Registro Italiano Navale*, ECLI:EU:C:2020:3, para. 137. Opinion of Advocate General Bot in Opinion 1/17, ECLI:EU:C:2019:72, paras. 174, 176. Opinion 1/17, ECLI:EU:C:2019:341, para. 117.

[60] Case C-91/05 *Commission v Council*, ECLI:EU:C:2008:288.

[61] Case C-91/05, para. 66. However, the Court also noted that "it is … necessary, if a measure is to fall within that policy, that it contributes to the pursuit of that policy's economic and social development objectives." (para. 67).

[62] See *mutatis mutandis* Vianello, pp. 235-239.

[63] *Opinion 2/15*, ECLI:EU:C:2017:376, paras. 139-167.

mon commercial policy.[64] The Court linked the concept of sustainable development to Article 3(5) TEU which "obliges the European Union to contribute, in its relations with the wider world, to 'free and fair' trade."[65] Thus, according to the Court "sustainable development … forms an integral part of the common commercial policy."[66] The linkage made by the Court between the concept of sustainable development under Article 21 TEU and the obligation to promote 'free and fair trade' under Article 3(5) TEU is important in assessing its normative impact. Taking into account that in the *Air Transport of Association of America* (ATAA) judgment the Court clearly articulated an obligation on the part of the EU to respect the Union's values when acting externally,[67] the fact that in Opinion 2/15 the Court linked sustainable development to Art. 3(5) TEU buttresses the proposition that sustainable development may be considered as having normative effect – guiding and governing the EU's relationship with the outside world.

However, we also have to insert a caveat here as 'free and fair trade' appears in Article 3 (5) TEU next to sustainable development of the Earth but finds no reflection in Article 21 TEU or Article 207 TFEU. This raises the question whether it reappears in another value found in Article 21 TEU and 207 TFEU or whether it should be understood as a "shorthand" for all non-economic values which the EU trade policy has to take into account.[68] If fair trade is considered a separate and self-standing legal concept next to other non-economic values, it, however, is riddled with ambiguity. Furthermore, the decisive impulse for fair trade does not derive from a level-down approach through the legislator or policy-maker but from bottom-up initiative. So has fair trade, a labelling organization coordinating national labelling initiatives, and the World Free Trade Organisation influenced private businesses to achieve greater equity in international trade and support development that is socially, economically and environmentally sustainable.[69] Despite its non-legal and disputed character, the Commission and European Parliament promote fair trade aims since the 1990s.[70] A fair trade reference found its entry into the Cotonou Agreement 2000[71] but kept a low-key profile[72] until it celebrated a comeback with above discussed TSD chapters in all recent FTAs.[73] But also here we see the chameleonic char-

[64] *Opinion 2/15*, paras. 142-143.

[65] *Opinion 2/15*, para. 146.

[66] *Opinion 2/15*, para. 147.

[67] Case C-366/10, para. 101.

[68] M. Krajewski, The reform of the Common Commercial Policy, p.297 in Biondi, Eeckhout and Ripley.

[69] See also D. Martens and J. Orbie, The European Union and Fair Trade: Hands-off?, S. Khorana and M. Garcia (eds.), 'Handbook of European Union and International Trade', Edward Elgar Publishing, 2018 .

[70] In such reflected in EU policy instruments: EP Resolution 1998 and Communication from the Commission to the Council on "fair trade", COM (1999) 619final, Brussels, 29.11.1999.

[71] Art. 23 (i) Cotonou Agreement, Art. 324 (1) c) FTA with Andean States.

[72] Art.19 of the 2000 FTA with Mexico: The purpose of customs cooperation shall be to ensure fair trade, however, no mentioning in other FTAs, association agreements or the Economic Partnership with ECOWAS and EUMOA from 2014.

[73] So for instance in the FTAs with Singapore and Vietnam (referring to economic development, social development and environmental protection). Before see the FTA with the Andean

acter of this term which appears as a principle or value which needs to mainstreamed into the EU's external action and determines the course of that action.

5. THE STRUCTURE OF THE EDITED ISSUE

The contributions to this volume "Sustainable Europe and its global reach" exemplify the numerous regulatory challenges that the commitment to 'sustainability' poses for the EU in its relations with the wider world as well as the multitude of ways in which the Union pursues the goal of promoting sustainable development in different fields of its external action. The papers included here are no means exhaustive of the myriad of ways in which the concept has permeated the Union's external policies and practice. They are, however, illustrative thereof and they broadly fall within the analytical framework delineating the concept's normative impact within the EU legal order set out earlier.

The papers by Honkonen and Navasartian exemplify the strong normative influence the concept exerts in two distinct fields, namely that of water management and of protection of fundamental rights. Brière's contribution shows how legal political issues prevent the concept from influencing the EU's position vis-à-vis the UN Draft Treaty on Business and Human Rights. Finally, Alexovičová's paper illustrates how the interpretation of FET standards can narrow the regulatory space of states – and hence, adversely affect the concept's influence thereon.

Chloe Brière's contribution focuses on evaluating the EU's participation in the negotiation of the draft UN Treaty on Business and Human Rights – a binding international instrument addressing the responsibility of transnational corporations for human rights abuses. Brière argues that establishing a legal framework on corporate responsibility for human rights abuses is crucial in creating a level playing field on responsible business conduct globally and in providing access to justice for victims – in line with several UN Sustainable Developments Goals (SDGs). Despite calls for greater engagement, the paper illustrates that the Commission has not been an active participant in the elaboration and negotiation of the instrument in question. Brière illustrates the existence of an interinstitutional divide between the Commission and the Parliament on the matter; while the Parliament supports the adoption of a binding instrument on corporate accountability for human rights violations, the Commission has adopted a more cautious approach. The paper continues by identifying the legal and political hurdles underlying the Commission's reluctance towards the envisaged agreement. From a legal point of view, the broad scope of the envisaged instrument – covering a wide range of areas – complicates its negotiation and conclusion since it requires a careful and in-depth delineation of the competences of the EU and its M.S. for each of the areas the draft Treaty covers. Brière argues that, legal difficulties aside, the Commission's hesitance to take on a more active role attests to the lack of consensus among M.S. regarding

States: Art.324 (2) c): (c) "promoting fair and equitable trade, facilitating access to the benefits of this Agreement for all production sectors, the weakest in particular."

the necessity of adopting the instrument in question. Brière concludes by highlighting that the ambiguous position of the EU towards the draft UN Treaty on Business and Human Rights illustrates the typology of legal and political difficulties faced by the Union in its expanding role in the international arena.

Next, Areg Navasartian explores the link between sustainable development through trade and fundamental rights in the context of the EU's bilateral and regional trade agreements. The paper critically analyses the existing mechanisms for the protection and promotion of fundamental rights in the EU's trade agreements, namely human rights impact assessments; essential elements clauses and Trade and Sustainable Chapters. The paper argues that the current framework governing the promotion and integration of fundamental rights in the EU's trade relations leaves much to be desired both in terms of effectiveness and in terms of coherence. Against this backdrop, Navasartian argues that the EU Charter of Fundamental Rights "can and must be regarded as a guideline for policy-making in regards to treaty relations." According to the author, using the Charter as a benchmark for EU trade policy would help alleviate the shortcomings of the existing mechanisms by introducing into the current framework a clear set of rules that reflect both EU-wide and international standards. This, in turn, would pave the way for a more coherent approach towards human rights in the EU's trade policy.

Iveta Alexovičová's paper examines the fair and equitable (FET) standard of investment protection in the investment treaties concluded by the EU. Alexovičová's main argument is that the relevant standard remains open to interpretation and the ensuing uncertainty could significantly restrain the regulatory autonomy of States. This, in turn, could lead to numerous legal challenges being mounted against regulation that is necessary in order to achieve the sustainable development goals. The paper begins by sketching out how the FET standard has been interpreted under the old-generation international investment agreements (IIAs). Alexovičová explains that, in the past, expansive readings of the standard have given rise to far-reaching obligations for States – thereby, creating 'regulatory chill' over measures pursuing legitimate public policy objectives. The paper turns next to assessing the EU's attempt to redefine the FET standard in new-generations IIAs. It is shown that despite the EU's assertion that enough guarantees have been built into the FET standard included in the EU's IIAs to safeguard the regulatory space of States, problems still persist. More particularly, the paper identifies the concept of 'manifest arbitrariness' as a backdoor through which a broad range of regulatory acts could potentially be successfully challenged by negatively impacted investors. The paper concludes with a call for greater clarity of the elements falling within the scope of 'manifest arbitrariness' contained in the EU' FET standard – as a means to guarantee the regulatory autonomy of States.

Finally, Tuula Honkonen's paper examines how the EU is promoting sustainable development beyond its borders through transboundary water co-operation. The paper identifies two main ways through which the EU has become a key actor in transboundary water co-operation: i) through the 'extraterritorial' application of the Union freshwater legislation; and ii) through the promotion of

water-diplomacy and sustainable transboundary water management. First, the paper argues that EU legislation on fresh water has extraterritorial effect by actively engaging non-Member basin States in policy planning and governance of shared water resources. The paper further shows that the Eu's standards on freshwater management are now considered as best practices in the field, thus, having a broad normative appeal – thereby, contributing to the promotion of sustainable development beyond the EU's borders. Honkonen turns next to the ways in which the EU promotes water diplomacy and sustainable water management in different fields of its external policy. The paper shows how water diplomacy and sustainable water management have become an integral part of the EU's climate policy; its human rights policy; its development policy as well as its foreign and security policy. Overall, the paper attests to the wide array of tools and policies that the Union has as its disposal in order to achieve sustainable development through transboundary water cooperation.

TOWARDS AN INTERNATIONAL TREATY FOR ADDRESSING VIOLATIONS OF HUMAN RIGHTS IN THE CONTEXT OF BUSINESS ACTIVITIES : THE AMBIGUOUS POSITION OF THE EU

Chloé Brière*

ABSTRACT

The accountability of businesses for the human rights violations committed abroad in the course of their activities is a long-standing issue. Numerous initiatives have been undertaken at international level to address this question, notably to ensure access to justice to the victims of such abuses. The main form of action has been the adoption of soft-law standards, such as the United Nations Guiding Principles on Business and Human Rights. However since 2014, an open intergovernmental working group within the UN Human Rights Council has been engaging in the negotiation of a new international legally binding treaty on the matter. The present paper focusses on the position of the European Union (EU), i.e. its institutions and its Member States, within these negotiations. After retracing the ambiguous position of the EU, and the inter-institutional divide appearing between the European Commission and the European Parliament, the paper conducts a legal appraisal of the limits to the EU's participation in such negotiations and in the future treaty if adopted. The ambiguous position of the EU may be traced back to the controversies surrounding the opportunity to adopt an international treaty on the matter, and it further reflects the tension between the opportunity to accompany a multilateral initiative in favour of human rights' protection on the one hand, and the risk of adopting an instrument failing to be implemented due to the limited support of key international actors on the other hand.

KEYWORDS

European Union; Business and human rights; UN Human Rights Council: Human rights in EU external relations.

INTRODUCTION

In 2019, a lawsuit was launched in the US against high-tech companies on behalf of families of children who experienced forced labour and died in mines in the Democratic Republic of Congo, aiming to hold those companies liable for human rights abuses committed abroad.[1] Such violations have been unfortu-

* Post-Doctoral Research Fellow F.R.S.-F.N.R.S and Professor of EU Law, Centre for European Law, Université libre de Bruxelles, chloe.briere@ulb.be. This Article has been finalised in August 2021, and it does not integrate developments that occurred after that date.

[1] A. Kelly, 'Apple and Google named in US lawsuit over Congolese child cobalt mining deaths', *The Guardian*, 16 December 2019.

nately recurrent for decades, and many examples, past and present, can be referred to illustrate the importance of preventing such abuses, and holding accountable those responsible for them.

This paper aims to take stock of the current negotiations taking place in Geneva for the elaboration of an international treaty defining the responsibilities of transnational corporations and business enterprises with respect to human rights. This agreement is envisaged as one of the ways to ensure accountability of businesses for the violations of human rights they may commit in the course of their activities. Whereas an abundant literature already exists on the topic of business and human rights and these negotiations,[2] the originality of this paper lies in the analysis it offers of the position of the European Union (EU), i.e. its institutions and its Member States, within these negotiations, and the legal appraisal of the limits to the EU's participation in such negotiations and in the future treaty if adopted.

The elaboration of such an international treaty does not operate in a legal and political vacuum. The international community has long supported a 'smart mix' of regulatory and voluntary actions, relying on the different but complementary roles of States and companies. As underlined by the EU Fundamental Rights' Agency,[3] since the 1970s, various initiatives have sought to set out voluntary standards in the area of business and human rights, with no less than five international standards, including the OCDE's Guidelines for Multi-National Enterprises,[4] the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy,[5] or the ISO's 26000 standards on Social Responsibility.[6] However, one mechanism appears of particular interest, especially due to its elaboration process and its recognition: the UN Guiding Principles on Business and Human Rights[7] (hereafter the UNGPs). The EU has been in particular a strong promoter of these Principles, which constitute a soft

[2] See inter alia, L. C. Backer, *infra* note 10, 457-542; O. de Schutter, 'Towards a New Treaty on Business and Human Rights', 1 *Business and Human Rights Journal* 2016, 41-68 ; D. Bilchitz, 'The Necessity for a Business and Human Rights Treaty', 1 *Business and Human Rights Journal* 2016, 203-228 ; C. Lopez, 'Struggling to take off: The second session of intergovernmental negotiations on treaty on business and human rights', 2 *Business and Human Rights Journal* 2017, 365-370 ; N. Bernaz and I. Pietropaoli, 'Developing a Business and Human Rights Treaty : Lessons from the Deep Seabed Mining Regime under the United Nations Convention on the Law of the Sea', 5 *Business and Human Rights Journal* 2020, 200-220 ; or B. Hamm, 'The Struggle for Legitimacy in Business and Human Rights Regulation—a Consideration of the Processes Leading to the UN Guiding Principles and an International Treaty', *Human Rights Review* 2021.

[3] FRA, 'Business-related human rights abuse reported in the EU and available remedies', FRA Focus (12 Decembe 2019), p. 4, available at <https://fra.europa.eu/en/publication/2019/business-related-human-rights-abuse-reported-eu-and-available-remedies>.

[4] OECD, 'Guidelines for Multinational Enterprises', (25 May 2011), available at <http://mneguidelines.oecd.org/guidelines/>.

[5] ILO, 'Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration)', (March 2017), available at <https://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm>.

[6] ISO, 'ISO 26000 standards on Social Responsibility' (1 November 2010), available at <https://www.iso.org/iso-26000-social-responsibility.html>.

[7] UN HRC, 'Guiding Principles on Business and Human Rights: Implementing the UN "Protect, Respect and Remedy" Framework', Publication HR/PUB/11/4 (2011), available at <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf>.

law instrument enjoying a quasi-universal recognition. The EU institutions participate in various initiatives to promote their implementation, mentioning them in numerous policy documents, such as those defining the EU's priorities in UN fora.[8] These UN Principles and the EU's activities in their favour are further complemented by national legislations and policies, which are also essential for the prevention of human rights violations in the context of business activities and for ensuring victims' access to remedies.[9] States, being members of the EU or not, have developed within their national legal orders specific standards addressing various aspects of the issue, imposing for instance a duty on due diligence on companies based with their jurisdiction, or defining broadly the jurisdiction of their national civil courts competent to compensate the damages. They also take initiatives to implement the UNGPs at national level, for instance through the adoption of National Action Plans, and/or promote their implementation by other States through their international assistance programs.

Yet whereas the UN Guiding Principles are considered as the key instrument to remedy the situation and are supported by the European Union and other influential actors (States and organisations representing large corporations), these principles have also been the subject to critics, notably from civil society organisationsand academics, denouncing their non-binding character.[10] Despite these numerous initiatives and serious public concern, access to justice and remedies for victims is mired with complexities, as victims struggle to gather evidence linking the alleged violations to companies, which sometimes hide behind the corporate veil of sub-contractors, infant companies and supply chains to evade responsibilities.[11] Victims must also navigate through a complex set of international, regional and national laws.[12] Furthermore, this complex legal framework does not result in an international level playing field on responsible business conduct,[13] and access to justice remains in some cases denied to victims. This appears in clear contradiction, not only with several UN Sustainable Development Goals, such as eradicating forced labour (8.7), protecting labour rights (8.8.) and ensuring equal access to justice for all (16.3). This situation prompted a movement supporting the elaboration of an international legally binding instrument, which turned into a concrete process with the adoption in 2014 of a Resolution within the UN Human Rights Council to that end.[14] This

[8] Council, 'EU Annual Report on Human Rights and Democracy in the World 2018', doc. 9024/19, 70f.

[9] FRA, 'Business-related human rights abuse reported in the EU and available remedies', *supra* note 3.

[10] L. C. Backer, "Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders and the Treaty Law that Might Bind Them All", 38 *Fordham International Law Journal* 2015, 518-520.

[11] A. Marx *et al.*, 'Access to legal remedies for victims of corporate human rights abuses in third countries', Study for the European Parliament, PE 603.475 (February 2019), 15-17.

[12] Ibid.

[13] Commission, Reflection Paper Towards a Sustainable Europe by 2030, COM(2019) 22 final, 27.

[14] UN HRC, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', 14 July 2014, A/HRC/RES/26/9.

resolution sets up an open-ended intergovernmental group which meets yearly to draft such international instrument, with the aim inter alia to provide for stronger enforcement mechanisms,[15] and which has to date reached the stage of a Second Draft. While fostering the promotion and protection of human rights, the text also aims at the establishment of a level playing field[16] in the field of corporate responsibility, with the definition of binding obligations.

The participation of the European Union in these negotiations constitutes an interesting case study not only to examine the dynamics at stake in these negotiations from the perspective of a regional organisation, but also to reflect on broader debates linked to the status of the EU as an international actor. Discussions are indeed vivid regarding the strength of the external objectives assigned to the EU under article 21 TEU[17] to both advance the protection of human rights in the wider world and promote multilateral solutions to common problems. It also echoes with the EU's capacity to promote respect for human rights on the international scene[18] and/or by transnational private actors.[19] The negotiations of the envisaged business and human rights treaty thus offers the opportunity to appraise the positions taken of the EU institutions and its Member States with the objective to examine if the objectives enshrined in the EU treaty translate into practice and pro-active participation in the negotiations. As we will further analyse, despite an increasing involvement in the negotiations, their approach can be best qualified as reserved, offering us the opportunity to reflect upon the legal and political limits potentially encountered.

After recalling the background behind the idea of a new international treaty (1.), the paper will first delve into the ambiguity of the EU towards the adoption of a new Treaty (2.), then it will analyse the legal considerations that may hinder the EU's full participation in such process, as well as the EU Member States'individual participation in the ongoing negotiations (3.).

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[15] Revised draft of 16 July 2019, Article 6 on liability of natural and legal persons for violations of human rights undertaken in the context of business activities, including those of transnational character.

[16] Level Playing Field can be defined in layman's terms as: «a trade-policy term for a set of common rules and standards that prevent businesses in one country gaining a competitive advantage over those operating in other countries. » C. Morris, 'Brexit: What is a level playing field?' *BBC*, 30 June 2021, available at <https://www.bbc.com/news/51180282>.

[17] See e.g. J. Larik, 'Entrenching Global Governance: The EU's Constitutional Objectives Caught Between a Sanguine World View and a Daunting Reality', in B. van Vooren *et al* (eds), *The Legal Dimension of Global Governance, What Role for the EU ?* (Oxford: Oxford University Press, 2013), 7-22.

[18] See e.g. A. Egan and L. Pech, 'Respect for human rights as a general objective of the EU's external action' in S. Douglas-Scott *et al.* (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar Publishing, 2017), 255- 256.

[19] See e.g. J. Scott, 'The New EU Extra-territoriality', 51 *Common Market Law Review* 2014, 1343-1380.

1. BACKGROUND BEHIND THE IDEA OF A NEW INTERNATIONAL TREATY ADDRESSING VIOLATIONS OF HUMAN RIGHTS IN THE CONTEXT OF BUSINESS ACTIVITIES

As the issue has been commented abundantly in doctrine,[20] the present part will skim through the main steps. The idea of holding companies responsible for the damages and the violations of human rights they commit within or outside the country where they are established is not new. Famous cases have attracted attention to the legal complexities of holding these companies liable, and the risks it entails for (the lack of) access to justice for victims. The idea has obtained further attention alongside the expansion of the globalisation of economies. Enterprises, including the transnational corporations operating across countries and continents, became increasingly subject to scrutiny and aware of their responsibility and accountability for corporate acts causing harm to others. This translated in their participation in voluntary schemes of self-regulation, or in multi-stakeholders' initiatives, promoting under different terms their support for sustainable development, for the respect of labour and environmental standards and corporate social responsibility. Meanwhile, the protection of human rights is ensured in legal instruments elaborated at international and regional levels, which mostly provide for obligations binding on States, remaining the main subjects of international law.

The UN Guiding Principles are a clear example of such trend, as they result from a failed attempt to adopt UN norms containing a mandatory code of conduct for transnational corporations, which faced opposition from the private sector and most governments.[21] To unblock the process, John G. Ruggie was nominated Special Representative on human rights and transnational corporations and other business enterprises, and he launched and led a large process of multi-stakeholders negotiations between 2005 and 2011, which resulted in the presentation of the UNGPs. The latter are based on three pillars:

> '1. The State Duty to Protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication;
> 2. The Corporate Responsibility to Respect Human Rights, meaning that businesses should act with due diligence to avoid infringing on the rights of others and to address adverse impacts in which they are involved;
> 3. The need for greater Access to Remedy for victims of corporate-related abuse, both judicial and non-judicial.'[22]

The adoption of these principles was particularly well-received by the EU and its Member States, and they quickly became one of the international standards that the EU sought to promote within and outside its territory.[23] The European

[20] See the references in note 2.
[21] B. Hamm, *supra* note 20, 9.
[22] Ibid., 7.
[23] For an overview, see FRA, Opinion 1/2017 on Improving access to remedy in the area of business and human rights at the EU level, available at <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-opinion-01-2017-business-human-rights_en.pdf >, pp. 75-79.

Commission referred for instance to these principles several times, starting with the 2011 Communication on Corporate Social Responsibility and the 2015 Staff Working Document on the implementation of the UN Guiding Principles.[24] The Council of the EU echoed this support in its 2016 conclusions on business and human rights, recalling the global consensus reached on the UNGPs and the leadership taken by the EU Member States on their implementation.[25] The UNGPs form also an integral part of the EU Actions Plans on Human Rights and Democracy. In the Action Plan for 2015 – 2019, all the actions envisaged under the heading 'Advancing on Business and Human Rights' referred to the UNGPS and integrated them in the EU's efforts to develop awareness, capacity and knowledge on their implementation within the EU MSs and with external partners,[26] and similar references can be found in the Action Plan for 2020–2024.[27] These few examples illustrate the stance taken by the EU for which the UNGPs constitute an important steppingstone for international efforts in developing responsible business conduct and achieving the Sustainable Development Goals. EU institutions refer to them as "the authoritative policy framework" in addressing corporate social responsibility.[28]

However, in taking this stance, the EU takes position in an ongoing debate regarding the best way to approach the issue of business and human rights. This debate precedes the endorsement of the UNGPs, and it has not ended with their adoption.[29] Whereas some actors considered that voluntary schemes, or soft law mechanisms, like the UNGPs, are sufficient, others, being States, academics or civil society organisations, denounced their limits and insisted for the elaboration of a legally binding framework.[30] A group of civil society actors, composed of prominent organisations, issued in January 2011 a Statement on the then draft Guiding Principles,[31] in which they pinpointed some failures of the process and supported the adoption of binding rules.[32] Civil society actors continued to join forces. They established a Treaty Alliance, whose mission was to 'resurrect the processes of drafting a binding international treaty',[33] and issued in 2013 a Joint Statement supported by a large number of organisations calling on States and the UN Human Rights Council to elaborate a binding interna-

[24] Commission, Communication 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' COM(2011) 681 final, or Commission, Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights – State of Play, SWD(2015) 144 final.

[25] Council, Conclusions on Business and Human Rights, 20 June 2016, doc. 10254/16, paras 5 to 7.

[26] Council, Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019, 20 July 2015, doc. 10897/15, p. 17.

[27] European Commission and High Representative for Foreign Affairs and Security Policy, 'EU Action Plan on Human Rights and Democracy 2020 – 2024', JOIN (2020) 5 final, pp. 11-12.

[28] Commission, 'Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights – State of Play', SWD (2015) 144, p. 2.

[29] B. Hamm, *supra* note 20, p. 14.

[30] Ibid.

[31] 'Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights' (January 2011), available at <https://www.fidh.org/IMG/pdf/Joint_CSO_Statement_on_GPs.pdf>.

[32] L. C. Backer, *supra* note 10, pp. 518-519.

[33] Ibid, p. 522.

tional treaty.[34] Their efforts and views were shared by some States that are also convinced of the need for an international binding instrument.

These lines of division and debates were reflected within the Human Rights Council, especially at the occasion of its 26th Session of 10 – 27 June 2014 during which two resolutions on the issue of business and human rights were adopted. The first one, sponsored by Norway and supported by some EU Member States (i.e. Austria, Bulgaria, France, and Greece), recalled the endorsement by consensus of the UNGPs and the primary responsibility of States in protecting human rights.[35] In contrast, the second one, sponsored by countries from the Global South, decided to establish an open-ended intergovernmental working group (hereafter the OEIWG), "whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises".[36] It is worth highlighting, like many other authors did,[37] that all voting EU member States (Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Romania, UK) voted against this resolution, as well as the United States of America.[38]

The subsequent meetings of the OEIWG since 2014 thus took place in a peculiar context, marked by this divide between those supporting the UNGPs and those defending the need for an international binding instrument. The pace of negotiations is slow due to lack of support by key countries, procedural disagreements,[39] and disagreement regarding the scope of the envisaged treaty.[40] Nevertheless, these hurdles did not prevent the publication of draft versions of the instrument: a Zero Draft in July 2018, a Revised Draft in July 2019, and a second Revised Draft in August 2020.[41] The existence of such drafts does not however mean that a treaty will be adopted in the near future. The report of the latest session of the OEIWG, held in October 2020, pinpoints the different views, comments and concrete textual suggestions expressed by

[34] 'Joint Statement: Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises' (27 May 2014), available at <https://www.escr-net.org/node/365592>.

[35] UN HRC, 'Human rights and transnational corporations and other business enterprises', 23 June 2014, A/HRC/26/L.

[36] UN HRC, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', 14 July 2014, A/HRC/RES/26/9.

[37] See e.g. R. Vecellio Segate, 'The first binding treaty on business and human rights: a deconstruction of the EU's negotiating experience along the lines of institutional incoherence and legal theories', *The International Journal of Human Rights* 2021, p. 17.

[38] Ibid., p. 3.

[39] C. M. O'Brien, 'Confronting the Constraints of the Medium: the Fifth Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty', 5 *Business and Human Rights Journal* 2020, p. 2.

[40] See e.g. R. Vecellio Segate, 'The first binding treaty on business and human rights', *supra* note 37, on the opposition between the EU and South Africa on the inclusion or exclusion of domestic enterprises from the scope of the Treaty.

[41] All available at <https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx>.

the participants on numerous provisions,[42] which all indicate that the negotiations have not yet entered a final stage. The lack of engagement of some countries, such as the USA or Canada, places further attention on the participation of the EU and its Member States, and the latter thus deserves a closer analysis.

2. THE EU'S AMBIGUITY TOWARDS A NEW TREATY ADDRESSING VIOLATIONS OF HUMAN RIGHTS IN THE CONTEXT OF BUSINESS ACTIVITIES

Since the adoption in 2014 of the resolution providing for the creation of the OEIWG, the support in favour of an internationally binding instrument has not been universally shared by all stakeholders. The need for such international treaty is in itself a controversial issue, and vivid discussions focus on the opportunity of devoting time and resources to the negotiation of a new instrument; as some countries have never participated in a single meeting. The EU has always had an ambiguous position to these negotiations, and its participation has substantially evolved over time (2.1.), while internally an institutional divide has arisen (2.2.).

2.1. **The evolution of the EU's position within the negotiations**

The EU is not opposed as such to the idea of involving the private sector in efforts to ensure the implementation of its external objectives regarding the protection of human rights in the world. Its approach has been marked by a strong and constant support to the implementation of the UNGPs within the EU and beyond.[43] For example, the EU Action Plan on Democracy and Human Rights for 2020–2024 includes among the overreaching priorities and objectives the need to promote a global cooperative system in which the business sector is included,[44] and in which the EU strengthens its engagement to actively promote and support partner countries' efforts to implement the UNGPs.[45] The EU's approach is reflected in the position it has taken regarding the elaboration of a new international instrument, as revealed by the analysis of the positions and statements made by the EU at the occasion of the OEIWG's meetings.[46]

However, at the very first session of the OEIWG, the statement by the EU can be qualified at best as sceptical of the whole process. For the EU, it was

[42] UN HRC, 'Report of the sixth session of the OEIWG on transnational corporations and other business enterprises with respect to human rights', 14 January 2021, A/HRC/46/73, p. 9.

[43] See e.g. references to the principles in the Council Conclusions on EU Priorities in UN Human Rights Fora in 2019 and in 2020, *infra* note 94.

[44] European Commission and High Representative for Foreign Affairs and Security Policy, 'EU Action Plan on Human Rights and Democracy 2020 – 2024', JOIN (2020) 5 final, 25 March 2020, pp. 11-12.

[45] Ibid.

[46] These statements are available online on the webpages devoted to each meeting of the OEIWG (see *infra*).

'unclear how a possible treaty would relate to the policy framework already created by the UNGPs and what a legally binding instrument would involve, or how it would function in operational terms.'[47] In addition, it considered that 'pushing for a legally binding document at this stage unnecessarily polarizes the debate.'[48] The main point of contention was the scope of the envisaged Treaty, focussing only on transnational corporations, neglecting 'the fact that many abuses are committed by enterprises at the domestic level' and not taking into account small and medium-sized enterprises.[49] The EU secured the amendment of the programme of work to include a new panel on the commitment to implement the UNGPs, but failed to convince on the amendment of the scope of the programme to include transnational corporations and *all* other business enterprises. As a consequence, the EU representative did not join the remainder of the session, while many States (including European States), often represented by low-ranking officials or summer interns, sat silently in the room.[50]

In the following sessions, the attitude of the EU shifted towards more willingness to engage in the discussions, illustrated by the practice of making at least a general statement and/or opening remark at the beginning of each session, complemented by remarks on specific questions.[51] Yet the EU maintained a certain reserve, calling at times for the adoption of a new resolution by the HRC to better clarify the exact scope of the future international instrument, and insisting on its redlines.[52] Indeed, throughout the sessions, the two points mentioned above, namely reference to the commitment to implement the UNGPs and reference to all business enterprises, appear of key importance for the EU[53] and became on certain occasions sticking points in the negotiations.

A first illustration of such difficulties can be identified through tensions around the procedure to be followed prior to and during meetings of the OEIWG. The EU repeatedly highlighted procedural difficulties in the work of the OEIWG, referring for instance to the late communication of certain documents, such as the Zero Draft,[54] corrected since.[55] These procedural difficulties were particularly noticeable during the WG's fourth session in 2018. The EU stressed in its opening statement its regret that some of its proposals regarding the programme of work were not taken on. This concerned in particular a reference to the work

[47] OEIWG, 1st session, Submissions of the EU, 6–10 July 2015, available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Session1.aspx>.

[48] Ibid.

[49] Ibid.

[50] C. Lopez and B. Shea, 'Negotiating a Treaty on Business and Human Rights: A Review of the First Intergovernmental Session', 1 *Business and Human Rights Journal* 2016, pp. 112-113.

[51] See Table 2 in annex.

[52] Ibid.

[53] See for instance the opening remarks by the EU at the OEIWG's 3rd session, 23 October 2017, available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>.

[54] Ibid., p. 3. 'Questions have been raised about the late circulation of the "elements for a draft legally binding instrument" before us today, made available only three weeks before the start of this session, when the document was initially announced for June 2017'.

[55] OEIWG, 5th session, Opening remarks by the EU, 14 October 2019, available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session5/Pages/Session5.aspx>

of the OEIWG covering all companies, or its proposal to invite Prof. Ruggie as the second keynote address.[56] Tensions persisted throughout the session, ending with the EU's decision not to approve the Recommendations formulated in the session's final report,[57] due to both their substance and their late communication.[58] The EU stressed repeatedly how these aspects are not "simple" procedural matters but real substantive issues.[59]

Further illustrations of difficulties can be found in the substance of the draft versions of the international instrument,[60] with the EU repeatedly pinpointing certain points as essential to its further engagement in the process. Of particular importance is that the EU referred to the inclusion of a reference to the UNGPs and the importance of building upon them in the preamble, an element which was not present in the Zero Draft.[61] The definition of the enterprises covered by the future instrument also evolved over time, in line with the EU's ambition to cover not only business activities of transnational character (Zero Draft), but more broadly activities of transnational corporations and other business enterprises, including particularly but not limited to those of a transnational character (Revised Draft, Articles 1(3) and 3 (1)), including State-owned enterprises (Second Revised Draft, Article 1 (3)). The EU also expressed satisfaction to see a more refined definition of the human rights covered by the envisaged treaty. Whereas the Zero Draft referred to 'all international human rights and those rights recognised under domestic law',[62] and the Revised Draft to 'all human rights' (Article 3 (3), the Second Revised Draft now refers to "all internationally recognized human rights and fundamental freedoms emanating from the Universal Declaration of Human Rights, any core international human rights treaty and fundamental ILO convention to which a state is a party, and customary international law » (Article 3 (3)). These changes were acknowledged by the EU, which remarked that they constitute progresses and address some

[56] OEIWG, 4th session, Opening remarks by the EU, 15 October 2018, available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx>.

[57] UN HRC, 'Report of the fourth session of the OEIWG on transnational corporations and other business enterprises with respect to human rights', 2 January 2019, A/HRC/40/48, p. 19.

[58] OEIWG, 4th session, Intervention by the EU under Item 5 "Adoption of the report", 19 October 2018, available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx>. See in particular 'The draft Conclusions and recommendations were made available only on the last day of this session, 19 October at around noon. Their content clearly confirmed that, in our view, there was no attempt by the Chairperson-Rapporteur to respond positively to the proposals to revert to the Human Rights Council with a view of rethinking the best way forward'.

[59] See e.g. OEIWG, 3rd session, Intervention of the EU under Item 3 'Adoption of the agenda and program of work", p. 3.

[60] Zero Draft, 16 July 2018, available at <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>; Revised Draft, 16 July 2019, available at <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf>; and Second Revised Draft, 6 August 2020, available at < https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf >.

[61] Zero Draft, Article 1.

[62] Zero Draft, Article 3 (2).

of its concerns.[63] Yet these changes do not fundamentally alter the hesitation of the EU towards the whole process. The EU continues to pinpoint the absence of a number of elements from the draft treaty, both in the Revised Draft and the Second Revised Draft, such as the regulation of civil and criminal liability, applicable law and jurisdiction, or the relationship with existing international instruments on judicial cooperation.[64] More tellingly, the Commission has still not sought to obtain a formal negotiation mandate. In 2018, shortly after the publication of the Zero Draft, the EU stressed that from the EU's perspective, "we are not yet at a stage where a formal negotiating mandate could be sought to engage in this format of negotiations".[65] A year later, in 2019, the EU delegation advanced as a justification the appointment – ongoing at the time – of the von der Leyen Commission,[66] but the appointment and entry into function of the new Commission has not changed this element. During the latest session in 2020, the interventions by the EU consisted mostly of requests for clarifications regarding the content of certain provisions of the Second Revised Draft,[67] and in its opening statement the EU highlighted the need for any proposal to reach the necessary traction amongst UN members, as a number of them are not ready to engage in negotiations.[68]

The EU's reserved approach has been dissected in detail by scholars, stressing notably how in the absence of the USA in the discussions, its weight has been stronger[69] or how it forged a strong divide with countries, like South Africa, on whether or not the text should only cover activities of transnational corporations.[70] Furthermore, the EU has been repeatedly criticised by NGOs and human rights advocates for not engaging effectively in the negotiations.[71] Its attitude is indeed in sharp contrast with its involvement in the negotiations of a convention establishing a multilateral court for the settlement of investment disputes. The Commission obtained in March 2018 a mandate to negotiate on behalf of the EU in the framework of the United Nations' Commission on International Trade Law (UNCITRAL),[72] and its involvement in the negotiations has been far more constructive.[73] This oine of criticism come from not only NGOs and civil society,

[63] OEIWG, 6th session, Statement by the EU, 26 October 2020, available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx >.

[64] Ibid. See also OEIWG, 5th session, Opening remarks by the EU, 14 October 2019, available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session5/Pages/Session5.aspx >.

[65] Opening remarks by the EU, 15 October 2018, *supra* note 56.

[66] Opening remarks by the EU, 14 October 2019, *supra* note 55.

[67] See Table 2 in annex.

[68] Statement by the EU, 26 October 2020, *supra* note 63.

[69] B. Hamm, *supra* note 20, p. 9.

[70] R. Vecellio Segate, *supra* note 40, pp. 3-6.

[71] See e.g. SOMO, 'Re-cap: 2020 negotiations over binding treaty on business and human rights', November 2020, available at <https://www.somo.nl/re-cap-2020-negotiations-over-binding-treaty-on-business-and-human-rights/>.

[72] Press release from the Council available at <https://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/ >.

[73] O. Svoboda, 'The EU and its Member States at the UNCITRAL: Pushing for the multilateral investment court against the odds', in I. Bosse-Platière, *et al.* (eds), "*The New Generation of EU FTAs: External and Internal Challenges*", LAwTTIP Working papers 2019/6, 96-111.

but also from the European Parliament itself reflecting an internal interinstitutional divide, as we will analyse below.

2.2. **The interinstitutional divide within the EU**

The vivid discussions concerning the added value of an international instrumentt and its scope, described above, are also taking place within the European Union and tensions can be noticeable between EU institutions. The European Parliament has expressed a position contrasting with the position expressed by the EU representative at the first sessions of the OEIWG. As a consequence, the European Parliament, or more accurately individual members of the European Parliament, took part in the sessions of the OEIWG, delivering opening statements,[74] and/or participating as panellists.[75] In these statements, MEPs notably expressed their regret that apart from France, the EU is not engaged in the negotiations and proclaimed their intention to reach out to other EU institutions and persuade them to engage more in the process.[76] The latest statements, pronounced by MEPs belonging to the Left Group (GUE/NGL) and the Progressive Alliance of Socialists and Democrats (S&D),[77] repeated the support of the European Parliament to the elaboration of an international binding treaty, and stressed the resolutions it previously adopted on the matter.

The European Parliament has indeed on multiple occasions expressly supported the idea of a binding international treaty, including in resolutions addressing more concrete issues.[78] Already in 2016, the European Parliament 'warmly welcomed the work initiated in preparation for a binding UN Treaty on Business and Human Rights; regretted any obstructive behaviour in relation to this process, and called on the EU and Member States to constructively engage in these negotiations'.[79] MEPs then further engaged with the ongoing negotiations, and in a resolution adopted in 2018,[80] they pointed out the weaknesses of the UNGPs and called upon the EU and its Member States to be more actively involved in the negotiations.[81] They notably proposed the creation of a working

[74] See for instance the statements delivered at the 4th and 5th sessions of the OEIWG.

[75] See e.g. UN HRC, 'Report of the fourth session of the OEIWG on transnational corporations and other business enterprises with respect to human rights', 2 January 2019, A/HRC/40/48, p. 23.

[76] Statement delivered during the fourth session, available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx>.

[77] The speakers were Maria Arena, MEP S& D; Clare Daly, MEP GUE/NGL and Manon Aubry MEP GUE/NGL. Statements available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session5/Pages/Session5.aspx>.

[78] See f.i. European Parliament resolution of 27 April 2017 on the EU flagship initiative on the garment (2016/2140(INI)) *or* European Parliament resolution of 29 May 2018 on sustainable finance *OJ* [2020] C 76/23.

[79] European Parliament, Resolution of 25 October 2016 on corporate liability for serious human rights abuses in third countries *(2015/2315(INI))*.

[80] European Parliament resolution of 4 October 2018 on the EU's input to a UN Binding Instrument on transnational corporations and other business enterprises with transnational characteristics with respect to human rights ((2018/2763(RSP)).

[81] Ibid., para. 8: 'regrets that the UNGPs are not embodied in enforceable instruments; recalls that the poor implementation of UNGPs, as in the case of other internationally recognised standards, has been largely attributed to their non-binding character.'

group including all the relevant departments of the Commission, the EEAS, the Council Working Group on Human Rights (COHOM) and the relevant committees of Parliament.[82] In a resolution adopted in January 2020,[83] the European Parliament stressed once more the need to establish an international binding instrument to regulate, in international human rights law, the activities of transnational corporations and other companies. It further encouraged the EU and its Member States to participate constructively in the work of the OEIWG, as it considers it as a necessary step forward in the promotion and protection of human rights.[84] Such call was repeated in January 2021,[85] illustrating how the issue has become a recurring matter on the European Parliament's agenda.

Beyond the regular adoption of resolutions, the European Parliament has also been engaged in efforts to put pressure on other EU institutions in order to obtain a more constructive engagement in the elaboration of a new binding Treaty. MEPs mobilised a series of tools to do so. Some asked a written question to the European Commission, questioning whether the EU would provide comments to the Zero Draft and inquiring about the state of play with regard to the mandate for negotiations to be granted to the Commission.[86] The answer simply stated the position taken by the EU towards the Zero Draft and announced a reassessment of the opportunity to propose negotiating directives after a new draft treaty would be available.[87] MEPs also established a Responsible Business Conduct Working Group, an informal cross-party group gathering those interested in promoting and championing responsible business conduct and due diligence in business operations and in business relationships. It notably advocates for EU-wide systematic and effective measures to implement the UNGPs and OECD Guidelines on Multinational Enterprises, and it has for that purpose adopted in 2019 the Shadow EU Action Plan on the Implementation of the UN Guiding Principles on Business and Human Rights within the EU. The Shadow Action Plan took in large part the formatting and language of officially endorsed EU Action Plans or work programmes. It identified a series of actions to be implemented by the EU institutions, the EEAS and/or the Member States, with a view to ensure that all business enterprises domiciled or conducting business within the EU and/or in a Member State's jurisdiction respect human rights throughout their operations.[88] Finally, MEPs addressed a call on 15 July 2020

[82] Ibid., para. 18.

[83] European Parliament resolution of 15 January 2020 on human rights and democracy in the world and the European Union's policy on the matter – annual report 2018 (2019/2125(INI)).

[84] Ibid., para. 51.

[85] European Parliament resolution of 20 January 2021 on human rights and democracy in the world and the European Union's policy on the matter – annual report 2019 (2020/2208(INI)), para. 127.

[86] Question for written answer P-000335-19 to the Commission, MEPs Judith Sargentini (Verts/ALE), Anne-Marie Mineur (GUE/NGL), Heidi Hautala (Verts/ALE), 23 January 2019, available at <https://www.europarl.europa.eu/doceo/document/P-8-2019-000335_EN.html>.

[87] Answer given by Ms Mogherini on behalf of the European Commission, 14 March 2019, P-000335/2019(ASW), available at <https://www.europarl.europa.eu/doceo/document/P-8-2019-000335-ASW_EN.html>.

[88] 'Shadow EU Action Plan on the Implementation of the UN Guiding Principles on Business and Human Rights within the EU', available at < https://responsiblebusinessconduct.eu/wp/wp-content/uploads/2019/03/SHADOW-EU-Action-Plan-on-Business-and-Human-Rights.pdf>.

to the President of the Commission, several EU Commissioners, including the High Representative and the German presidency of the Council, in order to plead for the adoption of an EU negotiation mandate to participate in the UN negotiations for a binding treaty on business and human rights.[89] The call does not however contain any detail regarding the potential content of such mandate.

At last but not least, the European Parlimant has been engaged in the preparation of a draft proposal for a Directive on Corporate Due Diligence and Corporate Accountability.[90] This text has been put forward by the European Parliament, exercising its right to submit a proposal to the European Commission under Article 225 TFEU, and the draft proposal was approved by the Parliament's plenary in March 2021.[91] This initiative is of particular interest, as it aims to introduce EU legislation on due diligence, a text that may potentially serve as a basis for identifying the EU's external competences to take part in the envisaged future Treaty. The resolution also contains a repetition of the Parliament's position towards the work of the OEIWG, with MEPs calling the EU and Member States to support and engage in the ongoing negotiations and inviting the Commission and the Council to define and adopt a negotiating mandate.[92]

The efforts of the European Parliament, combined with the evolutions of the draft version of the treaty discussed within the OEIWG, seem to have partially influenced the position of some EU institutions. For the first time in February 2021, in its conclusions setting the EU priorities in UN fora, the Council of the EU makes a reference to the EU's active participation in the discussions taking place within the OEIWG.[93] Yet the EU's approach has not fundamentally changed. The emphasis on the UNGPs remains strong,[94] and it was even strengthened with the 10th anniversary of their adoption, with the EU's support to the adoption of a renewed roadmap for the next decade.[95] As for the adoption of a negotiating mandate for the Commission, no significant developments seem to have occurred. The European Commission has shown no sign of interest in proposing such mandate and does not announce its intention to reflect about a proposal in the EU Action Plan for Democracy and Human Rights for 2020–2024, nor in the Commission Work Agenda for 2021. Such reluctance

[89] Full text of the call available at <https://media.business-humanrights.org/media/documents/files/documents/2020-07-20_-_EU_Parliament_-_Letter_requesting_a_negociation_mandate.pdf>.

[90] Procedure 2020/2129(INL), full overview of the different steps available at <https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/2129(INL)>.

[91] European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)). Annex – Recommendations for drawing up a Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability, text of the proposal requested.

[92] European Parliament resolution of 10 March 2021, ibid., point W and para. 30.

[93] Council, Conclusions on EU Priorities in UN Human Rights Fora in 2021, doc. 6326/21, 22 February 2021, para. 24

[94] Council, Conclusions on EU Priorities in UN Human Rights Fora in 2019, doc. 6339/19, 18 February 2019, para. 20 and Council, Conclusions on EU Priorities in UN Human Rights Fora in 2020, doc. 5982/20, 17 February 2020, para. 22.

[95] Council, EU Priorities in 2021, *supra* note 93.

may be explained by the ever-changing text of the draft UN treaty, but it may also be linked to legal limits that we will explore in the next section.

3. LEGAL LIMITS TO THE PARTICIPATION OF THE EU

Beyond the political positions taken by the EU institutions, namely the Commission, the Council, the European Parliament as a whole and its individual members, the possibility for the EU to obtain a negotiating mandate and later become a party to the envisaged international treaty is subject to a specific legal framework defining the external relations of the EU. This section will not discuss the scope of the EU's competences for each provision of the envisaged treaty, as this delimitation exercise is complex and partially irrelevant at the current stage, when the draft international treaty changes drastically with each new version. We will nevertheless pinpoint some general considerations regarding notably the place of the EU within the UN system and in particular within the HHRC (3.1), the scope of its competences to enter into the envisaged treaty (3.2.) and the positions of the EU Member States and its potential impact on the EU's participation in the treaty (3.3.).

3.1. **The place of the EU within the Human Rights Council**

The EU and the United Nations share the same ambition of promoting human rights in the world as well as multilateral engagement in such issues. The EU's participation in the activities of the entities composing the UN system is carefully analysed, as in some instances the participation of a regional organisation in fora designed only for States' membership requires innovative approaches.[96] The Human Rights Council is an entity of such UN system which is not immune to controversies regarding its composition and/or its activities: the geographic distribution of the seats being for instance considered disadvantageous to European and other Western countries,[97] and it includes among its members countries with a questionable human rights record.[98]

Within the HRC, the European Union is not a member, but an observer, that can sponsor resolutions,[99] but cannot take part in their adoption by voting.[100] The EU can also engage in negotiations, and make statements,[101] which are

[96] For an exploration, see R.A. Wessel and J. Odermatt, *Research Handbook on the European Union and International Organizations* (Edward Elgar, 2019) and its second part on the EU and UN system.

[97] E. Paasivirta and T. Ramopoulos, 'UN General Assembly, UN Security Council and UN Human Rights Council' in R. A.Wessel and J. Odermatt, *supra* note 96, p. 74

[98] J. Wouters and K. Meuwissen, "The European Union at the Human Rights Council. Multilateral human rights protection coming of age?", KU Leuven Centre for Global Governance studies, Working Paper 126, p. 15.

[99] E. Paasivirta and T. Ramopoulos, *supra* note 97, p. 79.

[100] C. Pérez Bernárdez, 'The Consistency of the European Union's Human Rights Policy at the United Nations', in P. Eeckhout and M. Lopez-Escudero (eds), *The European Union's External Action in Times of Crisis* (Oxford, Hart Publishing, 2016), p. 342.

[101] J. Wouters and K. Meuwissen, *supra* note 98, p. 7.

delivered by the Permanent Representative of the Member State holding the presidency of the Council of the EU, even if that State is not a member of the HRC.[102] For discussions in other sessions, including those of the OEIWG, the statements on behalf of the EU are delivered by more diverse actors, being members of the EU delegation in Geneva, Brussels-based officials,[103] or even sometimes national diplomats. Such statements, be it a higher-ranking level or within working groups or debates, are preceded by intense preparatory work in order to determine whether a coordinated position may be reached among EU Member States. Such preparatory work can take place in Brussels within the Council's specialised working groups, such as COHOM,[104] in which the EU's priorities in UN human rights fora are elaborated annually. It also takes place in Geneva, where the EU delegation works closely with the diplomatic missions of EU Member States and with other stakeholders (non-EU countries, NGOs, etc.).[105] However, research has shown that such internal coordination is sometimes perceived as negative, the EU being slow in formulating common positions,[106] despite the initiatives taken to speed up decision-making.[107] Most importantly, EU Member States retain their capacity to intervene independently, including the capacity to develop their autonomous policies, proposing or supporting resolutions. Some of them have often exercised such possibility, including within the OEIWG, sometimes to support the EU's statements and positions, but also to formulate their own views and opinions (see table 2 and below). The European Parliament does not have a formal role in this process, neither in the elaboration of the EU priorities nor in the HRC, but it does not prevent it to express its own views on key issues, as illustrated above regarding the negotiations of the UN treaty on business and human rights. The openness of the OEIWG's sessions has allowed individual MEPs to take part in the negotiations marking their support for the elaboration and adoption of a binding instrument at international level.

Despite these complexities, the EU plays an important political role in the negotiations, even though its positions often express reserves and critics towards the initiative and its content. It still nevertheless contrasts with the complete absence of other Western Countries, such as the United States of America and Canada, which never participated in the OEIWG's sessions.[108] The role to be played by the EU is reflected in the evolution of the draft versions of the Treaty, in which the EU's redlines are progressively addressed. The possibility for regional integration organizations to become party to the Treaty is explicitly fore-

[102] On the membership of EU Member States in the HRC, see Table 1. See also C. Pérez Bernárdez, *supra* note 100, p. 349.

[103] E. Paasivirta and T. Ramopoulos, *supra* note 97, p. 79.

[104] Working Group on Human Rights of the Council of the EU. For more details, see C. Pérez Bernárdez, supra note 100, p. 349.

[105] E. Paasivirta and T. Ramopoulos, supra note 97, p. 79.

[106] J. Wouters and K. Meuwissen, supra note 98, p. 9. See also H. Tuominen, *The Role of the European Union at the United Nations Human Rights Council*, PhD Thesis, 120, available at <https://helda.helsinki.fi/bitstream/handle/10138/162475/theroleo.pdf?sequence=1&isAllowed=y >.

[107] C. Pérez Bernárdez, *supra* note 100, p. 371.

[108] The USA had left the HCR in 2018 and the president Joe Biden has announced in February 2021 that they would return.

seen since the first version of the text, now provided in Article 19 of the second revised draft, "within the limits of their competence" and pending the declaration of their level of competences in respect of matters governed by this treaty (article 1 para. 6 Second Revised Draft). This possibility and the conditions under which it may be exercised are standard for such international legally binding instruments, however given the substance of the currently negotiated treaty, the delimitation of the scope of the EU's competences could be a tricky exercise.

3.2. **Assessment of the scope of the EU's external competences to become a party to the envisaged treaty**

The principle of conferral of competences, enshrined in Article 5 (2) TEU is a well-known and established principle of EU law,[109] and it has prompted numerous discussions and cases before the ECJ in relation to the competences at the disposal of the EU to conduct external activities and become a party to international agreements, even after the clarification and codification efforts carried out in the Lisbon Treaty[110]. The control of the existence of such competences is a pre-requisite before the EU can formally enter into international negotiations. The proposals made by the European Commission in view of obtaining a negotiating mandate and directives from the Council comply too with the requirement of a legal basis, and such requirement continues to apply for the decisions allowing the EU to sign and ratify an international agreement. In relation to the envisaged treaty on the protection of human rights in the context of business activities, the competences potentially at the disposal of the EU are as wide and diverse as the issues potentially covered by the envisaged agreement.

Whereas a series of provisions refer to the protection of human rights in the EU's external activities[111] and make it one of the EU's external objectives, none of them can be considered as a legal basis for the recognition of the EU's competence to enter into such agreements.[112] It is therefore necessary to turn to other basis for the recognition of EU's external competences, which is particularly adequate for the envisaged treaty on business and human rights. The Commission had previously carried out an exercise of mapping out the EU's competences relevant in the context of the implementation of the UNGPs,[113] and this exercise can serve as an illustration of the potential scope of the EU's competences in relation to the future UN treaty. According to the Commission, the EU's competence may derive from explicit treaty provisions, such as Article

[109] H.-J. Blanke and S. Mangiameli, Article 5 [Principles on the Distribution and Limits of Competences] in H.-J. Blanke and S. Mangiameli (eds), *The Treaty on European Union A Commentary* (Springer, 2013) 255-286,

[110] A. Ott, 'EU External Competence' in J. Larik and R.A. Wessel, *EU External Relations* (Oxford, Hart Publishing, 2020), 63-64.

[111] Articles 3 § 5, 6 and Art. 21 TEU

[112] Y. Nakanishi, 'Mechanisms to Protect Human Rights in the EU's External Relations' in Y. Nakanishi (ed), *Contemporary Issues in Human Rights Law* (Springer, 2017), p. 12.

[113] Commission, 'Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights – State of Play' SWD(2015) 144 final, 4-5.

207 §1 TFEU or Articles 208 §1 and 209 §2 TFEU, which insert human rights considerations and objectives within the common commercial policy and the development cooperation policy. In addition, the Commission stressed that implicit external competences might also be identified on the basis of internal EU instruments, whose content might overlap with certain aspects of the envisaged international treaty.[114] The latter might be for instance encountered with regard to the provisions on access to justice by victims of human rights violations, for which the EU might be able to claim competence on the basis of the existance of internal rules enrhsined in the Brussels I Regulation or the Victims' Rights Directive.[115]

A similar reasoning may be applicable to identify the scope as well as the nature of the EU's competences to conclude the draft UN treaty. Whereas the text pursues the objectives of protecting human rights, its content, which is yet to be finalised, is likely to touch upon a wide range of areas, including but not limited to human rights law, labour law, environmental law, anti-discrimination law, international humanitarian law, investment and trade law, consumer protection law, civil law, commercial law, corporate law and/or penal law. As a consequence, the EU's regulatory competence, and its ability to enter into the agreement, will vary according to the scope of competence awarded to the EU in respect of each of those areas.[116] The nature of its external competence (exclusive, shared or complementary) would also have to be determined.[117] As a consequence, the EU institutions would be required to go through a detailed exercise of reviewing each provision of the envisaged UN treaty in order to determine whether the EU, its Member States or both of them are competent to negotiate, adopt, sign and ratify the text. This exercise is extremely sensitive in political terms,[118] something already reflected in some declarations and statements made within the OEIWG, such as the statement made by France during its 5th session. The French delegate started its declaration by a reservation, indicating that "numerous aspects of the draft legally binding instrument may potentially fall within the scope of exclusive EU competences",[119] demonstrating the awareness of an EU Member State regarding the potential limitation of its capacity to act autonomously.

In this perspective, a long list of EU internal instruments would have to be examined in parallel to the latest version of the draft UN treaty, in order to determine whether or not these instruments may constitute a basis for an EU's external competence and its capacity to participate in the implementation of the

[114] Ibid.

[115] See below box n° 2.

[116] Ibid.

[117] FRA, Opinion 1/2017, *supra* note 23, p. 21.

[118] See e.g. the adoption of Council Decisions for the conclusion of the UN Protocol against the Smuggling of Migrants by the European Community, discussed in C. Brière and T. Molnár, 'The new Review Mechanism of the UN Smuggling of Migrants Protocol: challenges in measuring the EU's and its Member States' compliance', in N. Levrat *et al.* (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart Publishing, forthcoming 2021).

[119] OEIWG, 5th session, Panel on Article 5, Oral statement by France, 14-18 October 2019, available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session5/Pages/Session5.aspx>. Translation from French by the author.

treaty. Most of the EU opening remarks to the OEIWG sessions refer to such instruments, next to the EU's efforts in supporting the implementation of the UNGPs. To mention but a few, the EU referred to such internal legislation at the occasion of the fourth session of the OEIWG, indicating that both EU institutions and Member States "do not shy away from binding norms when they are needed". Some instruments are indeed relevant for demonstrating the EU's commitment to the protection of human rights, including via the imposition of obligations to private companies, but they may not neceassrily constitute a basis for the recognition of an EU's external competence. The boxes below provide a non-exhaustive list of instruments which would have to be assessed, in order to illustrate their variety, and those foreseeing provisions relating to the victims' access to justice.

Box. 1 – Due diligence legislation for specific sectors

- Regulation (EU) 995/2010 laying down the obligations of operators who place timber and timber products on the market (Timber Regulation)
- Regulation (EU) 2017/821 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (Conflict Minerals Regulation).
- Directive 2014/95/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, requiring public-interest companies with more than 500 employees to publish reports on their policies regarding environmental protection, social responsibility and the treatment of employees, respect for human rights, anti-corruption and bribery, and diversity on company boards.
- Directive (EU) 2017/828 as regards the encouragement of long-term shareholder engagement (Shareholder Rights Directive).
- Regulation (EU) 2019/2088) on sustainability-related disclosures in the financial services sector, requiring investors and financial advisors to disclose the risks of negative environmental, social and governance impacts and their effect on investment value.

Box. 2 – EU instruments granting victims access to justice.

The EU Fundamental Rights Agency further detailed them in a report recently published in which it detailed the avenues through which victims may access remedies and seek redress for business-related human rights abuses.[120]

- The Brussels I Regulation (Regulation (EC) No 44/2001, then Regulation (EU) 1215/2012), that enables victims of human rights violations in which European domiciled companies are involved to claim compensation before

[120] FRA, 'Business and human rights – access to remedy', Comparative Report (6 October 2020), available at <https://fra.europa.eu/en/publication/2020/business-human-rights-remedies>.

domestic courts in the EU for damages caused and/or arising outside the Union.[121]
- The Rome II Regulation (Regulation (EC) No 864/2007) that establishes the applicable law for tort cases, including torts relating to human rights infringements.
- The Victims' Rights Directive (Directive 2012/29/EU) establishing minimum standards on the rights, support and protection of victims of crime.

In addition to this exercise of going through the current text of the treaties and the existing internal EU instruments, the definition of the scope of the EU's competence may evolve over time, and in particular every time the EU legislator decides to make use of the EU's internal competences to adopt legislative instruments. By way of example, one may refer to the forthcoming proposal for a Directive on Corporate Due Diligence and Corporate Accountability discussed above. The European Commission having already given signs of its favourable approach to such proposal,[122] it seems a likely outcome that in a few years, the EU would have an internal legislation, providing for a general obligation for a wide range of undertakings established within the EU or operating in the internal market to take "all proportionate and commensurate measures and make efforts within their means to prevent adverse impacts on human rights, the environment and good governance from occurring in their value chains, and to properly address such adverse impacts when they occur".[123] This procedure supports the EU's stance on the promotion of human rights, including beyond its territory. Linking it back to the context of the ongoing negotiations of a UN treaty on business and human rights, the text (if adopted) would also probably reinforce the EU's competences for negotiating further aspects of the envisaged treaty. The Directive may potentially enable the EU to claim competences regarding the implementation of the treaty provision on prevention (Article 5).

This will result in the necessity to carefully draft the declaration of competences that will be attached to the EU's ratification of the future UN treaty on business and human rights. This is particularly important considering that when adopting, concluding and ratifying the envisaged UN treaty, the EU and its Member States will most likely face situation in which parts of the Treaty fall within the scope of the EU's exclusive competence, others within the scope of a shared competence or within the scope of the Member States' competences, requiring to conclude the treaty as a mixed agreement. The request of a negotiating mandate would be a first opportunity to clarify such allocation of compe-

[121] See the reference to the case *Vedanta Resources PLC and another v Lungowe and others*, [2019] UKSC 20, in which the claimant's argument built on Article 4.1 of the Brussels Regulation and the literature quoted in R. Veccellio Segate, *supra* note 37, fn 85.

[122] See e.g. Commission, 'Work Programme for 2021' COM(2020) 690 final, Annex I : New Initiatives, point 15, or Remarks by Commissioner Didier Reynders during the debates in the EP on 8 March 2021 (transcript available at <https://www.europarl.europa.eu/doceo/document/CRE-9-2021-03-08-ITM-022_EN.html>). The proposal for a Directive (not analysed here) has been published on 25 February 2022 (COM(2022) 71 final).

[123] European Parliament, 'Annex to the Resolution of 10 March 2021', *supra* note 91, Preamble, para 20.

tences, and it would be furthermore useful to allow the EU and its Member States to engage more actively in the negotiations.

3.3. **The position(s) of the EU Member States**

The added value of an international treaty providing for the protection of human rights in the context of business activities is a controversial issue, as evidenced by the positions expressed within the HRC and the OEIWG. Many States, including EU Member States, are not convinced by the necessity of a new instrument, and support the reliance of mixed solutions combining self-regulation of enterprises, voluntary schemes and narrowly construed legal obligations. Whereas we have already addressed in detail the EU's involvement in the work of the OEIWG, it is also relevant to address the involvement of EU member States, which can be qualified as mild. Their participation can be traced from the lists of participants present in the reports adopted at the end of each session (Table 2), and on average, around 20 EU Member States are included in these lists.[124]

However, their input to the discussions appears limited. This can be explained due to the coordination efforts carried out by the EU, and thus the expression of the position of the EU's Member States in the EU's opening remarks. This is for instance evidenced in the EU's remarks in the fifth and sixth sessions of the OEIWG with the wording "the EU and its Member States".[125] Nevertheless, individual Member States intervene occasionally, mostly within the panels, and when they take the floor, they depart little from the position expressed by the EU. It has notably been the case at the occasion of the second session of the OEIWG, during which the European delegates from France and the Netherlands, which seemed satisfied with a separate segment of the work programme on the UNGPs, dedicated most (if not all) of their substantive interventions to highlight and insist on implementation of the UNGPs.[126] In subsequent sessions of the OEIWG, the EU Member States were criticised for not providing their own statements on the content of the draft versions.[127] Some of them are taking the floor at most of the sessions of OEIWG, but it is often the same States (France and the Netherlands, more rarely Spain or Belgium). They do not necessarily express independent views. Belgium for instance took the floor at the occasion of the 2018 session of the OEIWG merely to express its alignment with the position expressed by the EU, including the reserves expressed about the negotiation

[124] Information extracted from the reports adopted at the end of each session: 1st session – 16 MSs ; 3rd session – 19 MSs ; 4th session – 20 MSs and 5th session – 19 MSs.

[125] Opening remarks by the EU, 14 October 2019 and 26 October 2020, supra notes 55 and 63.

[126] C. Lopez, *supra* note 1, p. 366.

[127] SOMO, 'Re-cap: negotiations over the Zero Draft of a binding treaty on business and human rights', published in 2018 available at <https://www.somo.nl/reflections-on-the-first-round-of-negotiations-for-a-united-nations-treaty-on-business-and-human-rights/>, and in 2019, available at <https://www.somo.nl/re-cap-negotiations-over-the-revised-draft-of-a-binding-treaty-on-business-and-human-rights/>.

process.[128] Other Member States, like France and the Netherlands, are more often taking the floor, most probably due to their national experiences in corporate governance, and they refer to these specific national developments. France has for instance taken the floor in all sessions of OEIWG, mostly when the provision on prevention was discussed (Table 2). This can be explained by the intention to showcase its efforts since the adoption of a law establishing a duty of vigilance for companies.[129] The law obliges companies with more than 5,000 employees in France or 10,000 employees worldwide (including the company's subsidiaries) to draw up an annual plan covering due diligence in the parent company, the companies under its control and the suppliers and subcontractors with which the parent company or any of its subsidiaries have established a commercial relationship. The plan should include procedures to identify and analyse the risk of human rights violations or environmental harms connected to the company's operations, procedures to regularly assess risks associated with the supply chain, actions to mitigate identified risks or prevent serious violations, mechanisms to alert the company to risks, and mechanisms to assess measures that have been implemented as part of the vigilance plan and their effectiveness. This national development impacts not only the participation of France in the OEIWG, but it may also have an impact on developments in other Member States and/or at EU level. After the adoption in 2019 of the Child Labour Due Diligence Act (not entered into force yet) in the Netherlands, four political parties submitted in March 2021 a Bill for Responsible and Sustainable International Business Conduct, aiming at introducing in national law a similar due diligence obligation for all companies in all economic sectors that are registered in the Netherlands or sell products or services on the Dutch market.[130] The development of such national legislations is fully acknowledged by the EU institutions, and they are for instance referred to in the draft Directive on Due Diligence proposed by the European Parliament. In a classical EU approach, these national initiatives are used to advocate the need for an EU-wide instrument, as divergences among national legislations have an adverse impact on the freedom of establishment and damaging the existence of a level playing field.[131]

However, the existence of these national legislations, as well as the European Parliament's proposal for an EU-wide instrument, do not hide the potential lack of consensus among the EU Member States regarding the elaboration of legally binding obligations in the field of business and human rights. Some Member States might be opposed to the adoption of an EU internal Directive,

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[128] OEIWG, 4th session, Panel "Voices of the victims", Intervention de la Belgique, 19 October 2018.

[129] Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (Law on the duty of vigilance, 27 March 2017), quoted in FRA, 'Business and human rights – access to remedy', *supra* note 120.

[130] J. Wilde-Ramsing, M. Wolfkamp and D. Ollivier de Leth ,'The Next Step for Corporate Accountability in the Netherlands: The New Bill for Responsible and Sustainable International Business Conduct', NOVA BHRE Blog, 18 March 2021, available at <https://novabhre.novalaw.unl.pt/new-bill-for-responsible-sustainable-international-business-conduct-netherlands/>.

[131] European Parliament resolution of 10 March 2021, *supra* note 91, Annex, preamble, paras. 8 to 13.

and attempt to block its adoption within the Council of the EU. Internationally, all EU Member States participating in the HRC in 2014 have voted against the establishment of the OEIWG and since then, most of EU Member States have taken a passive approach to its work, participating to the sessions without making any statement, nor commenting on the draft versions of the text. Their attitude is just slightly more active than other like-minded countries, such as the United States of America, Canada, Australia, New Zealand, and Japan, which remain absent.

Without entering into too abstract considerations, one may wonder if the future of the UN treaty may not resemble the situation of the Istanbul Convention, whose ratification by the EU is currently on hold. All the EU Member States are signatories, but some of them have not yet ratified the text, while the Council of the EU adopted two decisions authorising its signature by the EU.[132] Before the adoption of the decisions authorising the ratification of the Convention by the EU, the European Parliament requested an Opinion to the ECJ, notably to clarify the compatibility of the conclusion of the Convention by the EU in the absence of mutual agreement between all EU Member States.[133] This question is linked to the practice, already analysed by some authors,[134] according to which Member States seek to reach a unanimous agreement on the conclusion of a mixed agreement, i.e. all Member States confirming their intention to conclude the agreement, before the Council can allow the EU to conclude the agreement.[135] This contrasts with the procedure foreseen under Article 218 TFEU, which does not provide for such condition and under which the Council's decisions shall be adopted by qualified majority voting.[136] The question of the legality of this practice has been already raised before the ECJ in the case *Commission v. Council*[137], in which the Commission and the European Parliament, argued that it sometimes led to hybrid decisions adopted by both the Council and the Representatives of the Governments of the Member States, amounting to a *de facto* change of the voting rules within the Council.[138] At the time, the ECJ considered that argument well-founded, as the two different acts, brought together in the contested decision, could not have been validly adopted

[132] Council Decision (EU) 2017/865 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, [2017] OJ L 131/11; and Council Decision (EU) 2017/866 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement, [2017] OJ L 131/13.

[133] Request for an opinion submitted by the European Parliament pursuant to Article 218(11) TFEU (Opinion 1/19), [2019] *OJ* C 413/19.

[134] See e.g. J. Heliskoski, 'The Procedural Law of International Agreements: A Thematic Journey through Article 218 TFEU', 57 *Common Market Law Review* 2020, p. 90-94.

[135] ECJ, Opinion Procedure 1/19, Conclusions of AG Hogan delivered on 11 March 2021, EU:C:2021:198, para. 197.

[136] M. Chamon, 'Op-Ed: AG Hogan's Opinion in Avis 1/19 regarding the Istanbul Convention', *EU Law Live*, 15 March 2021, available at <https://eulawlive.com/op-ed-ag-hogans-opinion-in-avis-1-19-regarding-the-istanbul-convention-by-merijn-chamon/>.

[137] ECJ, Case C-28/12, *Commission v. Council*, 28 April 2015, EU:C:2015:282.

[138] Ibid., para 29.

under a single procedure, and thus and annulled the contested decision.[139] In the context of the decision allowing the EU's ratification of the Istanbul Convention, the Advocate General Hogan delivered his Conclusions on 11 March 2021, in which he gave a rather unsatisfactory answer leaving the last word to the Council. He indeed found that the decision would be compatible with the Treaties if it were adopted in the absence of a common agreement, but it would also be compatible with the Treaties if the EU's decision were adopted only after such common agreement had been established.[140] The decision of the Court remains thus very much expected, as it might provide more clarity on the validity of such practice. This would have potential repercussions for the EU's participation in the envisaged UN treaty on business and human rights, even though the perspective of deciding on the EU's signature and ratification of text remains a rather hypothetic and distant perspective.

CONCLUSION

The paper explored the position taken by the European Union with regard to the elaboration of a new international treaty addressing the obligations of companies with respect to the protection of human rights in the course of their activities. Whereas there seem to be a consensus on the need to ensure accountability of human rights' violations, the ways through which it can be ensured remain particularly sensitive and divisive. The option of an international legally binding instrument has been brought back since 2014 with the creation of the OEIWG, and the ongoing negotiations on the draft versions of the text are closely followed by a vast array of actors, being representatives of corporations, civil society organisations, academics, States and other stakeholders. Yet, many questions remain open, including the added value of such instrument if it is not endorsed by a sufficient number of countries. Previous experiences have illustrated how much such support is essential to ensure that a text does not remain dead letter but gives rise to clear obligations, whose implementation is effective and potentially controlled through judicial proceedings.

The position taken by the EU is particularly interesting. Its initial reluctance to engage in the negotiations illustrates the sensitivity of the whole process, and in a context where many 'Western' States are absent from the negotiations, its participation is perceived as important. This may be linked to the fact that many transnational corporations and SMEs potentially concerned by the envisaged instrument are based and/or operate in the EU, and the EU's participation would thus boost compliance with the obligations enshrined in the envisaged instrument. This may also relate to the fact that the EU provides sources of fundings that are instrumental in supporting the implementation of international standards beyond its territory. Nevertheless, despite the repeated calls for a stronger engagement, the EU institutions, especially the Commission, have remained ambiguous and participated rather marginally in the negotiations. The absence

[139] Ibid., para 52-53.
[140] Opinion 1/19 Istanbul Convention, Conclusions of AG Hogan, 11 March 2021, para. 222.

of a proposal for obtaining a negotiation mandate, almost two years after the entry into function of the von der Leyen Commission, is an indication of such ambiguity. This contrasts with the negotiations of other multilateral instruments, such as the Paris Agreement, in which the EU has played a very constructive role in the negotiations leading to the agreement.[141]

More than legal limits relating to the scope of the EU's external competences, one may wonder whether the source of this ambiguity does not fall back on the controversial character of the envisaged agreement, and in that regard, the envisaged treaty finds echoes in situations in which the EU's external engagement faced disagreements among EU institutions and/or Member States. These disagreements were for instance encountered at the occasion of the endorsement of the Global Compact for Safe, Orderly and Regular Migration, or the ratification of the Istanbul Convention. They reflect not only the expansion of the EU's external activities in fields previously solely in the realm of national competences, but they also illustrate the challenges that may still be encountered by the EU when acting externally.

[141] S. Schunz, 'The European Union's Strategic Turn in Climate Diplomacy: 'Multiple Bilateralism' with Major Emitters', EU Diplomacy Papers 4/2021, available at <http://aei.pitt.edu/103401/1/edp_4-2021_schunz.pdf>.

ANNEXES

Table 1 – Participation of the EU and its Member States to the sessions of the HRC

including * State not a member of the Human Rights Council

Year	Member States part of the HRC		Resolutions on business and human rights		
	Number	**List**	**Title**	**Date**	**Votes**
June 2011 – 31 Dec. 2012	8	Austria, Belgium, Italy, Spain, Hungary, Poland, Romania, Czech Republic	Human rights and transnational corporations and other business enterprises A/HRC/17/L.17/Rev.1	15 June 2011	Argentina, **Austria***, Canada*, **Denmark***, Guatemala, India*, Nigeria, Norway, Peru*, Russian Federation, **Sweden*,** Turkey*: revised draft resolution
			Contribution of the United Nations system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human Rights A/HRC/21/L.14/Rev.1	25 Sept. 2012	Adopted orally Supported by Andorra* , Argentina* , **Austria**, Bosnia and Herzegovina* , **Bulgaria*** , Canada* , **Croatia* , Denmark*** , Finland* , Ghana* , **Greece*** , Guatemala, Honduras* , Iceland* , **Ireland* , Italy,** Mexico, Montenegro* , Morocco* , **Norway, Portugal*** , Russian Federation, **Spain, Sweden*** , Switzerland, Turkey*, **United Kingdom of Great Britain and Northern Ireland***: draft resolution
1 Jan. – 31 Dec. 2013	9	Germany, Austria, Spain, Ireland, Italy, Estonia, Czech Republic, Poland, Romania	NA		

Year	Member States part of the HRC		Resolutions on business and human rights		
	Number	List	Title	Date	Votes
1 Jan. – 31 Dec. 2014	9	Germany, Austria, France, Ireland, Italy, UK, Estonia, Romania and Czech Republic	Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights A/HRC/26/L.22/Rev.1	25 June 2014	In favour: Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russian Federation, South Africa, Venezuela (Bolivarian Republic of), Viet Nam Against: **Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy,** Japan, Montenegro, Republic of Korea, **Romania,** the former Yugoslav Republic of Macedonia, **United Kingdom of Great Britain and Northern Ireland,** United States of America Abstaining: Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, United Arab Emirates]
1 Jan. – 31 Dec. 2015	8	Germany, France, Ireland, Netherlands, Portugal, UK, Estonia, Latvia	NA		
1 Jan. – 31 Dec. 2016	8	France, UK, Latvia, Netherlands, Portugal, Belgium, Germany, Slovenia	Business and human rights: improving accountability and access to remedy A/HRC/32/L.19	29 June 2016	Adopted orally without a vote with support of Andorra,* **Austria,*** Argentina,* **Belgium**, Bosnia and Herzegovina,* **Bulgaria,* Denmark,*** Fiji,* Finland,* Ghana, Honduras,* Iceland,* Liechtenstein,* **Luxembourg,*** Montenegro,* Norway,* Paraguay, Russian Federation, **Spain,*** Switzerland, Turkey,* Ukraine,* **United Kingdom of Great Britain and Northern Ireland**: draft resolution

Table 1 – cont.

Year	Member States part of the HRC		Resolutions on business and human rights		
	Number	**List**	**Title**	**Date**	**Votes**
1 Jan. – 31 Dec. 2017	9	Latvia, Netherlands, Portugal, Belgium, Germany, Slovenia, Croatia, Hungary, UK	Business and human rights: mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises A/HRC/35/L.11	1 9 June 2017	Adopted orally without a vote with support of Andorra,* Argentina,* Australia,* Canada,* Cyprus,* **Denmark,*** Finland,* Ghana, Liechtenstein,* Lithuania,* **Netherlands,** Norway,* Russian Federation,* Switzerland, Turkey,* Ukraine,* United States of America: draft resolution
1 Jan. – 31 Dec. 2018	8	Belgium, Germany, Slovenia, Croatia, Hungary, UK, Slovakia, Spain	Business and human rights: improving accountability and access to remedy A/HRC/38/L.18	2 July 2018	Andorra,* Argentina,* **Austria,* Belgium,** Bosnia and Herzegovina,* Canada,* Chile, Colombia,* **Denmark,*** Finland,* Gambia,* **Germany,** Ghana,* Honduras,* Iceland,* **Ireland,*** Liechtenstein,* **Netherlands,*** Niger,* Norway,* Paraguay,* Peru, **Portugal,*** Russian Federation,* **Spain,** Switzerland, Thailand,* the former Yugoslav Republic of Macedonia,* Tunisia, Turkey:* draft resolution
1 Jan. – 31 Dec. 2019	9	Austria, Croatia, Czechia, Denmark, Hungary, Italy, Slovakia, Spain, UK.	NA		

Year	Member States part of the HRC		Resolutions on business and human rights		
	Number	List	Title	Date	Votes
1 Jan. – 31 Dec. 2020	10	Slovakia, Spain, Austria, Bulgaria, Czechia, Denmark, Italy, Germany, Netherlands, Poland.	Business and human rights: the Working Group on the issue of human rights and transnational corporations and other business enterprises, and improving accountability and access to remedy	14 July 2020	Argentina, Australia, **Austria**, Bulgaria, Canada,* Chile, **Croatia,* Czechia, Denmark**, Finland,* **Germany**, Ghana,* Greece,* Iceland,* **Luxembourg,*** Mexico, **Netherlands,** Norway,* Paraguay,* Russian Federation,* **Slovakia, Spain**, Switzerland,* Thailand,* Turkey* and United Kingdom of Great Britain and Northern Ireland*
1 Jan. – 31 Dec. 2021	8	Austria, Czechia, Denmark, Italy, Germany, Netherlands, Poland, France	NA		

Table 2 – Meetings of the Open-Ended Intergovernmental Working Group

Session	Member States' participation	Statements		EU's participation	Statements
		On their behalf	On behalf of the EU		
1st session - 6 to 10 July 2015	Austria, France, Greece, Italy, Latvia, Luxembourg, the Netherlands France stayed during the whole session.	/	/	Yes (meetings held on 6 July and on the morning of 7 July)	One written contribution

Table 2 – cont.

Session	Member States' participation	Statements		EU's participation	Statements
		On their behalf	On behalf of the EU		
2nd session	Austria, Belgium, Czechia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Romania, Slovakia, Spain, United Kingdom of Great Britain and Northern Ireland.	France (panel 1 – own statement) Netherlands – Panel 2 (national position)	France (panel 1 – supporting EU) Netherlands – Panel 6 (reporting efforts under Dutch presidency of the Council of the EU).	Yes	One general statement EU intervention under Panel V Subtheme 1: "Moving forward in the implementation of the UN Guiding Principles on Business and Human Rights EU intervention under Panel V Subtheme 2 ("The relation between the UN Guiding Principles and the elaboration of an international legally binding instrument on TNCs and other business enterprises")
3rd session	Austria, Belgium, Croatia, Cyprus, Czechia, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Lithuania, Luxembourg, Malta, Netherlands, Norway, Portugal, Slovakia, Slovenia, Spain, Sweden, United Kingdom of Great Britain and Northern Ireland.	Netherlands - debate Reflections on the implementation of the United Nations Guiding Principles on Business and Human Rights and other relevant international, regional and national frameworks France – intervention on Subject 4 – Preventive measures	Netherlands – intervention in panel on the Voices of victims – support EU and further national reflections	Yes	No written submission Opening remarks Interventions under Item 3: "Adoption of the agenda and program of work" Intervention during Debate on the implementation of the UN Guiding Principles Remarks by the European Union Intervention during "Panel: the voice of the victims"

Session	Member States' participation	Statements		EU's participation	Statements
		On their behalf	On behalf of the EU		
4th session	Austria, Belgium, Czechia, Denmark, Finland, France, Germany, Greece, Hungary, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovenia, Spain, Sweden, United Kingdom of Great Britain and Northern Ireland.	France written submission – comments on the zero draft & intervention on Article 9	France - general statement (supporting the EU) & intervention in panel on the voices of victims (aligning with the EU) Belgium – panel voices of victims (aligning with the EU)	Yes	**Opening remarks** (opening remarks by the European Parliament too) Intervention during "Panel: the voice of the victims" Intervention as closing remarks : under the section "Adoption of the report": *"the European Union disassociates from the Recommendations of the Chair-Rapporteur and the Conclusions of the working group and considers that it is not bound by the directions set out".*
5th session	Austria, Belgium, Czechia, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, United Kingdom of Great Britain and Northern Ireland.	Spain - Artículos 3 (ámbito de aplicación) y 4 (derechos de las víctimas) + article 5 France – Article 5 (prévention – reference à l'expérience nationale)	France article 5 – beginning *De nombreux aspects du projet d'instrument juridiquement contraignant étant susceptibles de relever de domaines de compétences exclusives de l'Union européenne, la France réserve sa position sur la nouvelle version diffusée par la Présidence et souscrit à la déclaration de l'Union européenne en ouverture de la session.*	Yes	Opening remarks European Parliament – opening statements by Clare Daly MEP, Manon Aubry MEP & Maria Arena MEP.

Table 2 – cont.

Session	Member States' participation	Statements		EU's participation	Statements
		On their behalf	On behalf of the EU		
6th session - 26 to 30 October 2020	Austria, Belgium, Czechia, Denmark, Finland, France, Germany, Greece, Ireland, Netherlands, Portugal, Slovenia, Spain, Sweden.	France – intervention on article 6 (prevention)		yes	General statement Requests for clarification on Article 1; on articles 3 and 4; on article 4. Rights of victims and article 6 ; on article 8 on Legal liability ; on article 9 ; and on article 12

SALVAGING THE MARRIAGE BETWEEN EU TRADE AGREEMENTS AND FUNDAMENTAL RIGHTS CONSIDERATIONS

Areg Navasartian*

ABSTRACT

The EU has established itself as both a major trading partner on the international scene, as well as a champion for the promotion and the respect of fundamental rights. The EU concludes trade agreements with third countries, and these agreements have since the early nineties included human rights considerations. However, the EU's human rights objectives in its trade policy have been accused of ineffectiveness and promoting double standards. This paper looks at the different human rights mechanisms that are embedded in the EU's trade policy (human right impact assessments, human rights clauses, sustainable development chapters) and proposes to interpret the obligations stemming from them in light of the EU Charter of Fundamental Rights, an interpretation that both allows the EU to uphold high human right standards in its relation to the wide world, as well as respect its own constitutional obligations.

I. INTRODUCTION: THE PLACE OF FUNDAMENTAL RIGHTS IN EU TRADE AGREEMENTS

The EU has steadily positioned itself as one of the largest trading blocs of the world. Ever since the 1960s, both for altruistic and strategic reasons, the EU has pursued, in its trade policy, objectives foreign to commerce, with as a guiding principle the promise of "development through trade".[1] These objectives increasingly included the promotion and protection of fundamental rights,[2] which lay now at the core of European trade relations. Initially exclusively relegated to the polity field, fundamental rights promotion in the EU's external relations has received an important normative injunction through the Treaty of Lisbon, and has been considerably judicialized ever since.[3] However, the marriage between trade and fundamental rights does not always run a smooth course. Despite enjoying a privileged place within the EU trade framework, the effectiveness and coherence of the fundamental rights policy pursued by the Union in

* Assistant and Ph.D candidate at the Centre for European Law of the Université libre de Bruxelles – Institut d'études européennes. The author would like to thank professor Chloé Brière and the reviewers for their comments.

[1] Commission, Communication 'Global Europe: Competing in the World – A Contribution to the EU's Growth and Jobs Strategy' COM(2006) 567 final, p. 9.

[2] We consciously use the notion of 'fundamental rights' as it is understood in EU law, as opposed to 'human rights' which is a notion of international law, in order to encompass rights that are not traditionally included in the latter (e.g. most labour rights and environmental protection).

[3] See *infra*.

its trade relations has been questioned and criticised[4], which in turn affect the credibility of the EU's actions, and thus its capacity to act and influence on the world stage.[5] The multitude of actors, techniques and the objectives pursued by the external fundamental rights policy led to a fundamental rights protection framework that is patchy, inconsistent, and therefore most often ineffective.[6] Trade policy is most certainly not the only nor the most appropriate forum for fundamental rights advancement; it has been argued that the European Union is first and foremost an economic entity, that tries to obtain a purely formal legitimacy by including the external promotion of human rights[7], through mere "declaratory diplomacy".[8] The EU has however, as the global human rights actor it claims to be, a role to play in the advancement of its values in the wider world, and it is precisely this promotion of fundamental rights that makes the EU the international actor that it is today.[9]

In this paper, we will specifically address fundamental rights considerations in the EU's bilateral and regional trade agreements, which constitute one of the main expressions of the Common Commercial Policy. These trade agreements have the specificity of being tailored to the needs of the EU and the third country trading partner(s), taking into account the commercial needs and perhaps more importantly the bargaining power of each Party.[10] However, with this comes also a tailored, and thus fragmented approach towards the promotion and protection of fundamental rights.[11] In order to achieve such protection and promotion of fundamental rights in trade agreements, the EU relies on several mechanisms embedded in its legal framework, policy and negotiation practice that we will address in turn. Firstly, we will analyse the role of human rights impact assessments, which should lay the groundwork for the negotiations of any trade agreement. These are complemented by two other mechanisms integrated in the agreements themselves: human rights clauses, also called essential elements clauses, which dictate the commitment to upholding democracy, human rights and the rule of law by all Parties; and Trade and Sustainable Development Chapters, which lay down labour and environmental protection. For all these instruments, we will critically analyse their characteristics and their shortcom-

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[4] L. Pech, J. Grogan, 'EU External Human Rights Policy', in R. A. Wessel, J. Larik (eds.), *EU External Relations Law* (Oxford: Hart Publishing 2020), 327 ff.

[5] Literature on the EU as a normative actor is abundant: see, e.g., I. Manners, 'Normative Power Europe: A Contradiction in Terms?' 40 *JCMS* 2002, 235-258; C. Bretherton, J. Vogler, *The European Union as a Global Actor* (Oxfordshire: Routledge 2005); C. Kaddous and R.A. Wessel (eds.), *The European Union as a Global Actor*, Geneva Jean Monnet Working Papers, 2017; J. Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford: OUP 2016).

[6] S. Velluti, 'The Promotion and Integration of Human Rights in the EU External Trade Relations', 32 *Utrecht Journal of International and European Law* 2016, 41-68.

[7] C. Maubernard, 'Prendre la promotion externe des droits de l'Homme «au sérieux»', in R. Tinière, C. Vial (eds.), *La protection des droits fondamentaux dans l'Union européenne. Entre évolution et permanence* (Brussels: Larcier 2015) at 295.

[8] K. E. Smith, *European Union Foreign Policy in a Changing World* (Cambridge: Polity Press 2015) at 95.

[9] C. Maubernard, *supra* note 7, at 297.

[10] A. Poletti *et. al.*, 'Promoting Sustainable Development Through Trade? EU Trade Agreements and Global Value Chains', 50 *Italian Political Science Review* 2020, 1-16.

[11] Ibid.

ings. By doing so, we propose a new paradigm for fostering a coherent external human rights policy, based on the Charter of Fundamental Rights. Along with the entry into force of the Treaty of Lisbon, the EU Charter of Fundamental Rights acquired the same binding force as the Treaties.[12] In the decade that has followed, the Charter has asserted itself as the new fundamental rights standard for internal EU action, yet references to and the use of the Charter in the EU's external action instruments are still rare. However, we argue that the Charter of Fundamental Rights should be used as a guiding thread for EU external policy, more specifically in the context of negotiating, concluding and implementing free trade agreements.[13]

Against this backdrop, our paper will appraise the fragmentation of the fundamental rights protection mechanisms in EU trade agreements and its consequences. It will propose, *de lege ferenda*, a more coherent approach to fundamental rights protection in the EU's trade policy, within the constricts of EU competences.

II. MAINSTREAMING FUNDAMENTAL RIGHTS IN EU EXTERNAL POLICY THROUGH ARTICLE 21 TEU AND THE EU CHARTER OF FUNDAMENTAL RIGHTS

A preliminary observation must be made on the absence of a single institutional framework of protection of fundamental rights. While the TEU, in particular Articles 3(5) and 6, repeatedly stresses the importance of fundamental rights as a foundational value underlying the Union's action, this is not translated into an actual competence for the Union to act in the field of fundamental rights, even more so in its external activities. The protection and promotion of fundamental rights are accessory to the scope of competences of the Union, and cannot be pursued outside of this scope, or autonomously.[14] The EU has therefore no positive obligation stemming from the Treaties to protect and promote fundamental rights abroad, e.g. of third country citizens from EU businesses

[12] Art. 6(1) TEU: 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.'

[13] A related question to those explored in this paper is that of the extraterritorial application of the Charter, which would imply a direct interaction between the Charter and the legal system of a third country. Given the negotiated nature of trade agreements, the direct application of the Charter is a less relevant matter in the questions raised in this paper, as the Charter cannot be enforced *in se* against third countries. Instead, we focus on how the contents of the Charter can be reflected in trade agreements in order for the EU to respect its obligations under Article 51 of the Charter and under international law. On extra-territoriality, see, e.g., E. Kassoti, 'The Extraterritorial Applicability of the EU Charter of Fundamental Rights: Some Reflections in the Aftermath of the Front Polisario Saga', 12 *European Journal of Legal Studies* 2020, 117-141; V. Moreno-Lax, C. Costello 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model', in S. Peers *et. al*. *The EU Charter of Fundamental Rights. A Commentary* (Oxford: Hart Publishing 2014), 1657-1683; C. Ryngaert, 'EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations', 20 *International Community Law Review* 2018, 374-393.

[14] R. Wessel, J. Larik, *supra* note 4, p. 334.

operating in these countries.[15] This leads to the absence of accountability mechanisms for the EU as a regional actor in case of breaches of fundamental rights within this competence.[16]

Two innovations of the Treaty of Lisbon must however also be addressed: the entry into force of the EU Charter of Fundamental Rights with the same legal value and status as the Treaties, as well as the newly added Article 21 TEU.[17] The latter is particularly important as a programmatic provision in regard of the EU's external action, as it enshrines in the Treaties the objective of the promotion and the protection of fundamental rights in all areas of the EU's external action, including the CCP, as well as the imperative of consistency in this field.

In contrast, the consequences of the entry into of the EU Charter of Fundamental Rights expand across all of the EU's activities. This instrument is one of the most ambitious and comprehensive human rights catalogues to date, covering both civil and political rights, as well as economic, social and cultural rights. The process of the elaboration of the Charter was rooted in the desire to codify rights and freedoms proclaimed by the CJEU in its case-law, enshrined in the European Convention of Human Rights and those found in the constitutions of the Member States.[18] The Charter's innovative character is not due to the fundamental rights it covers, which were all already observed by the Union and the Member States through different sources, but rather to the unique place it occupies and role it plays in the EU's constitutional framework. In accordance with the absence of a fundamental rights competence for the Union and the principle of subsidiarity, the Charter can only be mobilised and apply within the sphere of EU competences, and within the scope of EU law. Article 51 of the Charter, regarding its scope of application, provides that the "provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law". Only when Member States imple-

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[15] A. Micara, 'Human Rights Protection in New Generation Free Trade Agreements of the European Union', 23 *International Journal of Human Rights* 2019, at 1449.

[16] C. Gammage, 'A Critique of the Extraterritorial Obligations of the EU in Relation to Human Rights Clauses and Social Norms in EU Free Trade Agreements', *Europe and the World: A Law Review*, Special Issue, 2018, at 4.

[17] 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. (…) 3. The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies. The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.'

[18] R. Tinière, 'Propos introductifs', in R. Tinière, C. Vial (eds.), *Les dix ans de la Charte des droits fondamentaux de l'Union européenne. Bilan et perspectives* (Brussels: Bruylant 2020) 14-15.

ment EU law (e.g. when they transpose a directive), they must respect the provisions of the Charter.[19] EU institutions, however, must at all times observe the Charter in the exercise of their competences, at the risk of being censured by the CJEU in case of non-compliance.

The Charter was initially not constructed with the EU's external perspective in mind,[20] and thus, whether deliberate or not, there is no mention of the external relations field in the Charter, nor a mention of the Charter in Article 21 TEU. However, the combined absence of a territorial clause, limiting the application of the Charter to the sole "territory" of the Union,[21] with the wording of Article 51 of the Charter, and the role of the Commission as the guardian of the Treaties, leads to the indisputable consequence that the EU must also observe the Charter in its external relations policy, including in the CCP and the negotiations of trade agreements. On the discursive level, this is not a controversial statement. In their 2011 joint communication '*Human Rights and Democracy at the Heart of EU External Action. Towards a more Effective Approach'*, the Commission and the High Representative stated that

> 'EU external action has to comply with the rights contained in the EU Charter of Fundamental Rights which became binding EU law under the Lisbon Treaty, as well as with the rights guaranteed by the European Convention on Human Rights. (…) The EU's obligation to respect human rights implies not only a general duty to abstain from acts violating these rights, but also to take them into account in the conduct of its own policies, both internal and external. (…) These EU policies are relevant to Europe's credibility in raising human rights with other countries'.[22]

This joint communication has led to the elaboration of a Strategic Framework and Action Plan on Human Rights and Democracy[23], which relies on the imperatives of Article 21 TEU and the Charter to propose key actions to further enhance fundamental rights promotion and protection in all areas of EU external policy.

The application of the Charter to EU external relations, and more particularly in the framework of trade agreements with third countries, raises several crucial questions: can the EU enforce the Charter against third countries a human rights instrument they *de facto* do not adhere to? And even in such case, can trade deals lead to the harmonization of human rights standards between the EU and a third country, in the absence of a human rights competence for

[19] For more details see, e.g., F. Picod, 'Article 51. – Champ d'application' in F. Picod, C. Rizcallah, S. Van Drooghenbroeck (eds.) *Charte des droits fondamentaux de l'Union européenne. Commentaire article par article* (Brussels: Bruylant 2019).

[20] T. Destailleur, 'La Charte et l'action extérieure de l'Union européenne. Du déni à l'acceptation ?', in R. Tinière, C. Vial (eds.), *supra* note 18, at 155.

[21] V. Moreno-Lax, C. Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model', in S. Peers *et. al*. *The EU Charter of Fundamental Rights. A Commentary* (Oxford: Hart Publishing 2014), 1657-1683.

[22] Commission and High Representative for Foreign Affairs and Security Policy, Communication 'Human Rights and Democracy at the Heart of EU External Action—Towards a More Effective Approach', COM (2011) 886 final.

[23] Council, 'EU Strategic Framework and Action Plan on Human Rights and Democracy', 25 June 2012, doc. 11855/12.

the EU? Both these questions have been answered by the CJEU, which has played a critical role in the advancement of the Charter in trade agreements.[24] Through its function of controlling the respect of EU law by the EU institutions, in accordance with Article 218 TFEU, the Court has given binding advisory Opinions on several envisaged international trade agreements, including on their compatibility with fundamental rights.

Regarding the first question, the Court implicitly answered by the positive, since it held that envisaged international trade agreements must effectively be up to par with the standards of the Charter. The most emblematic case in this regard is Opinion 1/17 on CETA, in which the Belgian government requested an Advisory Opinion from the Court, after internal governance disputes on the ratification of CETA, specifically relating to the Investor-State Dispute (ISDS) mechanism foreseen in the investment part of the Agreement.[25] The Belgian government questioned the compatibility of the ISDS mechanism with Articles 20 and 21 of the Charter (equality before the law and non-discrimination), as well as with Article 47 (right to access to an independent tribunal). While the Court confirmed the compatibility of the ISDS mechanism and therefore of CETA with the Charter, it did so after an in-depth review of the litigious provisions of the Agreement. The Court dismissed the views of several Member States and the Council that the Charter is 'not binding on Canada and that the CETA falls within the scope, not of EU law, but of international law, the only law applicable to that mechanism'[26], asserting that international agreements must be entirely compatible with the Treaties. This includes not only the provisions concerning the division of competences, but also the provisions on substantive law, including the Charter, since the Charter has the same legal status as the Treaties.[27] Opinion 1/17 was not however the first opportunity for the Court to establish the Charter among the parameters against which it would review the compatibility of international agreements with EU law. In its Advisory Opinion 1/15 on the envisaged PNR agreement between the EU and Canada, the Court did issue a negative Opinion, based on the incompatibility of certain provisions with the Charter.[28] The Court put the onus back on the Commission to renegotiate the PNR agreement in accordance with the Charter.[29] Through such rulings, the Court firmly establishes that the compatibility of envisaged international agreements with the Charter is a question that must be addressed and resolved at the negotiation stage, and thus must figure among the red lines of the Commission.

Regarding the question whether trade deals can lead to the harmonization of human rights standards, the Court unequivocally responded by the negative.

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[24] For a comprehensive overview of the role of the Court in advancing fundamental rights in international agreements see C. Brière, A. Navasartian, 'Lex generalis and the Primacy of EU Law as a Source of the EU's Duty to Respect Human Rights Abroad : Lessons Learned from the Case-Law of the CJEU', *CLEER Papers* 2020, 13-36.

[25] ECJ, Opinion 1/17, *CETA,* EU:C:2019:341.

[26] Opinion 1/17, para. 88.

[27] Opinion 1/17, paras 165 and 167.

[28] ECJ, Opinion 1/15, *EU-Canada PNR Agreement*, EU:C:2016:656.

[29] Opinion 1/15, para. 232.

In Opinion 2/15 on the EU-Singapore FTA, the question was raised whether Chapters 11 on intellectual property and 13 on sustainable development led to a harmonization of those fundamental rights standards.[30] This was the first "new generation" FTA subject to the scrutiny of the Court, and the Opinion was thus highly anticipated, since it would determine whether, among other questions, the protection of these fundamental rights could fall within the exclusive competence on trade. The consequences of the answer of the Court would not be innocuous; if the protection of labour standards and intellectual property were in this scenario to be considered a shared competence, the outcome would either be that the negotiation of free-trade agreements would become a shared competence with the Member States, or, more likely, that those fundamental rights would be abandoned altogether in order to preserve the exclusive competence of the EU.[31] The Court considered that both Chapter 11 and Chapter 13 do not seek to harmonize legislation but govern the trade relation between the EU and Singapore and ensure that both Parties respect the international agreements they both are Party to, in order to ensure a level-playing field.[32] On the trade-sustainable development nexus specifically, the Court considered, based on Article 21 TEU, that labour and environmental protection are an integral part of the CCP.[33] In line with international law, the Court confirmed that standards binding on third countries may only be those to which they abide by virtue of their international law obligations.

Nevertheless, a combined reading of Opinions 2/15 and 1/17 indicates thus that while respect of the Charter provisions as such cannot be binding upon external trading partners, because this would effectively lead to harmonization of the human rights standards in that State, the levels of protection provided for in the Agreement must however be up to par with the Charter. This inevitably entails that potential trading partners must ensure equally high levels of protection within their domestic legal system.

The following sections of this paper will explore how to effectively translate these requirements into the mechanisms provided for by the CCP to ensure high levels of fundamental rights protection, compatible with the Charter. We have identified three key mechanisms: sustainable impact assessments and human rights clauses, which predate the Treaty of Lisbon (III.), and Trade and Sustainable Development Chapters in trade agreements, of which the use coincides with the entry into force of the Treaty of Lisbon (IV). We will first describe each mechanism in turn, as well as their shortcomings and their eventual evolution in light of the Treaty changes. We will, where necessary, propose an approach to these mechanisms that conciliates the requirements of free trade with adequate protection of fundamental rights.

[30] ECJ, Opinion 2/15, *EU-Singapore FTA*, EU:C:2017:376.

[31] Opinion of Advocate General E. Sharpston in the context of the Opinion procedure 2/15, *EU-Singapore FTA*, EU:C:2016:992, paras 470 ff.

[32] Opinion 2/15, paras. 126 and 152 resp.

[33] Opinion 2/15, para. 147.

III. SOMETHING OLD: SUSTAINABLE IMPACT ASSESSMENTS AND HUMAN RIGHTS CLAUSES

In this section, we will analyse two mechanisms that pre-dated the entry into force of the Treaty of Lisbon, and see if and how the changes brought about by the latter have had an impact on those mechanisms.

a. **Sustainable impact assessments and Human rights impact assessments**

Respecting and promoting fundamental rights in international trade relations can only be credible if fundamental rights considerations are properly ta ken into account before the conclusion of a trade deal. This can be done through relying on findings of international fundamental rights organisations such as the ILO or the UN Human Rights Committee, but it is also necessary to prevent concluding trade agreements that would 'undermine a third country's capacity to fulfil its human rights duties' or deteriorate the situation of fundamental rights in said country, whether they concern civil rights or labour and environmental protection.[34]

To meet this goal, the EU has since 1999 conducted Sustainability Impact Assessments (SIA) during the negotiations of trade agreements, in order to measure the agreements' potential economic, social and environmental impact both in the EU and the potential partner country.[35] However, these SIA did not systematically measure the impact on human rights that are not labour-related, which led to growing criticism.[36]

The entry into force of the Lisbon Treaty allowed for a certain revamping exercise. In the 2012 Strategic Framework and Action Plan, the EU committed to pursuing an integrated approach to impact assessments, and to incorporate human rights in all trade impact assessments,[37] in order to uphold its commitments under Article 21 TEU.[38] To this end, the Commission developed in the framework of the *Better regulation* agenda[39] 'in-house guidelines in order to help with examination of the potential impacts of a trade-related initiative on human rights in both the EU and the partner country/ies'.[40] The guidelines stress that respect for the Charter of Fundamental Rights is a binding legal

[34] S. Velluti, *supra* note 6, at 57.

[35] Commission, Handbook for Trade and Sustainability Impact Assessment, Publications Office of the European Union, 2nd edition, 2016, p. 4.

[36] S. Velluti, *supra* note 6, at 58.

[37] Council, 'EU Strategic Framework and Action Plan on Human Rights and Democracy', 25 June 2012, doc. 11855/12.

[38] Commission, 'Guidelines on the analysis of Human Rights Impact Assessments for Trade-related Policy initiatives', DG Trade, May 2015, available at <https://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf>.

[39] Commission, Communication 'Better Regulation: Delivering Better Results for a Stronger Union' COM(2016) 615 final.

[40] Commission, 'Guidelines on the analysis of Human Rights Impact Assessments for Trade-related Policy initiatives', *supra* note 38.

requirement for the Commission, and checking compliance with the Charter is thus 'an essential element of the analysis of human rights impacts in impact assessments of trade-related initiatives', as well as with international law.[41] The 2015-2019 Action Plan on Human Rights and Democracy once more repeated the continued development of a 'robust and methodologically sound approach to the analysis of human rights impacts of trade and investment agreements.'[42]

However, despite the commitments made under the Action Plans, the question arises to what extent conducting human rights impact assessments in SIAs is a binding obligation under EU law.[43] A first indication of an answer can be found in the case-law of the CJEU. In the framework of the Euro-Mediterranean Association Agreement between the EU and the Kingdom of Morocco, the Council adopted a decision on free trade of agricultural and other products, replacing certain Protocols of the Agreement.[44] This decision was challenged before the General Court by the *Front Polisario* – the national liberation movement – in the context of the ongoing territorial dispute regarding the Western Sahara,[45] over which the EU does not recognise the sovereignty of Morocco. According to the Front Polisario, the Council violated several dispositions of the Charter, as the conclusion of the agreement, and therefore subsequent decisions, allegedly "encourage the policy of annexation conducted by Morocco, the occupying power".[46] The applicants claimed the Council had failed to conduct an *ex ante* impact assessment on the possible consequences of the Agreement on the rights of the Sahrawi people.[47] The General Court found that despite the wide margin of discretion the EU institutions enjoy as regards whether it is appropriate to conclude a trade agreement with third countries, 'the fact remains that the protection of fundamental rights of the population of such a territory is of particular importance and is, therefore, a question that the Council must examine before the approval of such an agreement.'[48] On appeal, Advocate General Wathelet considered the following:

> 'Since the human rights situation in Western Sahara is one of the points of dispute between the Front Polisario and the Kingdom of Morocco and for that reason was the subject of an examination by the UN Secretary-General in his annual reports on Western Sahara, it cannot be claimed that there was no cause for an impact assessment.

[41] Ibid., p. 5

[42] Annex to Council Conclusions on the Action Plan on Human Rights and Democracy 2015–2019, Draft table of the New Action Plan on Human Rights and Democracy, point 25.

[43] A. Micara, *supra* note 15, at 1458.

[44] Council Decision 2012/497/EU of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, [2012] OJ L241/2.

[45] Case T-512/12, *Front Polisario* v *Council*, EU:T:2015:953.

[46] Ibid., para. 143.

[47] Ibid., para. 120.

[48] Ibid., paras 223, 227.

> In my view, neither the Council nor the Commission nor any of the interveners puts forward a convincing reason why, given these requirements, the EU institutions are not required, before the conclusion of an international agreement, to examine the human rights situation in the other party to the agreement and the impact which the conclusion of the agreement at issue could have there in this regard.
> I note that the Council and the Commission have set the bar very high for themselves by deciding to 'insert human rights in Impact Assessment, as and when it is carried out for legislative and non-legislative proposals … and trade agreements that have significant economic, social and environmental impacts.'[49]

The judgment was set aside on appeal by the Court of justice[50] and the question of the obligation to conduct a human rights impact assessment was therefore not addressed. Yet, both the General Court and the Advocate General seem to confirm that, at least in this specific case where a disputed territory was at stake, conducting a human rights impact assessment is an obligation incumbent on the EU institutions. Given the absence of further case-law on the obligation to carry out human rights impact assessments, it is unclear whether this requirement would also extend to situations not involving agreements covering territories of disputed sovereignty. Some elements of answers can nevertheless be found within the EU's administration, as the European Ombudsman, Emily O'Reilly, expressed her support for this opinion.

In the context of the negotiations of the EU-Vietnam FTA, she had been seized by Vietnamese the International Federation for Human Rights and the Vietnam Committee on Human Rights to address the refusal of the Commission to carry out an *a priori* human rights impact assessment.[51] The EU-Vietnam FTA negotiations were conducted in the framework of the abandoned FTA between the EU and ASEAN, and thus built on the bases of the negotiations of the latter. The Commission considered that since a SIA was already carried out in the framework of the EU-ASEAN FTA negotiations, there was no need for a human rights impact assessment, as the Commission pursues an integrated approach, including human rights concerns in the SIA.[52] However, this SIA had been carried out in 2007, pre-dating the entry into force of the Treaty of Lisbon and the EU's policy to integrate human rights in the SIA. When this was pointed out by the Ombudsman, the Commission confirmed that the negotiations predated the entry into force of the Treaty of Lisbon and thus Article 21 TEU, and the Action Plan. It then retorted that applying retroactively its requirements would put a disproportionate burden on the Commission.[53] Finally, the Commission argued that a human rights clause was in place and that human rights dialogues were conducted with Vietnam, which would suffice to guarantee adequate monitoring of human rights issues. For the Ombudsman, this was not satisfactory,

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[49] Opinion of Advocate General Wathelet in case C-104/16 P, *Council* v *Front Polisario*, EU:C:2016:677, paras 261-263.

[50] Case C-104/16 P, *Council* v *Front Polisario*, C-104/16 P, EU:C:2016:973.

[51] Decision in case 1409/2014/MHZ of the European Ombudsman on the Commission's failure to carry out a human rights impact assessment of the envisaged EU-Vietnam Free Trade Agreement.

[52] Ibid., para. 5.

[53] Ibid., para. 13.

as impact assessments must precisely be carried out *ex ante*, in order to have an effect during the negotiations phase, while the Commission proposed *ex post* solutions.[54] The Ombudsman therefore considered that the Commission failed to provide valid reasons for its refusal to carry out a prior human rights impact assessment for the EU-Vietnam FTA during the negotiations phase, and that this constituted maladministration.[55] The Ombudsman was called once more to assess a potentially similar malpractice concerning another agreement. On 8 July 2020, the Ombudsman opened an inquiry on the Commission's failure to finalise an updated SIA before concluding the negotiations regarding the trade agreement between the EU and Mercosur.[56] On 27 October 2020, the Commission replied to the inquiries of the Ombudsman. Among the refutations of her claims, and reassurances that all due diligence was undertaken, the Commission explicitly states that "there is no legal requirement on the Commission to finalise an SIA prior to the conclusion of a trade negotiation."[57] The Ombudsman has not yet taken a decision in this case, but the Commission's answer already raise doubts about its commitment to human rights assessments in SIAs. This is problematic since, as noted above, SIAs only make sense if they are conducted before or during the negotiation period. They indeed allow to adapt the text of the envisaged trade agreement in order to mitigate the risks that were discovered through the SIA, or in more severe cases to reconsider the opportunity to conclude the agreement.

The absence of a clear indication of the extent of the obligation to conduct prior human rights impact assessments, as well as on the temporal frame in which it needs to be carried out, thus lay a shaky and fragile groundwork for the pursuit of effective human rights policies once the envisaged agreement enters into force. A first step towards a more coherent approach is to reinforce the obligation of conducting human rights impact assessments. These should be carried out prior to any negotiation taking place,[58] testing the fundamental rights situation in the partner country against the requirements of the Charter. In the case of a trade agreement, major non-compliance issues should lead to abandoning the idea of pursuing a trade deal with said country or partner. If it concerns a developing country, the EU must actively engage with it through the primarily human rights instruments at its disposal, such as the European Instrument for Democracy and Human Rights,[59] to foster a mutual understanding of fundamental rights. The EU also has an arsenal of autonomous legislation offering trade incentives to developing countries, in return for the ratification and imple-

[54] Ibid., para. 24.
[55] Ibid., para. 28.
[56] Correspondence of the European Ombudsman in case 1026/2020/MAS of the European Ombudsman on the Commission's failure to finalise an updated SIA before concluding the Mercosur-EU trade negotiations, available at <https://www.ombudsman.europa.eu/en/correspondence/en/134638>.
[57] Ibid.
[58] S. Velluti, *supra* note 6 at 58.
[59] Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide, [2014] OJ L77/85.

mentation of international human rights instruments.[60] If the concerned country is a developed country, the EU must publicly call out their human rights track record and refrain from engaging in bilateral free trade agreements until progress is made. As such, the abandoning of the negotiations on TTIP following the withdrawal by the United States of America from the Paris Agreement on climate change under the presidency of Donald Trump was a symbolically strong statement,[61] and it would be interesting to follow whether the USA's recent return among the parties of the Paris agreement would be translated in relaunching comprehensive trade negotiations.

Robustly and effectively testing the fundamental rights climate in potential partner countries allows for better scrutiny afterwards, both in the framework of *ex-post* impact assessments, as well as in the assessment of the necessity to trigger human rights clauses, which will be the analysed in the next section.

b. **Human rights clauses in trade agreements**

The first and most prevalent mechanism to ensure the respect of fundamental rights the European Union has put in place within its trade and association agreements is a 'human rights clause'. Reflexions on human rights considerations in trade and associations date back only to the 1970s; prior to this, the Community believed that development was a prerequisite for human rights advancement, and not vice-versa.[62] The clause has had several iterations since its first appearance in the 1989 Lomé IV Convention and is since the mid-nineties based on the formulation used in the Association Agreement with Bulgaria, referring to the possibility for the Parties to take 'appropriate measures'.[6364] In 1995, the European Union committed to mainstreaming the use of the human rights clause in all its trade (and association) agreements,[65] and it has a consequence pursued such practice since.[66]

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[60] Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, [2012] OJ L303/1.

[61] Council Decision authorising the opening of negotiations with the United States of America for an agreement on the elimination of tariffs for industrial goods, 9 April 2019, doc. 6052/19.

[62] L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: Oxford University Press 2005) at 8.

[63] Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, [1994] OJ L358/3.

[64] N. Hachez, 'Essential Elements' Clauses in EU Trade Agreements Making Trade Work in a Way that Helps Human Rights?', Leuven Centre for Global Governance Studies, Working Paper No. 158, 2015, at 10.

[65] Commission, Communication 'The Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries', COM (95) 216 final.

[66] For a full overview of the evolution of the human rights clause see L. Bartels, *supra* note 63; N. Hachez, *supra* note 65; I. Zamfir, 'Human Rights in EU Trade Agreements: The Human Rights Clause and its Application', European Parliamentary Research Service (July 2019), available at <https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI(2019)637975_EN.pdf>.

This clause introduces the concept of political conditionality and is made up of two parts: a first 'essential elements' clause, which affirms that respect of human rights by the Parties is an essential element of the agreement, and a second 'non-execution' clause which allows either Party to take appropriate measures in case an essential element of the convention is violated. It typically reads as follows:

> Respect for democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, and for the principle of the rule of law, underpins the internal and international policies of the Parties. Respect for these principles constitutes an essential element of this Agreement. (…)
> Without prejudice to the existing mechanisms for political dialogue between the Parties, *any Party may immediately adopt appropriate measures* in accordance with international law in case of violation by another Party of the essential elements referred to in Articles 1 and 2 of this Agreement. The latter Party may ask for an urgent meeting to be called to bring the Parties concerned together within 15 days for a thorough examination of the situation with a view to seeking an acceptable solution. The measures will be proportional to the violation. Priority will be given to those which least disturb the functioning of this Agreement. These measures shall be revoked as soon as the reasons for their adoption have ceased to exist.[67] [emphasis added]

The clause is a unique way for the EU to be able to respond to human rights violations, while respecting its obligations under the Vienna Convention on the Law of the Treaties, specifically Article 60 on the rules of suspending or terminating agreements.[68] However, while promising on paper, the human rights clause presents important gaps in terms of coverage, and its strength is questionable from both a legal and a political point of view.

Firstly, it is important to note that while the human rights clause is present in most free trade agreements concluded by the EU, it is not included in all, and also not in the same manner. If most free trade agreements contain such clause, this is not the case for the overwhelming majority of sectoral trade agreements (e.g. concerning fisheries, timber or steel), considered to be of a less political and more technical nature,[69] despite their large number. As a nuance, many of such sectoral trade agreements are drafted in the framework of larger associations agreements containing a human rights clause, but this is not the case for all of them.[70] Such gap is particularly problematic considering that some of these sectors can be high-risk in terms of human rights violations.

Secondly, the extent of the human rights obligations to respect also differs according to the trading partner. In the example of the human rights clause of the agreement between the EU, Colombia and Peru, cited above, only the Universal Declaration of Human Rights is pinpointed as an instrument to observe,

[67] Articles 1 and 8.3 of the Trade Agreement between the EU and its Member States, of the one part, and Colombia and Peru, of the other part, [2012] OJ 354/3.

[68] K. E. Smith, *supra* note 8, at 111.

[69] F. Benoit-Rhomer *et. al.*, 'Human Rights Mainstreaming in EU's External Relations', Study for DG EXPO, at 36, available at <https://gchumanrights.org/tl_files/EIUC%20MEDIA/Docs/EST28775.pdf>.

[70] N. Hachez, *supra* note 65, at 13.

contrary to e.g., the EU-Korea framework agreement or the EU-Canada Strategic partnership agreements, which include innovative references to "other relevant international human rights instruments",[71] or "other legally binding instruments",[72] giving these human rights clauses a certain *droit vivant* character. References to the respect of the rule of law are also not systematic, but mostly included in Agreements with partners who have had rule of law issues in the past.[73] It comes as no surprise that the inclusion of a human rights clause presents a stumbling block in the negotiations of trade agreements with third countries, who do not want to tie economic benefits to human right scrutiny. Curiously, mostly developed countries firmly oppose the human rights clause and it is direct consequence for the stalemate in the negotiations with Australia and New-Zealand.[74] China, despite (or because of?) an appalling human rights track record, has also successfully always refused to include in its agreements with the EU.[75] This also reflects an inequality in bargaining powers, making the application of the clause particularly one sided.

Thirdly, if the human rights clause is, in principle, applicable to both Parties, and if the trading partner could, by the terms of the agreement, trigger the clause against the EU for human rights violations, this is not easily translated in practice. Due to the absence of a human rights competence, proving the liability of the EU is an arduous task.[76] Furthermore, the EU is a preferential trade partner for many developing countries, and the latter are therefore not readily inclined to see their agreement suspended.[77]

From a legal perspective, the CJEU has deprived the human rights clause from containing an obligation to act on the part of the EU institutions, as well as from having direct effect. This finding came out of an action initiated against the Commission and the Council by a Lebanese lawyer, Muhamed Mugraby, for failure to comply with their obligation deriving from the human rights clause contained in the Association Agreement between the European [Union] and the Republic of Lebanon, *i.e.* to suspend part or whole of the agreement in case of fundamental rights violations.[78] To sustain his claim, he invoked repeated violations of his fundamental rights by the Republic of Lebanon.[79] Both the General Court and the Court of justice dismissed the claims: "[b]y using the words 'may take', the parties to the Association Agreement indicated clearly and unequivocally that each of them had a right, and not an obligation, to take such appropriate measures."[80] Furthermore, the General Court argued that, "even

[71] Art. 1.1 of the Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea on the other part, [2013] OJ L20/2.

[72] Article 2 of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part, [2016] OJ L329/45.

[73] N. Hachez, *supra* note 65, at 15.

[74] Ibid., at 14.

[75] L. Bartels, *supra* note 63, at 35.

[76] K. E. Smith, *supra* note 8, at 111.

[77] Ibid.

[78] GC, Case T-292/09, *Muhamad Mugraby* v *Council and Commission* [2011] EU:T:2011:418.

[79] Ibid., para. 16.

[80] ECJ, Case C-581/11 P, *Mugraby* v *Council and Commission* [2012] EU:C:2012:466, para. 70.

assuming that those institutions have manifestly and gravely exceeded the limits of their discretion and have thereby infringed Article 86, that article does not, in any event, give rights to individuals."[81] The CJEU reinforces here the political nature of the clause. In new generation FTAs, this precedent has been codified, and the terms of the agreements exclude the conferral of rights upon individuals.[82]

While the absence of legal force is questionable in light of EU obligations in the framework of the Charter of Fundamental rights, it is indicative of the EU's approach on the inclusion of human rights clauses which are *in fine* mostly political. In a mostly redacted document, the Council listed the objectives of the insertion of human rights clauses, and mentioned: "asserting the EU's fundamental values and political principles; enhancing the effectiveness of the EU policies of which the clauses constitute a tool; ensuring coherence vis-à-vis third countries [and] strengthening the EU's negotiating stance."[83] It is remarkable that none of these objectives include the actual enforcement of such political clauses. According to Zanfir, "a common misconception is that the primary objective of the clause is to enable the EU to place sanctions on its partners"[84], while in reality it allows the EU to exert diplomatic pressure once the deal is in place.[85] This does however not explain why the EU concludes trade deals with partners that are (arguably) among the worst human rights offenders, such as Vietnam[86] or China, and does not use its bargaining power during the negotiation phase. It is, to this end, meaningful to note the modest track record of the application of the human rights clause. It has, to date, exclusively been used in the framework of the Cotonou Agreement against a handful of ACP countries, in cases of coup d'états or serious deteriorations of the political situation in a given country.[87] Scholars have argued that this is probably due to their weak bargaining position vis-à-vis the Union, as well as their colonial past which reinforces their dependence on the EU.[88]

These latter observations reinforce the argument that the EU's human rights policy in its external relations, as developed on the basis of pre-Lisbon mechanisms, is both incoherent and ineffective. In order to overcome these challenges in future negotiations, the human rights clause must be updated to include a greater number of international human rights instruments, in order to accurately reflect the fundamental rights standards contained in the Charter. The Universal Declaration for Human Rights does not include, e.g., the prohibition of the death penalty, yet the High Representative stated that "the European Union (EU) and the Council of Europe firmly oppose the death penalty *at all*

[81] Case T-292/09, *supra* note 78, para. 61.
[82] I. Zamfir, *supra* note 66, at 10.
[83] Council, 'Common Approach on the Use of Political Clauses', 2 June 2009, doc. 10491/1/09.
[84] I. Zamfir, *supra* note 66, at 7.
[85] Ibid., at 8.
[86] A. Navasartian, 'EU-Vietnam Free Trade Agreement: Insights on the Substantial and Procedural Guarantees for Labour Protection in Vietnam', *European Papers*, March 2020.
[87] I. Zamfir, *supra* note 66, at 9.
[88] S. Velluti, *supra* note 6, at 61.

times and in all circumstances."[89] An updated and extended human rights clause would as such entail an extended framework of dialogue, allowing for greater *a posteriori* scrutiny, as well as for the clause to both play the role of a vector of change, and for the EU to take measures in case the situation in a partner's country were to deteriorate. In conjunction with a strong and legally binding Trade and Sustainable Development Chapter, which will be analysed in the following section, this would allow for most fundamental rights enshrined in the Charter to be covered by trade agreements as well.

IV. SOMETHING NEW: TRADE AND SUSTAINABLE DEVELOPMENT CHAPTERS

Parallel to the increasing insertion of human rights clauses in trade agreements, sustainable development considerations, being understood as entailing labour rights and environmental protection, started making their way into trade agreements in the 1990's.[90] In 2002, the European Commission committed to strengthening "the sustainability dimension of bilateral and regional agreements by including a commitment to sustainable development and establishing a dialogue to enable exchange of best practices".[91] Since the entry into force of the Treaty of Lisbon, which significantly expanded the areas covered by the CCP, "new generation" free trade agreements contain an entire chapter dedicated to the nexus between trade and sustainable development. The 2011 EU-South Korea FTA was the first to contain such Chapter.

a. **Presentation of Trade and Sustainable Development Chapters**

Trade and Sustainable Development Chapters (hereafter 'TSD Chapters') are divided in two parts: a first part underlines the substantial obligations and commitments of the Parties to international labour and environmental standards. Obligations focus on the ratification and effective implementation of the fundamental ILO conventions[92] and multilateral environmental agreements. A second

[89] Joint Declaration by the EU High Representative for Foreign Affairs and Security Policy and the Secretary General of the Council of Europe on the European and World Day against the Death Penalty, 9 October 2019, available at <https://www.consilium.europa.eu/en/press/press-releases/2019/10/09/joint-declaration-by-the-eu-high-representative-for-foreign-affairs-and-security-policy-and-the-secretary-general-of-the-council-of-europe-on-the-european-and-world-day-against-the-death-penalty/>.

[90] The first time in 1993 in the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, [1993] OJ L347/2.

[91] Commission, Communication 'Towards a Global Partnership for Sustainable Development', COM(2002) 82 final.

[92] The fundamental Conventions are defined by the ILO governing body and are: Conventions No. 87 on Freedom of Association and Protection of the Right to Organise Convention, No. 98 on Right to Organise and Collective Bargaining, No. 29 on Forced Labour and its 2014 Protocol, No. 105 on Abolition of Forced Labour Convention, No 138 on Minimum Age Convention, No. 182 on Worst Forms of Child Labour, No. 100 on Equal Remuneration and No. 111on Discrimination (Employment and Occupation).

part establishes a dispute resolution mechanism specifically designed for the obligations stemming from the TSD Chapter. TSD Chapters aim thus to prevent a race to the bottom in the context of trade as well as to foster Corporate Social Responsibility.[93]

From the outset, the position of the Commission has been that TSD Chapters should act as framework in which to conduct structured dialogue on the interaction between trade, social and environmental objectives.[94] The EU focuses on cooperation, communication and coordination with trade partners at different levels of authority, as well as civil society and workers' and employers' representative organisations.[95] The consequence of such approach is that the inclusion of sanctions in the case of non-compliance with TSD Chapters is not envisaged in the negotiations of FTAs.[96] In its Resolution of 5 July 2016, the European Parliament called for the possibility of a sanctions regime as a last resort measure in case of non-compliance with labour standards.[97] However, in a 2018 non-paper, the Commission noted that there was no consensus for such regime, and that it would not be in line with the EU's model. In its view, "the EU would be 'compensated' for such a breach […], but [it] would not guarantee that this will result in effective, sustainable and lasting improvement of key social standards on the ground."[98]

In terms of content, the different TSD Chapters included in new generation FTAs lack consistency. Regarding labour provisions,[99] the minimum requirement present in all FTAs is the ratification and implementation of all eight fundamental ILO Conventions. It should be noted that at present, Singapore, South-Korea, Vietnam and Japan have not yet done so.[100] By means of comparison, CETA and the envisaged FTA with the Mercosur countries provide for the highest levels of protection and significantly further-reaching commitments. The text of the envisaged trade agreement with the Mercosur countries includes respect of standards regarding health and safety at work, compensation for illness or

[93] Commission, Report on Implementation of Free Trade Agreements, COM(2017) 654 final.

[94] Non-paper of the Commission Services, 'Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs)', 11 July 2017, at 3, available at < https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf>.

[95] Non-paper of the Commission services, 'Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements', 26 February 2018, available at <https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf>, at 1.

[96] Contrary to the practice of the USA and Canada, who attach trade and/or financial sanctions to the non-compliance with labour provisions in FTAs: Congressional Research Service, *Labor Enforcement Issues in U.S. FTAs*, updated 2 March 2020, available at <https://fas.org/sgp/crs/row/IF10972.pdf>; ILO, *Labour Provisions in G7 Trade Agreements: A Comparative Perspective* (Geneva: International Labour Office 2019), at 5.

[97] European Parliament Resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment (2015/2105(INI)).

[98] Non-paper of the Commission services, *supra* note 95, at 3.

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[100] See ILO database on the ratification of ILO Conventions per country/Convention, available at <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:0::NO::P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F>.

injury and decent wages.[101] Furthermore, it contains commitments to ensure effective labour inspections and access to administrative and judicial proceedings in case of violation of the labour standards provided for in the TSD Chapter. CETA emphasizes further on the prevention of risks of injury at work, and the recourse to science to achieve this aim.[102] On the other end of this comparative spectrum, the EU-Japan trade agreement simply provides that each Party should ratify the ILO conventions it deems necessary.[103]

Procedurally, the dispute resolution mechanism for the purposes of the TSD Chapters is disconnected from the general dispute resolution mechanism contained within the FTAs, the latter providing for an arbitration procedure to take measures if a consensus cannot be found between the Parties. This element is regrettably absent from the dispute resolution mechanism contained within TSD Chapters.[104] This dispute resolution mechanism provides for a cascading process[105] in which a jointly appointed Committee, comprised of senior officials of both administrations, exchanges on measures to be implemented. Both Parties each also designate a Domestic Advisory Group (DAG), which is comprised of civil society members. In case of a dispute, DAGs can be called upon by the Committee for consultations. if within a certain timeframe no solution has been found, a Party may request that the Panel of Experts is convened to examine the matter, who issues a report to both Parties. Based on this report, the Parties discuss appropriate actions and/or measures to be implemented.

Two elements that have been continuously criticised is the impossibility for private actors and stakeholders to bring claims, and the limited roles of the DAGs.[106] They are not automatically included in the dispute resolution mechanism, and their observations are not binding upon the Committee or the Panel of Experts. The Commission has underlined their commitment to making sustained efforts to include DAGs as much as possible in the ongoing dialogue process that flows forth from the TSD Chapter.[107] We argue that the role of the DAGs must be updated and expanded. DAGs must have the power to seize the Joint Committee on their own initiative and make recommendations to them. Civil society plays a crucial role as private citizens' spokesperson to government. Representation of all concerned stakeholders within the DAGs can ensure that all voices can be heard, and that feedback on potential violations of the sustain-

[101] Article 4 of the in principle agreed upon text of the Trade and Sustainable Development Chapter of the EU-Mercosur FTA, available at < https://trade.ec.europa.eu/doclib/press/index.cfm?id=2048>.

[102] Article 23.3 of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, [2017] OJ L11/23.

[103] Article 16.3 of the Agreement between the European Union and Japan for an Economic Partnership, [2018] OJ L330/3.

[104] See for a more in-depth analysis A. Navasartian, *supra* note 86.

[105] See e.g. Articles 13.15-13.17 of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, [2020] OJ L186/3.

[106] M. Bronckers, G. Gruni, 'Taking the Enforcement of Labour Standards in the EU's Free Trade Agreements Seriously', 57 *Common Market Law Review* 2019, 1591-1622.

[107] Non-paper of the Commission services, *supra* note 95 at 5.

able development goals contained within the TSD Chapter can efficiently reach the Parties.

b. **Strength or weakness of the dispute resolution mechanism?**

The dispute resolution mechanism provided for under a TSD Chapter has so far been triggered once on 17 December 2018 in the framework of the EU-Korea FTA TSD Chapter,[108] after prolonged failure on Korea's behalf to respect their commitments on labour protection, and more specifically on the right to freedom of association.[109] The initial consultations did not lead to satisfactory results, and a year later, on 19 December 2019, the European Commission announced the composition of the Panel of Experts,[110] which handed over its report on 20 January 2021 (which was significantly delayed due to the COVID-19 global health crisis and was published on 24 January 2021).[111] This Report was highly anticipated as it the first in its genre.

The requests made to the Panel by the European Union concerned the obligations deriving from the first and last sentences of Article 13.4.3 of the FTA[112], and raised two substantive issues. Firstly, several provisions of the Korean Trade Union Act, relating the restrictive notion of "worker" and the arbitrary approval procedure by the administrative authorities to create a trade union, are contrary to the fundamental right under Article 13.4.3. a) the freedom of association and the effective recognition of the right to collective bargaining.[113] Secondly, Korea failed to comply with its obligation to make continued and sustained efforts towards the ratification of outstanding fundamental ILO Conventions.[114]

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[108] Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, [2011] OJ L127/6. See also the 2018 non-paper, *supra* note 95, in which one of the objectives of the Commission was to step up its efforts to ensure that trading partners respected their commitments in the TSD Chapters.

[109] Request for Consultations by the European Union, available at <https://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157586.pdf>.

[110] Commission, *EU-Korea Dispute Settlement over Worker's Rights in Korea Enters Next Stage*, https://trade.ec.europa.eu/doclib/press/index.cfm?id=2095.

[111] Panel of Experts Proceeding Constituted Under Article 13.15 of the EU-Korea Free Trade Agreement, Report of the Panel of the Experts, 20 January 2021, available at <https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf>.

[112] 'The Parties, in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely:
(a) freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.
The Parties reaffirm the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the European Union have ratified respectively. The Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as 'up-to-date' by the ILO.'

[113] Report of the Panel of Experts, *supra* note 111, paras. 100-103.

[114] Ibid., para. 261.

Before addressing the EU's substantial claims, the jurisdiction of the Panel was challenged. Korea disputed it, as Article 13.2 on the scope of the TSD Chapter provides that "*except as otherwise provided* in this Chapter, this Chapter applies to measures adopted or maintained by the Parties affecting *trade-related aspects* of labour and environmental issues".[115] Korea argued that the substantive issues raised by the EU did not establish a connection with trade, and that they had not intended to subject their labour law to obligations that bear no such connection.[116] The EU counter-argued that the wording "except as otherwise provided" should apply here, as the obligations deriving from Article 13.4.3 of the FTA are not subject to the trade affection test.[117] The Panel underwrote the view of the EU, asserting that the Parties placed their relation within an ethical framework that promotes the universality of fundamental rights, and that Article 13.4.3 suffers no 'trade-relatedness' exception.[118] Korea then argued that the Panel Request would lead to a harmonization of the Parties' labour standards, which is excluded by the wording of Article 13.1.3 of the FTA.[119] The Panel disagreed with this view, as "the concept of harmonisation of labour standards suggests a bringing into alignment of actual standards such as minimum rates of pay, maximum hours of work, or access to job security procedures;" whereas "the fundamental principles and rights and core labour standards mentioned in Article 13.4.3 do not require harmonisation of domestic labour laws or outcomes".[120]

Concluding that it has the necessary jurisdiction to examine the EU's request, the Panel then turned to analyse the first substantive issue. Before examining the conformity of the Korean Labour Union Act with the freedom of association, the Panel examined the extent of the obligations contained in Article 13.4.3 of the FTA. Korea rejects the argument of the EU that ILO membership entails the obligation of Member States to give effect to freedom of association in their domestic law; this would amount to requiring Korea's adherence to core labour Conventions no. 87 and 98, which is only a matter for the Korean government to decide.[121] The Panel rejects this argument on two grounds: firstly, freedom of association is both a fundamental right under the ILO Constitution and a provision in ILO Conventions nos. 87 and 98. There is thus no "imposition of ratification by stealth".[122] Secondly,

> [T]he Panel finds that the Parties assumed new obligations when they concluded the EU-Korea FTA. A new obligation is the commitment in Article 13.4.3 to respecting, promoting and realising the principles concerning the fundamental rights, includ-

[115] Emphasis added.
[116] Ibid., para. 56
[117] Ibid., para. 60
[118] Ibid., paras. 64, 65, 70.
[119] Ibid., para.80
[120] Ibid., para.81
[121] Ibid., para.106. Korea has to date not ratified those Conventions.
[122] Ibid., para.113.

> ing the right to freedom of association. The EU's Panel Request is based on the legal obligation arising from Article 13.4.3, not the 1998 ILO Declaration *per se*.[123]

Subsequently, Korea challenged the semantics of Article 13.4.3 of the FTA, contending that the words "commit to", "respect", "promote" and "realise" each refer to an aspiration, rather than a binding legal obligation. After analysis of each word, the Panel rejects this view, and considers that Korea is bound by legal obligations.[124] Moving onto the conformity of the contested provisions of the Korean Labour Union Act with the freedom of association, the Panel conducts an in-depth review of the provisions and the freedom of associations, basing itself namely on the findings of the Committee on the Freedom of Association, the relevant ILO supervisory body. Out of the four contested provisions, the Panel found that three of them were not consistent with the principles concerning the fundamental right to freedom of associations, and recommended Korea to bring its Labour Union Act in conformity with it, in accordance with its findings.[125]

The second substantive claim brought by the EU is the failure on behalf of Korea to make continued and sustained efforts to ratify the outstanding fundamental ILO conventions, as well as other conventions considered up-to-date by the ILO. The EU considers that the last sentence of 13.4.3 contains a specific legal obligation, admittedly a 'best endeavours' provision, that Korea has not met as it did not "resort to all the appropriate measures that could allow it to attain the objective".[126] Korea argued that the use of the word "will" differs from "shall", and that the provision comprised therefore no legal obligation to do so. Even so, it only contains a "standstill" obligation, but not that positive action must be taken.[127] Relying on the Vienna Convention on the Law of Treaties, the Panel considered that the use of the word "will" does, in fact, denote a binding legal obligation. Furthermore, the obligation cannot be interpreted as a standstill clause, as this is contrary to the wording "continued and sustained efforts", which implies movement forward.[128] The Panel confirms that the last sentence of Article 13.4.3 comprises a 'best endeavours' clause, in which not the non-ratification, but the failure to act with due diligence would constitute a failure to comply. However, the Panel raises the fact that Article 13.4.3 does not indicate any timeframe in which the obligation must be met, nor any specific measures to take to this end.[129] It can therefore not be expected of Korea that it explores and mobilises all available measures in a similar manner and with similar intensity at all times in order to ratify the core ILO Conventions.[130] Furthermore, the submitted documents show that Korea has made since 2017 slow but tangible efforts to ratify the core ILO Conventions. In the absence of a given timeframe,

[123] Ibid., para. 122.
[124] Ibid., paras. 130-133
[125] Ibid., paras. 142-258.
[126] Ibid., para. 265
[127] Ibid., paras. 262, 263, 266.
[128] Ibid., paras. 268, 272.
[129] Ibid., para. 276.
[130] Ibid., para. 275.

these efforts are less-than-optimal, but satisfy the legal threshold of the provision.[131] The Panel thus finally dismissed the last request of the EU.

This unique report is interesting on several accounts. Firstly, it clarifies the extent of the obligations befalling on the Parties in the framework of the TSD Chapter. It must be welcomed that the Panel considered that the obligations stemming from ILO membership cannot be limited to labour related provisions affecting trade, even for the purposes of the FTA. This is an important nuance that enriches the reading of Opinion 2/15. Secondly, the decision on the duty to implement all core labour conventions seems strict, but fair. In our view, the Panel considered that if the Parties were truly committed to ratifying and effectively implementing these conventions, the provisions of the TSD Chapter could have been much more precise. Finally, at several stages, Korea referred to the discrepancies existing within the legislations of EU Member States regarding ILO obligations, namely the German and French labour codes.[132] While the Panel considered it had no jurisdiction to examine these legislations, since no formal request them concerning was addressed to it, the Panel did however note that "they may be the subject of discussions between the Parties in the future".[133] This leaves open the interesting question whether the EU is ready to accept scrutiny of its own Member States' domestic labour provisions in the framework of FTAs.

The next step will be a discussion between the Parties to agree on how the measures proposed by the Panel should be implemented. This will be the true test of the strength of the dispute resolution mechanism, and the TSD Chapter as a whole. It will also be interesting to monitor how eventual future Panels in other FTAs will deal with this precedent, and whether and how it will impact their decision.

V. CONCLUSION – FOR AN INTEGRATED APPROACH TOWARDS FUNDAMENTAL RIGHTS PROTECTION IN EU TRADE AGREEMENTS

In light of all the preceding considerations, we sketched a critical view of the fundamental rights protection in the EU's trade agreements. The existing mechanisms have not proven to always be effective, however this is not a fatality. Throughout this paper, we have argued that the Charter can and must be regarded as a guideline for policy-making in regards to trade relations.[134] The Charter is the fruit of a long negotiation between Member States in order to achieve a satisfactory text that is respectful of all the different legal traditions represented in the Member States. The end result is a codified instrument that is based on a community of values, building on national, international law and

[131] Ibid., paras. 287-288, 292.
[132] Ibid., paras. 158 and 222 respectively.
[133] Ibid., para. 174.
[134] V. Bonavita, 'The EU Charter of Fundamental Rights and the Social Dimension of International Trade', in G. Di Federico (ed.), *The EU Charter of Fundamental Rights. From Declaration to Binding Instrument*, (Heidelber: Springer 2019), at 249.

pre-existing EU law. In that perspective, it seems impossible to imagine that the EU would renounce to the rights and values expressed in the Charter in order to pursue a trade deal. Criticism has been loud regarding the inconsistency of the EU's fundamental rights protection policy in its trade policy, and the absence of adequate benchmarking and fundamental rights catalogues. Using the EU Charter as a guiding thread in trade deals would both allow for sufficient, clear benchmarks, as well as for transparency *vis-à-vis* potential trade partners. Given the codified character of the Charter, and the systematic linking of its provisions with correspondent international obligations, using the EU Charter as the foundation of human rights protection policy in trade is the only way forward.

The European Union recently lost its title as largest trading bloc of the world. In November 2020, the ten Member States of ASEAN (Brunei Darussalam, Indonesia, Malaysia, Thailand, Singapore, the Philippines, Cambodia, Myanmar, Laos, Vietnam) signed, together with five other partners – Japan, China, South Korea, Australia, and New Zealand – the Regional Comprehensive Economic Partnership (RCEP),[135] constituting now the largest free trade zone in the world, representing over 30% of the global GDP. Contrary to European FTAs, RCEP makes no mention of fundamental rights, whether they are human rights or sustainable development goals. Given the problematic track-record regarding human rights of many of the Parties, it has been cynically suggested that "the world's largest trading bloc could also end up being the world's largest hub of challenges to human rights".[136]

In such climate, the marriage between trade and fundamental rights stands now at a crossroads, and future actions will determine what kind of partner the EU seeks to be. The bargaining chip of the EU vis-à-vis RCEP countries has become smaller, however this must and cannot lead to sacrificing fundamental rights protection in the EU's trade relations. In a world ravaged by the economic and social consequences of the Covid-19 pandemic, it is more important than even that the EU truly acts as the global human rights actor it claims to be.

[135] See <https://rcepsec.org/>.

[136] D. Desierto, 'The Regional Comprehensive Economic Partnership (RCEP)'s Chapter 19 Dispute Settlement Procedures', *EJIL:Talk! Blog* (16 November 2020), available at <https://www.ejiltalk.org/the-regional-comprehensive-economic-partnership-rceps-chapter-19-dispute-settlement/>.

RISKY ARBITRARINESS IN THE EU'S INVESTMENT AGREEMENTS

Iveta Alexovičová*

ABSTRACT

This paper assesses the definition of the fair and equitable (FET) standard of investment protection in the investment treaties concluded by the European Union (EU) and argues that, contrary to the EU's contention and despite a higher degree of precision, the standard remains prone to interpretation that could continue to restrain state regulatory autonomy to an extent not necessarily intended by the EU. The main reason is the inclusion of 'manifest arbitrariness' in the FET definition – a concept which has largely remained under-defined and which has generated divergent interpretations by investment tribunals in the past. The paper argues that because of the uncertainty surrounding this concept in conjunction with both the explicit mandate to take into account investors' expectations in the assessment of FET claims, and the absence of exceptions for the standard's breach, the EU's FET standard is likely to remain a source of legal uncertainty and a potential basis for legal challenges by foreign investors against non-discriminatory regulatory acts. The paper further argues that without further precision in the definition of the EU's FET standard that would include an unambiguous stance on the role and the contours of the reasonableness and the proportionality principle therein, the states' regulatory space may not be as safe under the EU's investment treaties as pledged.

1. INTRODUCTION

International investment agreements (IIAs)[1] have been notoriously criticized for constraining the regulatory autonomy of states to pursue legitimate policy objectives, with the fair and equitable treatment (FET) standard of investment protection being at the core of the criticism.[2] This standard, contained in most existing

* Iveta Alexovičová is Assistant Professor of International Economic Law at Maastricht University.

[1] In line with common usage, in this paper IIAs refers to bilateral investment treaties (BITs) and other interational treaties containing investment provisions (TIPs) concluded by two or more states. However, in case of the EU, only IIAs with investment protection provisions are considered.

[2] For example, M. Waibel *et al.* (eds.), *The Backlash Against Investment Arbitration* (The Hague: Kluwer Law International 2010); P. Eberhardt and C. Olivet, 'Profiting from Injustice, How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom', Corporate Europe Observatory and the Transnational Institute (2012), available at <https://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf>; and E. Aisbett *et al.*, 'Rethinking International Investment Governance: Principles for the 21st Century', Columbia Center on Sustainable Development (2018), especially section 6.3, available at <http://ccsi.columbia.edu/files/2018/09/Rethinking-Investment-Governance-September-2018.pdf>. Note that the FET stadard is included on the list of 'eight IIA provisions that are most in need of reform, and that have seen a clear reform trend in line with the sustainable development goals (SDGs) and towards

IIAs, requires states to treat foreign investments 'fairly and equitably'.[3] Traditionally, IIAs offered no definition or guidance as to the precise meaning of this standard. Consequently, there was little to guide – and to limit – interpretation of the standard by early tribunals settling investor-state disputes and it is generally considered that they have done so in an expansive manner, inviting investors to bring new cases,[4] thereby making FET the most – and the most successfully – litigated standard of investment protection.[5]

While other reasons may have contributed to this trend,[6] there is no doubt that the investor-friendly interpretation of the FET standard has helped to generate much discontent among states and their citizens with the international investment protection regime established by IIAs.[7] Not only have states been obliged to pay high compensation to investors in situations not envisaged when signing these IIAs, including when regulatory measures pursuing legitimate public policy objectives were at stake,[8] some states felt compelled to delay or abandon adoption of such regulation in fear of losing subsequent investment litigation (the so-called 'regulatory chill').[9] Such developments have contrib-

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safeguarding the State's right to regulate in IIAs.' UNCTAD, 'International Investment Agreements Reform Accelerator' (June 2020), p. 2, available at <https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf>.

[3] According to the UNCTAD's IIA Mapping Project database, some 2450 out of 2575 mapped IIAs contain an FET provision. The UNCTAD's IIA Mapping Project database is available at <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping>.

[4] G. Van Harten, *Investmet Treaty Arbitration and Public Law* (Oxford: Oxford Scholarship Online 2009), pp. 88-90; K. Miles, 'International Investment Law and Climate Change: Issues in the Transition to a Low Carbon World', Society of International Economic Law (SIEL) Inaugural Conference 2008 (2 July 2008), pp. 20-22, available at <https://ssrn.com/abstract=1154588>; C. Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP', 19 *Journal of International Economic Law* 2016, 27-50, at 34 and 37; M. Sornarajah, *The International Law on Foreign Investment*, *Fourth Edition* (Cambridge: Cambridge University Press 2017), pp. 405-426.

[5] According to the most recent data, by the end of 2020, a FET breach was alleged in 555 known treaty-based investor-state disputes (out of 629 disputes for which data is available) and found in 154 out of 234 disputes decided thus far. No other investment standard has such a high rate of invocation or success; the second most ligated standard being indirect expropriation claimed in 450 disputes, of which only 65 times successfully. See UNCTAD's Investment Dispute Settlement Navigator available at <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

[6] Sornarajah goes even as far as to argue that investment arbitrators have done this intentionally, to ensure that investment arbitration is kept in business. M. Sornarajah, *supra* note 4, pp. 416-417.

[7] For example, M. Sornarajah, *Resistance and Change in the International Law on the Foreign Investment* (Cambridge: Cambridge University Press 2015). See also S. A. Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements', 13 *Journal of International Economic Law* 2010, 1037-1075.

[8] G. Van Harten, *supra* note 4, Introduction.

[9] For a comprehensive work on regulatory chill, see C. Côté, 'A Chilling Effect? The impact of international investment agreements on national regulatory autonomy in the areas of health, safety and the environment', PhD thesis (2014), available at <http://etheses.lse.ac.uk/897/>. See also, for example, G. Van Harten and D.N. Scott, 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada', *Osgoode Legal Studies Research Paper No. 26* (2016), available at <https://ssrn.com/abstract=2700238>.

uted to a decision by several countries to abandon their engagement in IIAs[10] or to reconsider conditions under which they were willing to remain committed.[11] The expansive interpretation and application of the FET standard has become one of the reasons triggering a comprehensive reform of international investment law and arbitration aimed at its rebalancing and the preservation of state regulatory autonomy.[12] As a result, IIAs signed more recently – the so-called 'new-generation IIAs'[13] – are characterized by a greater emphasis on the right of the state to regulate, reflected *inter alia* in a more careful drafting of the FET standard.

IIAs concluded by the European Union (EU) and its Member States[14] belong to this new-generation IIAs, with the first one being the Comprehensive Economic and Trade Agreement (CETA) concluded with Canada.[15] Upon CETA's conclusion, the EU argued that the agreement offered a balanced approach to

[10] Some countries have terminated their IIAs, or decided not to renew them, others halted negotations of new treaties. A few states denounced the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965. UNCTAD, 'World Investment Report 2014 – Investing in the SDGs: An Action Plan' (24 June 2014), pp. x, xxiii – xxv and 114, available at <https://investmentpolicy.unctad.org/publications/117/world-investment-report-2014---investing-in-the-sdgs-an-action-plan>. A useful overview of specific steps taken by a number of countries can also be found, for example, in P. Ranjan, 'Using the Public Law Concept of Proportionality to Balance Investment Protection with Regulation in International Investment Law: A Critical Reappraisal', 3 *Cambridge Journal of International and Comparative Law* (2014), 853-883, at 85-860.

[11] This has been done in various ways too, including attempts to renegotiate existing IIAs, adoption of new model treaties for negotiation of future IIAs, negotiation of new generation of IIAs, as well as engagement in multilateral efforts to reform investor-state dispute settlement. For the latter, see in particular work conducted under the auspices of UNCITRAL Working Group III: Investor-State Dispute Settlement Reform; with information available at <https://uncitral.un.org/en/working_groups/3/investor-state>.

[12] UNCTAD, 'The Changing IIA Landscape: New Treaties and Recent Policy Developments', *IIA Issues Note* (July 2020), p. 6, available at <https://unctad.org/system/files/official-document/diaepcbinf2020d4.pdf>. Globally, reform efforts kicked off with the UNCTAD's World Investment Report of 2012 entitled 'World Investment Report 2012 – Towards a New Generation of Investment Policies' (5 July 2012), available at <https://unctad.org/system/files/official-document/wir2012_embargoed_en.pdf>. UNCTAD publishes regularly updates about the progress of the reform on its International Investment Agreements Navigator website available at <https://investmentpolicy.unctad.org/international-investment-agreements>.

[13] The new generation IIAs are those concluded roughly since 2012. The commonly used expressions – old and new generation IIAs – stems from the UNCTAD's seminal World Investment Report of 2012, ibid.

[14] IIAs concluded by the EU are the so-called mixed agreements with both the EU and its Member States being parties to the agreements. This is due to the fact that only matters regulating foreign direct investment are the exclusive EU competence, whereas portfolio investment and investor-state dispute settlement are competences shared by the EU and its Member States. Art. 207, Treaty on the Functioning of the European Union (TFEU), *OJ* [2010] C 326, 26.10.2012 [consolidated version], pp. 47-390; and CJEU, Opinion 2/15 (16 May 2017), ECLI:EU:C:2017:376. However, for simplicity reasons, in this paper, all IIAs concluded by the EU and its Member States are reffered to as the EU's IIAs.

[15] The Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, *OJ* [2017] L 11, 14.1.2017. CETA was singed in October 2016 and entered into provisional application in September 2017. The ratification process by the EU Member States has not yet been completed at the time of this writing.

investment protection, preserving the regulatory autonomy of its parties through the reasserted right of states to regulate, clearly defined standards of investment protection (including FET) and a novel investor-state dispute settlement (ISDS) framework.[16] Subject to minor modifications, most of CETA provisions were copy-pasted into the EU's subsequent IIAs, i.e. investment partnership agreements concluded with Singapore (EU-Singapore IPA)[17] and Vietnam (EU-Vietnam IPA),[18] and an agreement reached in principle with Mexico (EU-Mexico Agreement).[19] Given the EU's negotiating leverage, the same approach is likely to come back in most, if not all, future IIAs negotiated by the EU.[20]

This paper assesses the definition of the FET standard of investment protection in the EU's IIAs[21] and argues that, contrary to the EU's contention and

[16] European Commission, 'Investment provisions in the EU-Canada free trade agreement (CETA)' (February 2016), available at <https://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf>. See also Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, *OJ* [2017] L 11, 14.1.2017, in particular paras. 2 and 6 (a),(b),(c) and (f).

[17] Investment Protection Agreement between the European Union and its Member States of the one part, and the Republic of Singapore, of the other part, COM(2018) 194 final. It was singed on 19 October 2018 and is currently in the process of ratification by the EU Member States. The text of the signed agreement can be consulted here: <https://eur-lex.europa.eu/resource.html?uri=cellar:55d54e18-42e0-11e8-b5fe-01aa75ed71a1.0002.02/DOC_2&format=PDF>.

[18] Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part, COM/2018/693 final. It was signed on 30 June 2019 and is currently in the process of ratification. The text of the signed agreement can be consulted at <https://eur-lex.europa.eu/resource.html?uri=cellar:2d9b97ac-d2e7-11e8-9424-01aa75ed71a1.0001.02/DOC_2&format=PDF>.

[19] In April 2018 the EU and Mexico reached an agreemet in principle which will modernize the existing EU – Mexico Global Agreement, concerning both trade and investment. Joint statement by Commissioners Malmström and Hogan, and the Secretary of the Economy of Mexico, Guajardo Villarreal, STATEMENT/18/3481 (21 April 2018), available at <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_18_3481>. The text of the investment chapter of the agreement is available for information purposes at <https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156812.pdf>. Although the EU-Mexico Agreement has only been reached 'in principle' and thus has ot yet been concluded, for simplicity reasons it is referred to as 'the EU-Mexico Agreement' in this paper.

[20] Currently, the EU is actively negotiating specific investment agreements with Indonesia and Japan. Negotiations with a number of other countries had started but were put on hold or became inactive, including the United States, Malasya, Myanmar and Philippines. European Commission, 'Overview of FTA and Other Trade Negotiations, Updated November 2020', available at <http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf>. See also International Institute for Sustainable Development, 'Update on EU trade and investment agreement negotiations: Indonesia, Mexico, Vietnam, and China, Investment Treaty News' (5 October 2020), available at <http://cf.iisd.net/itn/en/2020/10/05/update-on-eu-trade-and-investment-agreement-negotiations-indonesia-mexico-vietnam-and-china/?utm_source=International+Institute+for+Sustainable+Development+Newsletters+Network&utm_campaign=2d50025e01-EMAIL_CAMPAIGN_2018_04_24_COPY_01&utm_medium=email&utm_term=0_3dd24ff452-2d50025e01-225942497>. In December 2020 the EU reached a comprehensive investment agreement in principle with China but this agreement does not include investment protection; negotiations about investment protection standards (as well as ISDS) are to be continued and concluded within 2 years. European Commission, 'EU and China reach agreement in principle on investment, Press Release' (30 December 2020), available at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2233>.

[21] For simplicity reasons, the FET standard and FET clauses contained in the EU's IIAs are sometimes referred to as 'the EU's FET standard' and 'the EU's FET clauses' in this paper,

despite a higher degree of precision, the standard remains prone to interpretation that could continue to restrain states regulatory autonomy to an extent not necessarily intended by the EU. The main reason is the inclusion of manifest arbitrariness in the FET definition, with no – or an insufficiently precise – definition thereof while the concept has generated a divergent interpretation by investment tribunals in the past. Some tribunals considered arbitrariness interchangeably with unreasonableness which itself was interpreted in an inconsistent manner, with some tribunals merely requiring rationality of state conduct, whereas others have gone further and included the principle of proportionality in the standard, also in an inconsistent fashion.[22] The latter approach has proved to weigh towards finding an FET breach in a number of investor-state disputes involving the exercise of state regulatory power.[23]

On the basis of this interpretation of arbitrariness in ISDS jurisprudence, combined with the explicit mandate to take into account investors' legitimate expectations in the assessment of FET claims, and the absence of exceptions for the standard's breach, this paper argues that the EU's FET standard is likely to remain a source of legal uncertainty and potential basis for legal challenges by foreign investors against states' regulatory measures.[24] Without further precision in the definition of the EU's FET standard that would include an

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although strictly speaking they are not 'the EU's' only, being a result of negotiations with the other IIA party. Given a high similarity of the provisions in all EU's IIAs, the use of this terminology for the purposes of the present paper seems justifiable.

[22] See section 3 below.

[23] *LG&E v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006), para. 139; *Occidental* v. *Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012), para. 452; *AES Corporation and Tau Power B.V.* v. *Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award (1 November 2013), para. 409; *Copper Mesa Mining Corporation* v. *Republic of Ecuador*, PCA Case No. 2012-2, Award (15 March 2016), para. 6.84; *SolEs Badajoz GmbH* v. *Kingdom of Spain*, ICSID Case No. ARB/15/38, Award (31 July 2019), paras. 462-463. Rationality and proportionality were also used as a standard for reasonableness and arbitrariness in, for example, *Philip Morris* v. *Uruguay* and *9REN* v. *Spain*, although the tribunals found no breach in these cases, see *Philip Morris* v. *Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016), paras. 409-410; and *9REN Holding S.a.r.l* v. *Kingdom of Spain*, ICSID Case No. ARB/15/15, Award (31 May 2019), para. 323. See, however, dissenting opinion by a prominent arbitrator G. Born in *Philip Morris* v. Uruguay, who did consider Uruguay's measures arbitrary. *Philip Morris* v. *Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion (8 July 2016), paras. 133-136, 145-146.

[24] An example of a very recent case where the investor did not shy away from bringing a dispute against the state taking a claimate mitigation measure is *RWE* v. *Netherlands*. As reported by the Investment Abitration Reporter, on 2 February 2021 a request for arbitration by RWE's affiliates RWE AG and RWE Eemshaven Holding II BV was registered by the International Centre for the Settlement of Investment Disputes (ICSID), attacking a decision of the Dutch government to ban coal-based power generation by 2030. – L. Bohmer, 'The Netherlands is Facing its First ICSID Arbitration, As German Energy Giant Rwe Makes Good on Earlier Threats', *Investment Arbitration Reporter* (3 February 2021), available at <https://www.iareporter.com/articles/the-netherlands-is-facing-its-first-icsid-arbitration-as-german-energy-giant-rwe-makes-good-on-earlier-threats/>. Also the EU itself was put on notice by a foreign investor claiming a breach of the FET standard by a regulatory act in 2019. – See *Nord Stream 2 AG* v. *European Union*, PCA Case No. 2020-07, currently peding, with the EU's counter memorial on merits being submitted in May 2021. Information about this dispute is available at the website of the Permanent Court of Arbitration servicing the dispute at <https://pca-cpa.org/en/cases/239/>. Note that both these cases have been brought under the old-generation IIAs.

unambiguous stance on the role and the contours of the reasonableness and the proportionality principle therein, states' regulatory space may not be as safe under the EU's IIAs as pledged. As a result, similarly as the old-generation of investment treaties, the EU's new-generation IIAs may continue to expose states to legal challenges against regulation much needed to ensure the achievement of sustainable development objectives. Given the IIAs' considerable scope and reach, this paper argues that the EU should better demarcate the acceptable limits to state regulatory autonomy in its globally exported design of foreign investment protection.

The next section offers a brief overview of the interpretation of the FET standard under in the old-generation IIAs. It demonstrates how this interpretation gave rise to an obligation on states hosting foreign investments to pay compensation for their regulatory acts negatively impacting such investments. The subsequent section describes how the EU has attempted to exclude such extensive interpretation of the FET standard in its new-generation IIAs, pointing out to reasons why this attempt may not be entirely successful. The subsequent two sections elaborate on the main reason behind this contention, namely the concept of arbitrariness, included in the EU's FET definition. They firstly explain how the concept of arbitrariness has been interpreted in ISDS jurisprudence, to then show how this interpretation may continue to interfere with states' regulatory autonomy even under the EU's redefined FET standard. The paper concludes by calling for further clarity on the role of reasonableness and proportionality in the assessment of the FET standard contained in the EU's IIAs.

2. THE FET STANDARD IN ISDS JURISPRUDENCE

To assess the aptness of the EU's FET standard to withstand expansive interpretation in future disputes concerning states' regulatory acts, it is important to understand how the standard has been interpreted in the past. This is because the EU's IIAs have retained the FET standard (and its name) and it is likely that the existing ISDS jurisprudence will inform the interpretation of the EU's FET standard while, of course, paying regard to new features expressly incorporated into the EU's IIAs. To facilitate the analysis of the EU's definition of the FET standard in the subsequent section, this section briefly outlines the past ISDS jurisprudence.

As mentioned, traditionally, IIAs provided no definition of what constitutes fair and equitable treatment in the context of investment protection, although some treaties did include an explicit reference to (customary) international law in their FET clauses. Faced with little to no guidance and the broad and ambiguous nature of the words 'fair' and 'equitable', when breathing content into the standard, ISDS tribunals have relied on the ordinary meaning of the words 'fair' and 'equitable',[25] on states' intentions and treaties'

[25] For example, *MTD Equity Sdn. Bhd. and MTD Chile S.A.* v. *Republic of Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004), para. 113, referred to in many subsequent cases. In contrary, some tribunals found looking for dictionary definitions of the relevant terms 'unhelpful'. For example, *Windstream Energy LLC* v. *Government of Canada*, PCA Case No. 2013-22, Award (27 September 2016), para. 357.

objectives,[26] and also on jurisprudence of other international tribunals and other sources of international law.[27] They have also emphasized the gap-filling nature of the standard[28] and the importance of the facts of each case.[29] Moreover, rather than trying to provide an abstract definition, many tribunals have simply resorted to a list of situations recognized as contrary to the FET standard in previous cases, despite occasional criticism about a missing legal base.[30] A few landmark decisions have become particularly popular as a point of such reference, including *Waste Management* v. *Mexico*,[31] *Tecmed* v. *Mexico*[32] and

[26] For example, *Occidental Exploration* v. *Ecuador*, *supra* note 23, para. 183.

[27] For example, *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL)* v. *Republic of India*, PCA Case No. 2016-07, Award (21 December 2020), para. 1707.

[28] R. Dolzer and C. Schreuer, *The Principles of International Investment Law*, supra note 32, pp. 132-133.

[29] For example, *Mondev International Ltd.* v. *United States of America*, ICSID Case No. ARB (AF)/99/2, Award (11 October 2002), para. 118. Also the tribunal in *Windstream Energy* v. *Canada* stated that 'the ultimate test of correctness of an interpretation is not in its description in other words, but in its application on the facts' – *supra* note 25, para. 362. For criticism of this approach, see D. Zannoni, 'The Legitimate Expectation of Regulatory Stability under the Energy Charter Treaty', 33 *Leiden Journal of International Law* (2020), 451-466, at 453.

[30] For example, Roberts has compared ISDS jurisprudence to 'a house of cards built largely by reference to other tribunal awards and academic opinions, with little consideration of the views and practices of states in general or the treaty parties in particular'. A. Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States', 104 *American Journal of International Law* (2010), 179-225, at 179.

[31] *Waste Management, Inc.* v. *United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Final Award (30 April 2004), para. 98: 'conduct [that] is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process. In applying this standard, it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.' As explicitly noted by the tribunal, this definition relates to the FET standard linked to the customary internatioal law minimum standard of treatment. However, also tribunals dealing with with an autonomous FET standard have relied on this defintion. For example *Biwater Gauff (Tanzania) Ltd.* v. *United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), para. 597; and *Perenco Ecaudor Ltd.* v. *Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability (12 September 2014), para. 558.

[32] *Técnicas Medioambientales Tecmed, S.A.* v. *United Mexican States*, ICSID Case No. ARB (AF)/00/2, Final Award (29 May 2003), para. 154. Setting the bar higher than the *Waste Management* tribunal, the *Tecmed* tribunal placed a strong emphasis on investors' expectations and required consistency, a lack of ambiguity and arbitrariness, and 'total transparency' from host states in their dealings with foreign investors 'so that [the investor] may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations' – ibid. Occasionally this standard of state behavior was considered as extreme and unattainable by any state and criticized for a lack of legal basis, most notably by the tribunal in *El Paso* v. *Argentina*, para. 342, but see also *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.* v. *Argentine Republic*, ICSID Case No. ARB/03/19, Separate Opinion of Arbitrator Pedro Nikken (30 July 2010); Z. Douglas, 'Nothing if not Critical for Investment Treaty Arbitration, Occidental, Eureko and Methanex', 22 *Arbitration International* (2006), pp. 27-51, at p. 28; and C. Campbell, 'House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law', 30 *Journal of International Arbitration* (2013), pp. 361-380. Nonetheless, the decision was a source of inspiration for numerous subsequent tribunals, strongly influencing later jurisprudence on FET. According to the research database Investor State Law Guide, para. 154 of the *Tecmed* award was cited

Saluka v. *Czech Republic*,[33] with the latter gaining most prominence with time.[34]

In addition, most tribunals have paid significant attention to the presence or absence of a reference to (customary) international law in the relevant FET clause. This has resulted in the recognition of two variations of the standard – one that equals the minimum standard of treatment of aliens existing under customary international law,[35] and one that provides for an autonomous standard of investment protection.[36] While the exact level of protection accorded to

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in no less than 77 decisions till now, altough not always in total agreement with its statements: see Jurisprudence Citator available at <https://www.investorstatelawguide.com/ResearchTools/JurisprudenceCitators?id=11>. Cases relying on (aspects of) the Tecmed interpetation of FET include such prominent cases as *Ioan Micula and others* v. *Romania I*, ICSID Case No. ARB/05/20, Award (11 December 2013); *Gold Reserve Inc.* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014); *Murphy Exploration* v. *Ecuador* and *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award (27 August 2019).

[33] *Saluka Investments B.V.* v. *The Czech Republic,* PCA Case No. 2001-04, Partial Award (17 March 2006), paras. 304-308. The *Saluka* tribunal agreed with *Tecmed* that FET also protects investor expectations but observed that this may not be taken literally, otherwise it would impose inappropriate and unrealistic burden upon states. Rather, to be protected, investor expectations 'must rise to the level of legitimacy and reasonableness in light of the circumstances' keeping in mind that 'no investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged'. The tribunal stressed the need to weight investor legitimate expectations with the host state right to regulate domestic matters in the general interest. The same approach was to be applied to most other components of the FET standard – consistency, transparency, even-handedness and non-discrimination, though the tribunal stressed that, under the FET standard, the host state may never deviate from the principles of procedural propriety and due process, and engage in coercion or harassment.

[34] Y. Levashova, 'Fair and Equitable Treatment and the Protection of the Environment: Recent Trends in Investment Treaties and Investment Cases', in: Y. Levashova *et al.*, *Bridging the Gap between International Investment Law and the Environment,* Legal Perspectives on Global Challenges No. 16 (The Hague: Eleven International Publishing 2015), pp. 53-86, at p. 79; K. Nadakavukaren Schefer, *International Investment Law* (Cheltenham: Edward Elgar Publishing 2020), section 5.5.6.

[35] A prominent example of a provision offering this FET standard of protection was Art. 1105 of the North American Free Trade Agreement (NAFTA). It reads in paragraph 1 as follows: 'Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.' NAFTA, Chapter Eleven, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2413/download>. While NAFTA tribunals faced with early FET claims differed in their appreciation of the reference to international law in Art. 1105, with some arguing in favour of a higher level of protection for foreign investors than what is guaranteed under the customary international law minimum standard of treatment, NAFTA states put hold on such approach when they adopted a legally bidning Interpretative Note stipulating that Art. 1105 NAFTA does not offer protection beyond CIL. In 2020, NAFTA was replaced by a new agreement between the US, Canada and Mexico (USMCA), with the same approach to the FET standard but with explicit clarification of the relationship between the FET standard and the customary international law minimum standard of treatment, copying the NAFTA Interpretative Note. See Art. 14.6 USMCA, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6008/download>. This is in line with the approach towards this standard consistenly taken by the US and Canada, and generally also by Mexico, in their IIAs. Also other states that wish to limit the FET to customary international law do so now explicitly.

[36] Typically, IIAs concluded by European countries contain 'autonomous' FET provisions, i.e. provisions with no reference to (customary) international law. See, for example, Netherlands – Kuwait BIT of 2001 which provides in Art. 3.1 simply that 'Each Contracting Party shall in its

investors under each type has been the subject of significant debate,[37] many tribunals have considered that the autonomous FET standard offers a higher level of protection than the customary international law minimum standard.[38] This clearly has also become the understanding of states that have tied the FET standard to international law in their new generation IIAs, at times explicitly adding that the standard does not offer protection in addition to or beyond the customary international law minimum standard.[39] The EU does not belong to that group of states, making no reference to international law in its FET definition. Therefore, arguably, the EU's FET standard is an autonomous one, offering a higher level of protection to foreign investors than the minimum standard under customary international law. As discussed later in more detail, if this position is accepted, the autonomous nature of the EU's FET standard is likely to bear upon this standard's interpretation – possibly resulting in a more expansive understanding of state obligations than may be envisaged by the EU.

This 'higher level of protection' accorded to the autonomous FET standard should be understood particularly with respect to the requisite threshold for ascertaining the existence of a breach. Under customary international law, the threshold for finding a breach is high, though it remains controversial how high exactly. This is because not all tribunals have agreed that the benchmark set in

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territory ensure fair and equitable treatment of investments by investors of the other Contracting Party […]'. Agreement between the Government of the Kingdom of the Netherlands and the Government of the State of Kuwait for the Encouragement and Reciprocal Protection of Investments, singed on 29 May 2001, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1851/download>.

[37] R. Dolzer and C. Schreuer, *supra* note 28, pp. 134-139.

[38] UNCTAD, 'Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, A Sequel' (New York: United Nations 2012), p. 60. Review of case law from 2010 onwards reveals that in at least 22 cases the tribunals explicitly acknowledged a higher level of protection offered by an autonomous FET standard in comparison to the FET linked to customary international law, including cases like *Joseph Charles Lemire* v. *Ukraine II*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010), para. 253; and *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l.* v. *Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum (30 November 2018), para. 263. Not all tribunals have agreed, though. In at least 11 cases from 2010 onwards, the tribunals disageed, mostly because they regarded that the customary internatonal law minimum standard of treatment had evolved and/or that the content of the two types of the FET standard would be the same (e.g. *El Paso Energy International Company* v. *Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011), para. 336). In at least 8 cases the tribuanls did not find either way, mostly because they did not fid it necessary of helpful (e.g. *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A.* v. *Argentine Republic*, ICSID Case No. ARB/03/23, Award (11 June 2012), para. 999). It should also be noted that the autonomous FET standard has sometimes been recognized in cases where the FET clause in the applicable IIA referred to international law in a more general way (e.g. by refering to the principles of international law). In such instances, international law was seen to be a floor but not a ceiling of the investor's protection. See, for example, *Crystallex International Corporation* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016), paras. 530-535.

[39] For example, Art. 9.6(1) and (2)(a) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), signed on 8 March 2018, avaiable at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5673/download>. M. Sornarajah (*supra* note 4, p. 410) argues that the explicit reiteration in the new generation IIAs of the narrow understanding of FET demonstrates that (at least those) states have never intended otherwise.

the landmark 1926 *Neer* v. *Mexico* case still applies.[40] According to *Neer*, international law would only be breached by state conduct that amounts 'to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency'.[41] However, some tribunals have adopted an evolutionary approach to the interpretation of the minimum standard arguing that international law 'is not frozen in time and the minimum standard does evolve'[42] and so 'outrage' would not be required or, in any case, it would be more easily recognized.[43] Nevertheless, meeting such a high threshold would not necessarily be required in cases involving an autonomous FET standard. Therefore, should the EU's FET standard be regarded as autonomous, to breach it, state conduct would need not amount 'to an outrage, to bad faith, to willful neglect of duty…'; a less egregious conduct would do, raising the level of investment protection offered by this standard by requiring only 'unfairness and inequitableness', but not 'outrageousness'.

When it comes to the content of the FET standard, i.e. the actual obligations owed by the host state to foreign investors, making a distinction between the minimum standard and the autonomous standard does not actually help. This is because the content of the minimum standard itself is uncertain, though a few aspects, such as denial of justice, are uncontested.[44] Moreover, as stated

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[40] *LFH Neer and P. Neer (USA)* v. *United Mexican States*, United States–Mexico Claims Commission, Decision of 15 October 1926, Reports of International Arbitral Awards (United Nations 2006), Vol. IV, p. 60.

[41] Ibid, pp. 61-62.

[42] *ADF Group Inc.* v. *United States of America*, ICSID Case No. ARB (AF)/00/1, Final Award (9 January 2003), para. 179. The tribunal in *Merrill & Ring* v. *Canada* went as far as to state that the autonomous FET clause itself had become customary international law in the field of business, trade and foreign investment protection. – *Merrill & Ring Forestry L.P.* v. *Canada*, ICSID Case No. UNCT/07/1, Award (31 May 2010); para. 210.

[43] Other cases where evolutionary approach was adopted include *Mondev* v. *United States, supra* note 29; *Cargill, Incorporated* v. *United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009); *Loewen Group, Inc. and Raymond L. Loewen* v. *United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003), and *Bilcon of Delaware et al.* v. *Government of Canada*, Permanent Court of Arbitration (PCA) Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015). However, an opposite view (arguing in favour of continued application of the Neer standard of 'outrage') was taken for example in *Glamis Gold Ltd.* v. *United States of America*, UNCITRAL, Award (8 June 2009), although this tribunal did accept that the Neer standard could be reached more easily at present than in 1926 – paras. 614-615.

[44] M. Sornarajah, *supra* note 4, pp. 155-157 and 406-407. It should be noted that Sornarajah questions the existance of the minimum standard of treatment in customary international law, referring to a long-lasting and consistent disagreement between developed and developing countries. He also disputes application of customary international law rules developed in relation to natural persons to foreign investors, in particular foreign corporations. – Ibid, chapter 3, especially section 3.3. Also Salacuse has considered that 'the legal building blocks for the analysis of the international minimum standard and its role in international investment law are precarious and often incomplete, vague and contested'. – UCTAD, 'Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, A Sequel', *supra* note 38, p. 9, referring to J. Salacuse, *The Law of Investment Treaties* (Oxford: Oxford University Press 2010), pp. 75-76. For a comprehensive analysis of the concept of minimum stadard of treatment, see M. Paparinskins, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford: Oxford University Press 2013).

by the tribunal in the prominent case *Saluka* v. *Czech Republic*, the difference between the two variations of FET standard 'may well be more apparent than real' when applied to the specific facts of a particular dispute.[45] Therefore, despite some divergence in opinion, a fair degree of convergence on the main aspects of the FET standard can now be identified, whether understood as the minimum standard of treatment under customary international law or as an autonomous standard of investment protection.[46] It is thus largely settled that state conduct that is arbitrary, unreasonable or discriminatory, that lacks transparency, consistency or respect for investor legitimate expectation, that denies justice or due process, or that is abusive or contradicts good faith is capable of breaching any FET standard.[47] As shown below, most of these obligations have been incorporated in the EU's FET definition as well, which shows that the EU largely follows settled ISDS jurisprudence.

However, as is often the case with law, here too the devil is in the details, both when it comes to the EU's FET definition but also when it comes to important divergences in the ISDS jurisprudence. The latter may impact the interpretation of the EU's FET standard in an important manner.

One of the most significant differences relate to the protection of investors' expectations. Most tribunals are in consensus that, given the inherent long-term nature of foreign investments and the (often express) objective of investment treaties to encourage foreign investments by providing a stable and predictable business and legal environment, FET entails protection of investors' expectations.[48] Tribunals also largely agree by now that, to be protected, investors' expectations must be legitimate and reasonable, and that they ought to be weighed against states' right to regulate.[49] In assessing the legitimacy and reasonableness of investors' expectations, tribunals generally consider whether the concerned investor behaved with due diligence when making the investment, i.e. whether it made sufficient effort to familiarize itself with the business and legal situation in the host state and with the probability of future regulatory changes.[50] More recently, tribunals have also started to make a more conscious

[45] *Saluka* v. *Czech Republic*, *supra* note 33, para. 291.

[46] S. Schill, 'Fair and Equitable Treatment, the Rule of Law and Comparative Public Law', in S. Schill S (ed.), *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press 2010), pp. 151-182, at p. 153.

[47] For example, *Rusoro Mining Ltd.* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016), para. 524; and *Cairn Energy* v. *India*, *supra* note 27, para. 1722. See also R. Dolzer and C. Schreuer, *supra* note 28, pp. 145-160; and R. Dolzer, 'Fair and Equitable Treatment: Today's Contours', 12 *Santa Clara Journal of International Law* (2014), pp. 7-33.

[48] See *supra* notes 28 and 33 on *Tecmed* v. *Mexico*, *supra* note 32, para. 154 and *Saluka* v. *Czech Republic*, *supra* note 33, paras. 304-308.

[49] This applies to both the autonomous FET standard but also the FET stadard linked to the customary international law. See, for example, Y. Levashova, 'Fair and Equitable Treatment and the Protection of the Environment: Recent Trends in Investment Treaties and Investment Cases', *supra* note 53, p. 81.

[50] For example, *Parkerings-Compagniet AS* v. *Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007), para. 333; *Mamidoil Jetoil Greek Petroleum Products Société S.A.* v. *Republic of Albania*, ICSID Case No. ARB/11/24, Award (30 March 2015), paras.

distinction between, on the one hand, investors' expectations of a general legal stability in the host state (i.e. expectation that the legal framework in place in the host state at the time when the investment is made will not change during the investment's lifespan) and, on the other hand, expectations based on specific representations made by the host state towards the investor.[51] While the former has been recognized as an inherent part of the FET standard in many cases,[52] the latter requires additional proof that specific promises were made to the investor but subsequently breached.[53]

It is precisely with regards to this distinction that important disagreements exist. ISDS tribunals have differed in their appreciation of what qualifies as 'specific representation', i.e. how formal and how specific the promise of the host state must be to result in a legitimate expectation protected by the FET standard and whether general legislation qualifies as well.[54] Furthermore, with respect to the investors' expectation that legal stability would be provided by the host state, while most tribunals now acknowledge that not all regulatory changes in the host state would breach the obligation,[55] thus far they have failed to adopt a common standard for assessing what kind of change would do so.[56] A lack of consensus among tribunals on these conditions for the protection of investors' expectations demonstrates that uncertainty continues to exist with regards to both the actual content of the FET standard and also the obligations

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623-626; *Charanne Construction* v. *Spain*, SCC Case No. 062/2012, Award (21 January 2016), para. 505; and *Stadtwerke München GmbH, RWE Innogy GmbH, and others* v. *Kingdom of Spain*, ICSID Case No. ARB/15/1, Award (2 December 2019), para. 263.

[51] See F. Ortino, 'The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come?', 21 *Journal of International Economic Law* (2018), pp. 845-865.

[52] The obligation to provide legal stability has played a significant role in recent disputes initiated under the Energy Charter Treaty (ECT) in particular against Spain, Italy and the Czeck Republic in relation to their alternaton of the previous incentive schemes for renewable energy investments. In these disputes, investment tribunals often stressed the obligation to create stable conditions for investors expressly included in Art. 10(1) of the ECT where also the FET obligation can be found, although some tribunals distinguished between the stability obligation and the FET obligation. For a discussion of these disputes and the stability obligation in the ECT, see D. Zannoni, *supra* note 29. Outside the ECT, the obligation to provide legal stability was accepted, for example, in (a controversial case) *Occidental Exploration* v. *Ecuador, supra* note 23, para 181.

[53] *EDF (Services) Limited* v. *Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009), para. 217; and *Total S.A.* v. *Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability (27 December 2010), para 117.

[54] For example, the tribunal in *Micula* v. *Romania II* considered that legitimate expectations could arise from state acts or conduct, including specific actions but also general legislation. – *supra* note 32, para. 362. Also the tribunal in *Stadtwerke* v. *Spain*, the tribunal analyzed challenged measures under such assumption. – *supra* note 50, para. 264. In a number of other disputes concerning Spain and its alteration of the regulatory incentive schemes for renewable energy projects, tribunals ruled that such regulatory regimes could create legitimate expectations. – For example, *9REN* v. *Spain*, *supra* note 23, para. 295; and *Cube Infrastructure Fund SICAV and others* v. *Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum of 19 February 2019, para. 388. However, in *Charanne* v. *Spain* the tribunal took an opposite position, see *supra* note 50, para. 510.

[55] For example, *Impregilo S.p.A.* v. *Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 June 2011), paras. 285, 290-91.

[56] F. Ortino, *supra* note 51, pp. 860-863.

owed by host states to foreign investors, especially when it comes to regulatory measures.[57]

That said, it is not just the legal uncertainty about the details that has generated criticism of the FET jurisprudence; it is also the very idea that an FET breach could be found solely on the basis of investors' expectations, in particular the expectation of legal stability. While tribunals have embraced the idea and many have considered the protection of investors' expectations to be 'the most important function' of the FET standard,[58] the same can hardly be concluded about states. One can certainly question the initial intentions of states behind their decision to include a rather vague and undefined FET standard in the old-generation IIAs.[59] However, one cannot but acknowledge, as UNCTAD did, that:

> The language used in IIAs has generated unanticipated (and at times inconsistent) interpretations by arbitral tribunals, and has resulted in a lack of predictability as to what IIAs actually require from States. As a result, there is today a broadly shared view that treaty provisions need to be clear and detailed, and drafted on the basis of a thorough legal analysis of their actual and potential implications.[60]

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[57] A large number of cases (approximately 40) brought against Spain in relation to its adjustment of the incentive schemes for the renewable energy projects demonstrate this problem. They consider the same regulatory scheme and thus far, Spain won some of these case, while loosing other (most of them, in fact). For contributions discussing (aspects) of the cases, see for example M. Schmidl, 'The Renewable Energy Saga from Charanne v. Spain to The PV Investors v. Spain: Trying to See the Wood for the Trees', *Kluwer Arbitration Blog* (1 February 2021), available at <http://arbitrationblog.kluwerarbitration.com/2021/02/01/the-renewable-energy-saga-from-charanne-v-spain-to-the-pv-investors-v-spain-trying-to-see-the-wood-for-the-trees/>; D. Draguiev; 'Investment Treaty Arbitration in the Renewable Energy Sector: Overview of Arbitral Case Law on Legitimate Expectations in the Light of Policy', *Oil, Gas & Energy Law* (2018), available at <www.ogel.org/article.asp?key=3795>; I. Reynoso, 'Spain's Renewable Energy Saga: Lessons for International Investment Law and Sustainable Development', *Investment Treaty News* (27 June 2019), available at <https://www.iisd.org/itn/en/2019/06/27/spains-renewable-energy-saga-lessons-for-international-investment-law-and-sustainable-development-isabella-reynoso/>; and already mentioned D. Zannoni, *supra* note 29.

[58] For example, an often cited tribunal in *Electrabel S.A.* v. *Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) and Award (25 November 2015), in both para. 7.75. Also many prominent scholars in the field have been advancing this understanding of FET. – See R. Dolzer, *supra* note 47, p. 17 (referring to the protection of legitimate expectations as 'the central pillar of the understanding and application of the FET standard'). Disagreement with such proposition is rare, but it does exist. See, for example, *Suez* v. *Argentina*, Separate Opinion of Arbitrator Pedro Nikken, *supra* note 32. For criticism by commentators, see most notably M. Sornarajah, *supra* note 7, Chapter 5.

[59] Accordig to Henckels, there are historical reasons partly explaining the vague drafting of the old generation IIAs, namely a desire of capital-exporting countries to ensure a broad protection of investments in capital-importing countries, at that time all developing and less stable. By a broad and unprecise wording they intended to prevent under-inclusiveness of the investment protection standards. C. Henckels, *supra* note 4, pp. 31-32.

[60] UNCTAD, 'UNCTAD's Reform Package for International Investment Regime, 2018 Edition', pp. 16-17, available at <https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf>. On inconsistency and incoherence of ISDS awards, threatening predictability and legal security of the system, see UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters', A/CN.9/WG.III/WP.150 (28 August 2018), available at <http://www.uncitral.org/pdf/english/workinggroups/wg_3/WGIII-36th-session/WP_150.pdf>. Paragraph 16(i) lists a number of examples of identified inconsistency in the interpretation of the FET standard.

As a result, in the new generation IIAs (and model IIAs), most states have taken the effort to draft FET provisions more carefully to reduce scope for broad interpretation.[61] With regard to the protection of investors' expectations, this is often done explicitly and, if indeed so, always in the sense of excluding this ground from the FET's scope, at least as an independent FET obligation.

When it comes to the FET standard more generally, states have been following one or more recommendations developed by UNCTAD.[62] They include (i) clarification by an exhaustive list of specific obligations;[63] (ii) clarification by an illustrative list of FET obligations – positive, negative, or a combination thereof;[64] and (iii) omission of the FET standard altogether, even explicitly, or its reduction to a mere political commitment.[65] Prior to the issuing of the most recent policy document in late 2020, UNCTAD had also suggested the express linkage with the customary international law minimum standard as an option for

[61] Apart from a more precise defition of the FET standard, the new generation IIAs often include procedural and institutional safeguards that are to ensure investment tribunals do not mistake the meaning of stadards of investment protection, including FET, envisaged by the state parties to the treaty. This safeguards include a possibility to jointly determine by state parties certain issues under consideration by an investment tribunal, a possibility to issue joint interpretations binding on future investment tribunals, a preview and comment on draft arbitral awards, and a possibility to launch counterclaims. – UNCTAD, 'International Investment Agreements, Taking Stock of IIA Reform: Recent Developments' (7 June 2019), p. 9, available at <https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5_en.pdf>

[62] UNCTAD's Reform Package for International Investment Regime, 2018 Edition, *supra* note 60, p. 36.

[63] As discussed below, among IIAs parties that have followed this approach is the EU and its Member States. See also, for example, Art. 9 of Model BIT of the Netherlands and Art. 5 of Model BIT of Slovakia, both EU Member States. – Netherlands Model Investment Agreement, adopted on 22 March 2019, is available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>; and Slovakia Model, adopted in 2019, is available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5917/download>. As reported by UNCTAD, some states followed the exhaustive list approach but, in addition to providing such list, they omited the name of the FET standard, thereby effectively replacing the FET standard with an exhausting list of self-standing obligations. – For example Art. 3.1 of the India Model BIT, adopted on 12 December 2015, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download>. It should be noted that India linked the exhaustive list of obligations to customary internationa law in addition to omitting the FET name. Notably, no IIA that adopted this approach includes protection of investors' expectations. – UNCTAD's IIA Reform Accelerator, *supra* note 2, p. 20.

[64] Illustrative examples of IIAs adopting this recommendation are provided in UNCTAD's IIA Reform Accelerator, *supra* note 2, p. 22. It should also be noted that the approach has sometimes been used in combination with an explicit link to customary international law.

[65] Brazil is the most notable example of a country that has never ratified an IIA containing an FET obligation, but there are also other examples involving significant economic powers, such as a treaty between Australia and China (omits FET) and MERCOSUR (includes a political commitment in the preamble but explicitly excludes the FET obligation). Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China, signed on 17 June 2015, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3454/download>, Chapter 9 (note that Art. 9.9, paragraph 3, provides for a review of the agreement and possible future negotiations which could include the minimum standard of treatment of investors) and Intra-MERCOSUR Cooperation and Facilitation Investment Protocol, signed on 7 April 2017, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5548/download> (in Spanish), Preamble and Art. 4.3.

FET reform,[66] with numerous states adopting this approach.[67] These states may be disappointed to suddenly learn that UNCTAD no longer recommends this, noting persisting uncertainty about the nature, content and development of the minimum standard, also stressed above.[68]

The EU has consistently relied on the first mentioned reform option, clarifying the FET standard in its IIAs by an exhaustive list of obligations. Among the reform options proposed by UNCTAD, this is clearly the 'safest' option, apart from avoiding the use of the FET standard or avoiding its name.[69] UNCTAD itself has acknowledged that, while it may be difficult to agree upon an exhaustive list of obligations to be covered, such a list has the potential to 'help minimize unanticipated and far-reaching interpretations by tribunals.'[70] At the same time, the EU has included an express reference to investors' expectations in its FET clauses, be it not as an independent ground for FET breach but as a consideration to be taken into account in the assessment of FET claims. As discussed below, this may backfire and broaden up the scope of the EU's FET standard.

The next section discusses the EU's FET definition in detail, focusing on elements built into this definition with the aim of better safeguarding states' regulatory space and highlighting possibly problematic features that could undermine the achievement of this aim, including the express reference to investors' expectations.

3. THE FET STANDARD IN THE EU'S IIAs

The first EU's IIA, concluded with Canada, defines the FET standard in Article 8.10 as follows:

> A Party breaches the obligation of fair and equitable treatment […] if a measure or series of measures constitutes:
> (a) denial of justice in criminal, civil or administrative proceedings;
> (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
> (c) manifest arbitrariness;
> (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
> (e) abusive treatment of investors, such as coercion, duress and harassment; or

[66] UNCTAD's Reform Package for International Investment Regime, 2018 Edition, *supra* note 60, p. 36.

[67] Prominent examples of treaties relying on this approach are CPTPP and NAFTA-successor UMSCA, both containing identical wording of the FET provision, clearly reflecting previous and current general practice of the US and Canada. Both these and other investment treaties concluded by the US and Canada include a number of further clarification, one of them being an express exclusion of the investor's legitimate expectations from the scope of FET standard. Art. 9.6(1) and (2)(a) and 4 CPTPP; and Art. 14.6.(1) and (2)(a) and 4 USMCA.

[68] UNCTAD's IIA Reform Accelerator, *supra* note 2, p. 21.

[69] See an example of India's Model BIT in *supra* note 63.

[70] UNCTAD's IIA Reform Accelerator, *supra* note 2, p. 20.

(f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.[71]

The provision continues with several clarifications, such as that a mere breach of domestic law, a breach of another provision of CETA or another international agreement does not constitute FET violation[72] and that investors' legitimate expectations 'may' be considered by tribunals when assessing FET claims.[73]

The EU's subsequent IIAs contain very similar formulations.[74] This demonstrates that the EU wishes to continue offering the FET standard of protection to investors among its trading partners, but only if the safest option suggested by the UNCTAD for FET reform is adopted[75] in the form of an exhaustive list of obligations falling under the FET standard.[76] Moreover, while the list of included obligations is largely in line with the existing ISDS jurisprudence, the list omits obligations that have been considered as more problematic. Hence, as already mentioned, the protection of investors' expectations is not listed as a self-standing obligation under this standard, although tribunals are invited to take them into account when assessing FET claims. Moreover, there is no ex-

[71] Art. 8.10 CETA, paragraph 2. Paragraph 3 provides for a possibility of a review of FET obligations listed in paragaraph 2 upon a request by a CETA party, which may be followed by a recommendation to amend the list by a decision of the CETA Joint Committee.

[72] Ibid, paras. 6 and 7.

[73] Ibid, para. 4.

[74] See Art. 2.4 EU-Singapore IPA, Art. 2.5 EU-Vietnam IPA, and Art. 15 EU-Mexico Agreement (investment chapter). These provisions are not identical, though, and small differences exists both in the list of included FET obligations as well as in clarifications. For example, CETA is the only agreement with fundamental breach of transparency explicitly included as an aspect of due process , which is covered by the FET definition (Art. 8.10(2)(b) CETA). Another example is omission of targetted discrimination in the FET definition in the EU-Singapore investment agreement. In the EU-Mexico agreement, targetted discrimination on manifestly wrongful grounds is mentioned under manifest arbitrariness (Art. 15(2)(c)), whereas in all other agreements targetted discrimination is listed as a separate FET obligation (eg in Art. 8.10(2)(d) CETA and Art. 2.5(2)(d) EU-Vietnam IPA). When it comes to clarifications, for example, the EU-Mexico agreement provides for additional and specific clarifications for each ground included in the FET definition (footnote 16 to Art. 15(2)), with those concerning manifest arbitrariness being discussed below in section 4 of this paper.

[75] The fact that Canada was willing to accept the EU's approach in CETA is suggestive of the fact that the EU must have insisted, given that Canada consistently links the FET standard to the customary international law minimum standard of treatment in its IIAs. According to the UNCTAD's IIA Mapping Project database, *supra* note 3, out of 46 mapped IIAs concluded by Canada, 44 contains such a express link between the FET standard and (customary) international law. Only the early BIT with Hungary of 1991 contained an entirely unqualified FET standard (in Art. III.1) and only CETA has an exhaustive list of FET obligations. The Agreement between the Government of Canada and the Government of the Republic of Hungary for the Promotion and Reciprocal Protection of Investments, signed on 3 October 1991, is available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/615/download>.

[76] It should be noted that an argument has been made that the list of FET obligations in CETA may not necessarily be exhaustive. C. Henckels, *supra* note 4, p. 36; and G. Van Harten, 'The EU-Canada Joint Interpretive Declaration/Instrument on the CETA, Updated Comments', Research Paper No. 6, 13 *Osgoode Hall Law School Legal Studies Research Paper Series* (2017), pp. 4-5, avialable at <http://ssrn.com/abstract=2850281>. This paper does not share this position, relying on the wording of the provision listing specific obligations without including qualifiers such as 'including' or 'inter alia'.

press reference to the obligation of consistency and coherence of state conduct, good faith, transparency, reasonableness or proportionality. The EU also explicitly sets a higher threshold for FET breaches, requiring 'fundamental' breach (of due process), 'manifest' or 'targeted' state conduct (amounting to arbitrariness or discrimination). Together with the reaffirmed right of the state to regulate, the evident objective of all these features is to ensure a less expansive interpretation of the EU's FET standard that shows more respect to states' regulatory space.

Nonetheless, this paper argues that at least some of these aspects may have a more apparent than real effect on the interpretation of the EU's FET standard, not necessarily preventing compensation from being awarded to foreign investors negatively affected by regulatory changes in the EU. This is because the EU's FET definition includes prohibition of arbitrariness which has been interpreted in ISDS jurisprudence as encompassing some of the obligations omitted from this definition. If read together with the express instruction to consider investors' expectations in the assessment of FET claims, arbitrariness may well prove to be the gateway through which regulatory measures will continue to face legal challenges, despite safeguards built into the FET definition. This section discusses each of these safeguards to set the necessary context for the subsequent assessment of the potential of the prohibition of arbitrariness to be interpreted expensively in the next section.

To begin with the right to regulate, all EU's IIAs explicitly reassert this right, both in Preambles and in operative provisions.[77] Moreover, all these treaties include a clarification like:

> the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Chapter [on Investment Protection].[78]

[77] Art. 8.9 CETA, Art. 2.2 EU-Singapore IPA, Art. Art. 2.2 EU-Vietnam IPA, and Arts. 1 and 14 EU-Mexico Agreement (investment chapter). In fact, these articles on 'Investment and Regulatory Measures' always introduce the section on Investment Protection and precede the provision on 'Treatment of Investors and of Covered Investments' that contains the FET obligation. In the EU-Mexico Agreement, this applies to the clarifications only as the right to regulate is reiterated in Art. 1 which starts the investment chapter. In all cases, however, the position of these provisions in the agreement or investment chapter clearly demonstrates the importance the EU attaches to the state's regulatory autonomy in relation to the investment protection.

[78] Art. 2.2(2) EU-Singapore IPA, and almost identically Art. 8.9(2) CETA. Subsequent paragraphs of the same articles further clarify the host state's right to change its subsidy regimes. Clearly, this is a recation on the many disputes brought against some EU Member States (Spain, Italy, Czech Republic) under the ECT, all concerning alternation of earlier incentive regimes for renewable energy investments (see *supra* note 57). Note also that the two more recent investment agreements concluded by the EU changed the wording of the clarification, stating: 'For greater certainty, this Chapter [on Investment Protection] shall not be interpreted as a commitment from a Party that it will not change its legal and regulatory framework, including in a manner that may negatively affect the operation of investments or the investor's expectations of profits.' – Art. 2.2(2) EU-Vietnam IPA and almost identically Art. 14(1) EU-Mexico Agreement (investment chapter). It does not seem, however, that this change in formulation would lead to a different

This clarification leaves no doubt that the EU's standards of investment protection, including the FET standard, do not oblige the host state to provide general legal stability to foreign investments. This is an important reminder to ISDS tribunals but, at the same time, in fact, not much more than a reiteration of what is no longer disputed. By now, most tribunals have acknowledged that, absent explicit commitments to the contrary, no investor can legitimately expect that the host state will not modify its laws, and also that investors' expectations based on the host state's representations will be weighed against the state's regulatory autonomy.[79] Hence, also under the standing ISDS jurisprudence, 'the mere fact' that the host state has exercised its right to regulate would not be sufficient for a tribunal to award compensation to negatively affected investors. More would be needed for a breach of investment standards of protection, including FET, and this 'more' would not be satisfied by the mere existence of the investor's expectations based on specific representations since they too must be weighted with the right to regulate, at least in theory.

That said, in the case of the EU's FET standard, this 'more' is limited to the instances listed in the above cited definition, whereas no such limitation exists under the standing ISDS jurisprudence. This is precisely how the right to regulate is likely to be considered by ISDS tribunals adjudicating FET claims under the EU's IIAs – as a mandate to stick to the list of prohibited conduct rather than a *de facto* exception. Understanding the right to regulate as an exception would amount to a blank prohibition for tribunals to ever assess regulatory changes under the FET – or other – standards of investment protection, which would be at odds with the IIAs' stated objective to establish 'clear, transparent, *predictable* and mutually-advantageous rules' [emphasis added] governing trade and investment of the IIA parties.[80] Hence, tribunals are likely to continue scrutinizing regulatory changes in the host state and find breaches only if there is more than a loss suffered by the investor as a result of a regulatory change, even if the investor can successfully demonstrate it had certain expectations that should be weighted in the analysis. In and of itself, the reiteration of the state right to regulate is thus unlikely to make much of a difference in the assessment of FET claims brought under the EU's IIAs when compared to the current situation.[81]

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interpetation of the FET standard. Both formulations make clear that there is no commitment of (absolute) legal stability.

[79] See *supra* section 2.

[80] Preamble, third paragraph, CETA. In the last paragraph of its Preamble, EU-Vietnam IPA refers to an objective to 'promote the competitiveness of [the parties'] companies by providing them with a *predictable legal framework* for [the parties'] investment relations' [emphasis added]. Interestingly, no comparable statement can be found in the EU-Singapore IPA. Preamble of the EU-Mexico Agreement is not yet available, given the 'in principle' nature of the agreement at present.

[81] Also, Levashova has argued that the provisions on the right to regulate do 'not exclude the possibility that, in combination with other facts—for example, manifest arbitrariness, one of the possible grounds for the violation of FET under CETA Art. 8.10(2)(c))—a change to a regulatory framework could play a role in a tribunal's assessment of whether the legitimate expectations of an investor were frustrated. Therefore, treaty language in recent EU IIAs reduces to some extent the host state's risk of incurring liability under the FET standard, when it changes its regulatory framework. However, it does not provide clear criteria for determining the extent of regulatory change that may lead to liability.' Y. Levashova, 'Due diligence and ECT', *Investment Treaty News*

Rather, it is the omission of investors' expectations from the list of obligations defining the content of the FET standard that will safeguard a different approach in that tribunals will no longer be able to base their finding of an FET breach only on investors' expectations.[82]

At the same time, investors' expectations continue to be of relevance under the EU's FET standard, casting doubts about the extent to which the outcome of disputes involving investors' expectations will really differ. This is strengthened by the fact that the EU's IIAs do not depart significantly from the existing ISDS jurisprudence when stating that only a specific representation to an investor made to induce the investment, upon which the investor relied when deciding whether to make or maintain the investment, and which was subsequently frustrated by the host state, would be capable of creating expectations with bearing on the investor's FET claim.[83] All of this is the mainstream approach at present as well.[84] By not explaining how specific and how formal the host state's representations must be, the issue that has been decided upon by past tribunals differently,[85] the EU's IIAs do not prevent tribunals from, for example, accepting unwritten promises made by states' officials as creating legitimate expectations;[86] or from interpreting specificity as including general acts, for example when they regulate specific sectors, as some tribunals have done in disputes brought under the Energy Charter Treaty.[87] Hence, here too, a change may be more apparent than real.

To some extent, the same conclusion can be drawn with regard to the omission of certain obligations from the FET's scope, obligations which have been recognized as part of the standard in previous ISDS jurisprudence and which have served as a gateway for FET's extensive interpretation. These include

(27 June 2019), available at <https://www.iisd.org/itn/en/2019/06/27/investor-due-diligence-and-the-energy-charter-treaty-yulia-levashova/>.

[82] Note that the latest EU-Mexico Agreement adds an explicit sentence in the provision concerning investors' expectations stating that the mere frustration of such expectations does not amount to an FET breach, even if causing damage to the investment. It is difficult to understand a reason behind this additional clarification given the fact that the EU's list of FET obligations does not include the protection of legitimate expectations in any case and so a breach of legitimate expectations must always be linked to another – listed – obligation.

[83] Art. 8.10(4) CETA, Art. 2.4(3) EU-Singapore IPA, Art. 2.5(4) EU-Vietnam IPA, and Art. 15(4) EU-Mexico Agreement (investment chapter). As noted in *supra* note 124, the last mentioned provision adds in addition that 'the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's legitimate expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result'.

[84] See *supra* section 2.

[85] See *supra* note 54.

[86] G. Van Harten, *supra* note 76, p. 5.

[87] *InfraRed Environmental Infrastructure GP Limited and others* v. *Kingdom of Spain*, ICSID Case No. ARB/14/12, Award (2 August 2019), para. 366; and *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG* v. *Italian Republic*, ICSID Case No. ARB/16/5, Award (14 September 2020), paras. 512. See also Y. Levashova, 'ESPF v. Italy: The Broadening Scope of Specific Representations under the FET Standard', *Kluwer Arbitration Blog* (24 January 2021), available at <http://arbitrationblog.kluwerarbitration.com/2021/01/24/espf-v-italy-the-broadening-scope-of-specific-representations-under-the-fet-standard/>.

good faith,[88] transparency,[89] consistency and coherence of state conduct,[90] reasonableness and proportionality.[91] On the one hand, the absence of these obligations in the EU's FET definition is remarkable as, for example, good faith has been generally regarded as inherent in the FET obligation, the latter being an expression of the former[92] and, after all, the EU did keep the name 'fair and equitable' in its IIAs. Furthermore, the EU has been generally known as a fierce supporter of transparency in public administration.[93] On the other hand, it is evident the EU has omitted these obligations from the FET definition to limit instances in which regulatory measures could be challenged by negatively affected investors. A (not negligible) number of investment disputes have involved challenges to states' regulatory measures claiming their unreasonableness and/or lack of proportionality.[94] Moreover, the obligations of good faith, transparency and consistency have all been used as a legal hook enabling ISDS tribu-

[88] R. Islam, 'Role of Good Faith in Interpreting Fair and Equitable Treatment (FET) Standard in Arbitral Practice', 12 *Bangladesh Journal of Law* (2012), pp. 107-134. See also R. Dolzer and C. Schreuer, *supra* note 28, at p. 156.

[89] In the past jurisprudence, NAFTA tribunals applying the FET standard linked to customary international law have differed in their views on whether the standard encompasses a general duty of transparency or not. For example, the tribunal in *Waste Management* v. *Mexico* (*supra* note 31, para. 98) believed so whereas the tribunal in *Cargill* v. *Mexico* (*supra* note 43, para. 294) did not. Outside NAFTA, however, transparency has often been embraced by tribunals, sometimes in connection with the protection of investors' expectations and/or the requirement of consistency of state conduct. – For example, *Saluka* v. *Czech Republic*, *supra* note 33, para. 307; and *Olin Holdings Limited* v. *State of Libya*, ICC Case No. 20355/MCP, Final Award (25 May 2018), para. 320. See also C. Schreuer, 'Fair and Equitable Treatment in Arbitral Practice', 6 *Journal of World Investment and Trade* (2005), pp. 357-386, at pp. 374-379; R. Dolzer and C. Schreuer, *supra* note 28, pp. 149-152; and A. Reinisch, *Advanced Introduction to International Investment Law* (Cheltenham: Edward Elgar Publishing 2020), Chapter 3, section 3.3.2. The latter questions what degree of transparency is actually required under FET, pointing out at divergent caselaw, but concludes that 'FET jurisprudence still accords some weight to transparency aspects', ibid. For criticism of reading transparency into the FET standard, see C. Campbell, *supra* note 32, in particular section 3. Among the EU's IIAs, CETA includes transparency in Art. 8.10(2)(b) but it does so in relation to the obligation to provide due process in judicial and administrative proceedings. This means that even in CETA transparency is not a self-standing FET obligation. In the remaining EU's IIAs there is no mention of transparency at all.

[90] Once again, oft-cited *Saluka* v. *Czech Republic*, *supra* note 33, paras. 307-309.

[91] For example, *Philip Morris* v. *Uruguay*, *supra* note 23, paras. 409-410; *RREEF* v. *Spain*, *supra* note 38, paras. 464-465; and *9REN* v. *Spain*, *supra* note 23, para. 323 ('A regulatory measure rationally connected to a legitimate State objective, where the means chosen are proportionate to achievement of the objective […] is neither unreasonable nor arbitrary.')

[92] *Tecmed* v. *Mexico*, *supra* note 32, para. 154.

[93] The TFEU stipulates in Art. 15: 'The Union's institutions, bodies, offices and agencies conduct their work as openly as possible in order to ensure the participation of civil society and thus promote good governance.' At least formally, the EU is indeed a proud supporter of transparency. See, for example, the website of the European Commission on transparency of its service standards and principles available at <https://ec.europa.eu/info/about-european-commission/service-standards-and-principles/transparency_en> and of the European Parliament at <https://www.europarl.europa.eu/at-your-service/en/transparency/>. When it comes to the protection of foreign investments, the EU has also acknowledged its belief that 'economic activity must take place within a framework of clear and transparent regulation defined by public authorities'. CETA Joint Interpretative Instrument, pp. 3-8, para. 1.c).

[94] *Philip Morris* v. *Uruguay*, *supra* note 23, paras. 409-410.

nals to scrutinize states' regulatory acts through the lens of investors' expectations.[95]

That said, the EU's effort may prove in vain as most of the omitted obligations have been recognized as inherent in the concept of arbitrariness,[96] which does appear in the FET definition in every IIA concluded by the EU.[97] This may make the inclusion of arbitrariness in this definition rather risky. In fact, arbitrariness is the only ground on which (non-discriminatory) regulatory acts appear to be challengeable under the FET standard and under which arguments concerning investors' expectations could be made. The other listed grounds – denial of justice, lack of due process, discrimination, abusive treatment – are not apt for either of these arguments.[98] Therefore, the next section takes a closer look at the interpretation of the concept of arbitrariness in existing ISDS jurisprudence to find out how susceptible this concept is to a successful FET claim concerning states' regulatory acts, also under the EU's FET definition. Before that, however, the last safeguard against expensive interpretation built into the EU's FET

[95] Investors' expactations have been linked to good faith, for example, in the already metioned decision in *Tecmed v. Mexico*, *supra* note 32, para. 154; but see also *Amco Asia Corporation and others* v. *Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (25 September 1983), para. 47; and more recently *Athena Investments A/S (formerly Greentech Energy Systems A/S) and others* v. *Kingdom of Spain*, SCC Case No. V2015/150, Final Award (14 November 2018), para. 362. On the linkage between the requirement of consistency (and transparency) and investors' expectations, see for example recent awards in *Glencore* v. *Colombia*, *supra* note 32, para. 1419 and para. 1423 ('legitimate expectations to consistent conduct'); and *SunReserve Luxco Holdings S.À.R.L, SunReserve Luxco Holdings II S.À.R.L and SunReserve Luxco Holdings III S.À.R.L* v. *Italian Republic*, SCC Case No. V2016/32, Final Award (25 March 2020), paras. 731-733 and para. 910 ('the notions of transparency and consistency are a subliminal part of the investor's legitimate expectations on most occasions. It is only in exceptional situations, depending on the facts and circumstances of a case, that a host State can be found guilty of having conducted itself in a non-transparent or inconsistent manner, without also having frustrated an investor's legitimate expectations, or vice versa').

[96] For example, possible instances of bad faith include a deliberate conspiracy against a foreign investor, inflicting damage on purpose, unfair motives for the investor's expulsion (such as local favoritism), the use of legal instruments for improper purposes or reliance on internal structures to excuse a breach of contract. *Waste Management* v. *Mexico*, *supra* note 31, para. 138.; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A*. v. *Argentine Republic*, ICSID Case No. ARB/97/3 (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic), Award (20 August 2007), para. 7.4.39; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009), para. 250; *Frontier Petroleum Services Ltd.* v. *Czech Republic*, UNCITRAL, Final Award (12 November 2010), para. 300. All these situations have been recognized as being arbitrary as well, see below section 3 of this paper. As also explained in that section, arbitrariness has been understood by some tribunals to cover unreasonable state conduct, possibly comprising the proportionality requirement, too. On the other hand, inconsistency or incoherence of state conduct are not necessarily covered by the prohibition of arbitrariness. The most recent EU's IIA with Mexico even excludes inconsistent state conduct from the scope of manifest arbitrariness explicitly – see below section 4 of this paper.

[97] Art. 8.10(2)(c) CETA; Art. 2.4(2)(c) EU-Singapore IPA; Art. 2.5(2)(c) EU-Vietnam IPA; and Art. 15(2)(c) EU-Mexico Agreement (investment chapter).

[98] This argument has been made, for example, by Henckels with regard to any claim that would concern the substance of the host state's regulatory action. C. Henckels, *supra* note 4, p. 37.

definition should be noted – the high threshold for a breach to be found. This is because such a high threshold is also required for a finding of arbitrariness.

The EU leaves no doubt that only conduct reaching a significant level of gravity is to be caught by its FET standard. As mentioned, this is done by including adjectives 'fundamental' (breach of due process or transparency), 'manifest' (arbitrariness) and 'targeted' (discrimination) in the exhaustive list of obligations that define the EU's FET standard. While concerns have even been voiced that this threshold may be too high for an FET claim to ever succeed,[99] it remains to be seen whether a dramatic change will indeed occur as tribunals have already been requiring a high threshold for finding illegality under international law, including under the FET standard.[100] This certainly has been the case with the FET standard linked to customary international law,[101] but to some extent also for relevant obligations covered by the EU's FET definition under the autonomous FET standard.[102] Hence, perhaps with the exception of discrimination, a high level of gravity to find a breach of included obligations is likely to be required irrespective of whether or not this is expressly stipulated.[103]

An explicit incorporation of a high threshold in the FET standard is important, of course, as it prevents dissents from occurring and mandates justification of why the threshold is met in the dispute concerned. At the same time, it remains to be seen whether and how this will indeed raise the bar for finding an FET breach under the EU's IIAs also given, as argued by others, the required thresholds are, in fact, evaluative concepts.[104] Therefore, the actual assessment of how serious or apparent a wrongdoing is will always be the result of the subjective views of those deciding the case. Arguably, disagreements of that kind have

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[99] A. Reinisch, *supra* note 89, Chapter 3, section 3.4.

[100] Exceptions do exists but they can mostly be found in early case law. One of them is the much criticised *Tecmed* award rendered back in 2003 and discussed in *supra* note 32. For criticism of a low treshold, see also oft-cited Z. Douglas, *supra* note 32, p. 28.

[101] P. Dumberry, 'The Prohibition against Arbitrary Conduct and the Fair and Equitable Treatment Standard under NAFTA Article 1105', 15 *Journal of World Investment and Trade* (2014), 117-151.

[102] As explained *infra* in section 4, for a breach of due process or arbitrariness, investment tribunals have been following the ELSI case decided by the ICJ in 1989 stipulating that in order to constitute an international deliquency, state actions must be 'wilful' in the sense of being 'an act which shocks, or at least surprises a sense of judicial propriety', imposing a high treshold for such international deliquency. *Case Concerning Elettronica Sicula SpA (ELSI) (United States of America* v. *Italy)* (Judgment) [1989] ICJ Reports 15, para. 128. See also A. Reinisch, *supra* note 89, Chapter 3, section 3.3.2.

[103] Discrimination may be an exception here as, in principle, any unjustified differential treatment of the similarly situated investor or investment is prohibited. Under the EU's FET definition, one would also need to that the discriminatory treatment was 'targeted' at the investor or investment, in addition to being based on manifestly wrongful grounds as only such discrimination is covered by the EU's definition. However, the significance of a high threshold for discrimination claims is limited as it is generally rather difficult to succeed in such claims in ISDS disputes in any case due to the fact that discrimination is found only when no acceptable justification for a differntial treatment is provided. Moreover, there are other non-discrimination obligations in the EU's IIAs investors can invoke if faced with unjustified differential treatment – national and most-favoured-nation treatment obligations prohibiting nationality-based discrimination against or among foreign investors. These non-discrimination obligations prohibit all, not just targeted, discrimination.

[104] C. Henckels, *supra* note 4, p. 37.

been among the reasons why dissenting opinions are all but rare in ISDS arbitration.[105]

The next section discusses the concept of (manifest) arbitrariness as understood and applied in ISDS jurisprudence to then assess whether this concept could undermine the EU's claim that its IIAs and FET standard can withstand scrutiny in disputes involving states' regulatory autonomy.

4. ARBITRARINESS IN ISDS JURISPRUDENCE

The prohibition of arbitrariness is generally recognized as part of states' obligations under international law, even as a general principle of law.[106] It also is a common feature in IIAs, being either expressly mentioned (often jointly with a prohibition of unreasonable and/or discriminatory treatment) and/or considered as part of the FET standard.[107] Including arbitrariness in the definition of the EU's FET standard is thus unsurprising, and in line with standing ISDS jurisprudence.[108] To determine whether this inclusion of arbitrariness in the FET definition could undermine the EU's argument that states' regulatory autonomy is sufficiently safeguarded under its IIAs, this section offers an overview of the interpretation of the concept of arbitrariness in existing ISDS jurisprudence. The next section proceeds with the analysis of the EU's FET standard taking this jurisprudence into account together with the regulatory autonomy safeguards incorporated in the EU's IIAs and discussed in the previous section.

Turning to existing ISDS jurisprudence on arbitrariness, because IIAs normally do not define the concept of arbitrariness, ISDS tribunals were able to

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[105] According to the Jus Mundi research database, until January 2021, there have been no less than 141 dissenting opinions at the jurisdictional and merits stages of ISDS disputes, with another 4 dissents in annulment proceedings. Until 31 July 2020, the overal figure is 139 (six dissenting opinions less).- Jus Mundi available at <https://jusmundi.com/en/document/wiki/en-dissenting-opinions>. In the same period, 707 treaty-based investor-state disputes have been concluded, see UNCTAD's Investment Dispute Settlement Navigator. For example, in *Phillip Morris* v. *Uruguay* arbitrator G. Born dissented arguing that a denial of justice had taken place. He did so on the basis of the same facts that prompted the majority of the tribunal to find the opposite, while all three arbitrators generally agreed on the legal standard for the assessment of denial of justice claims (which also involve a high threshold to be met for a breach to be found). *Philip Morris* v. *Uruguay*, Concurring and Dissenting Opinion Co-Arbitrator Gary Born, *supra* note 23.

[106] C. Schreuer, 'Protection against Arbitrary or Discriminatory Measures', in: R.P. Alford and C.A. Rogers (eds.), *The Future of Investment Arbitration* (Oxford: Oxford University Press 2007), Chapter 10, 183-198, at 188-189; J. Stone, *supra* note 15, pp. 86-87.

[107] If there is no express prohibition of arbitrary treatment in the applicable IIA but there is an FET obligation, a finding of arbitrary treatment necessarily results in a finding of an FET breach. When the IIA prohibits arbitrary treatment in addition to the FET obligation, two treaty breaches are likely to be found, based on same reasons. This is because arbitrary treatment is always considered 'unfair and unequitable', though the opposite is not true as the FET standard is broader and contains other obligations as well. See, for example *CMS Gas Transmission Company* v. *Republic of Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005), paras. 290-295; *El Paso* v. *Argentina*, *supra* note 32, para. 230; and *Philip Morris* v. *Uruguay*, *supra* note 23, para. 445.

[108] For example, *Lemire* v. *Ukraine*, *supra* note 38, para. 284; and *Crystallex* v. *Venezuela*, *supra* note 38, para. 577. See also J. Stone, 'Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment', 25 *Leiden Journal of International Law* (2012), 77-107.

follow the ruling of the International Court of Justice in the well-known *ELSI* case, stipulating that:

> Arbitrariness is not so much something opposed to a rule of law as something opposed to the rule of law. […] It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety…[109]

This definition of arbitrariness has remained largely uncontested, both in ISDS jurisprudence[110] and in academia.[111] Only exceptionally an argument has been made that the *ELSI* definition is in fact not helpful as it is 'overly vague' and fails 'to provide a usable standard by which to test state actions.'[112] Generally, however, both the objective element ('the rule of law' standard) and the subjective element (a shock or at least a surprise) of the *ELSI* definition of arbitrariness have been replied upon by tribunals, with some focusing more on one and others on the other.[113] With regard to the objective element ('the rule of law' standard), it has been argued that there may be different types of arbitrariness, including substantive and procedural arbitrariness.[114] Substantive arbitrariness would exist where the conduct 'fails to meet some yardstick of rationality or proportionality', whereas procedural arbitrariness entails absence of procedural fairness, including denial of justice or absence of due process.[115] It is the former that has led – and may continue to do so – to an interpretation limiting states' regulatory autonomy to a significant extent.

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[109] *ELSI*, *supra* note 102, para. 128.

[110] For example, *Loewen* v. *United States*, *supra* note 43, para. 131; and *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A.* v. *Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability (10 April 2013), para. 873.

[111] See, for example, P. Dumberry, *supra* note 101, p. 122.

[112] K.J. Hamrock, 'The ELSI case: Toward an International Definition of Arbitrary Conduct', 27 *Texas International Law Journal* (1992), 837-864, at 838. According to Hamrock, there are at minimum three important difficulties with the ELSI's standard for arbitrariness: (i) an incorrect presumption that (ICJ) judges with different national (and legal culture) backgrounds have a shared conscience, a shared perspective by which a state conduct can be measured to conclude whether it is 'shocking or at least surprising'; (ii) the absence of predictability for the parties which cannot ascertain the judges' subjective beliefs and experiences that have shared their legal conscience; and (iii) insufficient guarantee that the reliance on subjective evaluation of the state conduct by judges does not expand the scope of review to the desirability rather than the mere rationality and thus validity of the conduct. Therefore, Hamrock proposes a more objective test for assessing arbitrariness in international law, drawing from national (English, US and French) law approaches and including four elements: (i) existence of authorization by law for the state's action; (ii) existence of an improper purpose for the action; (iii) existence of irrelevant circumstances because of which the action was taken; and (iv) patent unreasonableness of the action – ibid. For criticism relating to the subjective element of arbitrariness assessment in the sense of being of little help and predictability, see also V. Heiskanen, 'Arbitrary and Unreasonable Measures', in: A. Reinisch (ed.), *Standards of Investment Protection* (Oxford: Oxford University Press 2008), 87-110, at 103; and U. Kriebaum, 'Arbitrary/ Unreasonable or Discriminatory Measures', in: M. Bungenberg *et al.* (eds.), *International Investment Law* (Baden Baden: Nomos 2015), 790-806, at 10, available at <http://ssrn.com/abstract=2268927>.

[113] U. Kriebaum, ibid, pp. 9-10.

[114] J. Stone, *supra* note 108, p. 90, referring to other authors.

[115] Ibid.

Generally speaking, ISDS tribunals have settled that 'the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law'.[116] A list of state actions that would certainly be considered arbitrary, generated early onwards and repeatedly used by tribunals, comprises the following:

a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;
c. a measure taken for reasons that are different from those put forward by the decision maker;
d. a measure taken in willful disregard of due process and proper procedure.[117]

This understanding of arbitrariness has been supported by tribunals also when applying the FET standard, disregarding its type (autonomous or linked to customary international law). In all cases, to find a breach, tribunals would require 'something more' than a mere violation of states' law,[118] which is in line with the above mentioned ICJ ruling in the *ELSI* case calling for a breach of 'the' rule of law, not merely 'a' rule of law.

However, both in IIAs and in jurisprudence, arbitrariness has often been employed interchangeably with unreasonableness, as if there was no difference between these two concepts.[119] This seems indeed to be the position of many tribunals,[120] though not all considered the issue consciously, rather simply used the same definition for both concepts.[121] Even when the issue was explicitly addressed, the same conclusion was reached, supporting the view that the ordinary (dictionary) meaning of unreasonableness and arbitrariness is 'substantially the same in the sense of something done capriciously, without

[116] *Lemire* v. *Ukraine*, *supra* note 38, para. 263. See also *Cervin Investissements S.A. and Rhone Investissements S.A.* v. *Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award (7 March 2017), para. 523.

[117] As explicitly acknowledged in arbitral awards, this definition was generated by a recognized authority in the field, Prof. Schreuer, and taken over by investment tribunals, including *Lauder v. Czech Republic*, para. 221; *Tecmed v. Mexico*, *supra* note 32, para. 154; *Loewen* v. *United States*, *supra* note 43, para. 131; *Saluka* v. *Czech Republic*, *supra* note 33, para. 307; *EDF* v. *Romania*, *supra* note 53, para. 303. – *Lemire* v. *Ukraine*, *supra* note 38, paras. 262-263.

[118] P. Dumberry, *supra* note 92, pp. 147-150. Referring to a number of ISDS disputes, Dumberry explains that the 'something more' requirement was considered met in instances involving sectoral or local prejudice, unjustified repudiation of law, manifest lack of reasons, or unfair targeting of a specific investor. Dumberry notes that the threshold required by NAFTA tribunals (dealing with the FET standard linked to the customary international law minimum standard of treatment) was generally higher compared to non-NAFTA cases.

[119] C. Schreuer, *supra* note 106, p. 183.

[120] For example, *Siemens A.G.* v. *The Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007), para. 319; *National Grid plc* v. *The Argentine Republic*, UNCITRAL, Award (3 November 2008), para. 197; *Plama Consortium Ltd.* v. *Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), para. 184; *EDF* v. *Romania*, *supra* note 53, para. 303; *Lemire* v. *Ukraine*, *supra* note 38, para. 262.

[121] For example, in *EDF* v. *Romania*, the tribunal relied on the above mentioned definition of arbitrariness developed by Prof. Schreuer when interpreting reasonableness required by the applicable BIT, *supra* note 53, para. 303.

reason'.[122] Very few tribunals saw a distinction between arbitrariness and unreasonableness.[123] In academic literature, most commentators discuss arbitrariness and unreasonableness interchangeably,[124] though some do acknowledge debate on this issue.[125]

The making – or not – of a distinction between arbitrariness and unreasonableness has significant consequences for the finding of a treaty breach. If arbitrariness is to be understood as being narrower than unreasonableness, fewer situations are caught by the former than the latter. In contrast, if arbitrariness is to be regarded as interchangeable with unreasonableness, more situations fall under it. Indeed, tribunals that viewed the two concepts interchangeably interpreted arbitrariness rather broadly. For example, the tribunal in *Lemire* v. *Ukraine* included in the definition of arbitrariness 'conduct which "manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination"'.[126] Similarly, the tribunal in *LG&E* v. *Argentina* believed that the rationality of state conduct was covered, including 'a consideration of the effect of a measure on foreign investments and a balance of the interests of the State with any burden imposed on such investments', clearly reading rationality and proportionality into the concept of arbitrariness.[127] Normally, the requirement of rationality and proportionality would be used to assess 'reasonableness' of state conduct,[128] but the tribunal in *LG&E* v. *Argentina* applied them to arbitrariness as well, thereby extending the understanding of what constitutes arbitrary conduct.

Such a broad approach to the concept of arbitrariness finds some support also among commentators. The prominent example is Prof. Schreuer, cited by

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[122] *National Grid* v. *Argentina*, *supra* note 120, para 197.

[123] For example, in *BG* v *Argentina*, the tribunal had to interpret and apply the obligation of reasonableness and, while acknowledging a possible overlap with the prohibition of arbitrariness, the tribunal make a distinction between them, stressing that arbitrariness was about willful disregard of the rule of law whereas reasonableness about the protection of the expectations of the IIA parties rather than the means chosen by the state to achieve its objectives. See *BG Group Plc.* v. *The Republic of Argentina*, UNCITRAL, Final Award (24 December 2007), paras. 341-342. More recently, in *Glencore* v. *Colombia*, the tribunal opined that a measure that did not conform to reason was arbitrary and thereby by definition unreasonable but not contrarywise as the scope of unreasonableness was wider that the scope of arbitrariness. According to the tribunal, the latter is confined to the assessment of whether 'prejudice, preference or bias is substituted for the rule of law', whereas the former requires assessment of the rationality of states' measures and/or their adoption process – *supra* note 32, paras. 1446-1452.

[124] C. Schreuer, *supra* note 106 (though starting with providing dictionary meaning separately for both concepts); V. Heiskanen, *supra* note 112 (though see an important nuance made by this author, discussed in *supra* note 130); U. Kriebaum, *supra* note 112.

[125] J. Stone, *supra* note 108, p. 91.

[126] *Lemire* v. *Ukraine*, *supra* note 38, para. 262, referring in para. 307 to *Saluka* v. *Czech Republic*, *supra* note 33, although the latter did not discuss arbitrariness but fair and equitable treatment incl. reasonableness and arbitrariness.

[127] *LG&E* v. *Argentina*, *supra* note 23, para. 158. The tribunal adopted this interpetation of arbitrariness with a reference to, inter alia, the above quoted ELSI case. This interpretation was recently explicitly endorsed in *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.* v. *Argentine Republic*, ICSID Case No. ARB/09/01, Award (21 July 2017), para. 923.

[128] See *infra* notes 132 and 134.

tribunals, who wrote back in 2007 that the categories of measures deemed arbitrary would include:

> a measure that inflicts damage on the investor without serving any apparent legitimate purpose. The decisive criterion for the determination of the unreasonable or arbitrary nature of a measure harming the investor would be whether it can be justified in terms of rational reasons that can be related to the facts. Arbitrariness would be absent if the measure is a *reasonable and proportionate* reaction to objectively verifiable circumstances [emphasis added].[129]

This approach is among those now adopted by some tribunals addressing claims of arbitrariness.[130] Under this approach a problem arises whereby there is more scope for substantive scrutiny of state conduct with a danger of crossing 'a fine line between a mere procedural control and what may be termed a 'strict scrutiny' of governmental measures',[131] especially when considering how the concept of reasonableness has also been expended by the proportionality requirement, in particular in more recent ISDS disputes. Traditionally, reasonableness would be assessed by inquiring into the rationality of state conduct, looking at the rationality of both the policy and the measure taken to achieve it.[132] Many tribunals have endorsed this interpretation, some stressing in addition that the requirement of reasonableness does not give tribunals the power to pass judgments on the appropriateness of states' policies.[133] However, some of the very same tribunals would then go beyond assessing the mere rationality of state conduct, adding proportionality to their assessment as well.[134]

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[129] C. Schreuer, *supra* note 106, p. 188. Prof. Schreuer's views were referred to, for example, in the above mentioned *Teinver* v. *Argentina,* para. 923 and footnote 1116.

[130] Heiskanen refers to this as the 'due process' approach, as oppose to the 'I know it when I see it' approach under which focus is on the shocking or surprising nature of the state conduct. Under the (more technical) due process approach, the state conduct is being assessed through two questions: First, whether the conduct is supported by any rational or justification. If not, the conduct is arbitrary. If yes, the second question is whether there is a rational connection between the provided justification and a legitimate public policy. If not (or if the conduct is discriminatory), the state conduct is unreasonable. Under this approach, there is a certain distinction between arbitrariness and unreasonableness. – V. Heiskanen, *supra* note 112, pp. 101-106.

[131] Ibid, p. 106.

[132] *AES Summit Generation Limited and AES-Tisza Erömü Kft.* v. *Republic of Hungary*, ICSID Case No. ARB/07/22, Award (23 September 2010), paras. 10.3.7 – 10.3.9. This interpretation was followed by many tribunals, including recently for example in *Voltaic Network GmbH* v. *Czech Republic*, PCA Case No. 2014-20, Award (15 May 2019), para. 602.

[133] *AES* v. *Hungary*, ibid, para. 10.3.34; *Eletrabel* v. *Hungary*, *supra* note 58, para. 180; *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB* v. *Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum (9 March 2020), para. 570. See also V. Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (Cheltenham: Edward Elgar Publishing 2018), p. 133.

[134] *Electrabel* v. *Hungary*, *supra* note 58, para. 179 and *Hydro Energy v. Spain*, ibid, paras. 573-574. When holding that proportionality is part of the applicable test, many recent tribunals have referred to the passage from *AES v Hungary*, reading proportionality into the tribunal's argument that rationality requires, next to the existence of a rational policy, also a rational measure. According to the tribunal in *AES* v. *Hungary*, such measure only exists if there is 'an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented' (*supra* note 132,

These tribunals clearly joined those that have used proportionality as a tool capable of 'balancing State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities and the necessity to protect foreign investment and its continuing flow'.[135] Remarkably, many ISDS tribunals did not apply (what is commonly accepted to be) the proportionality test,[136] often merging the analysis of the individual steps of the test.[137]

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paras. 10.3.7 – 10.3.9). The tribunal in *Electrabel* v. *Hungary* understood this to mean as including 'the requirement that the impact of the measure on the investor be proportional to the policy objective sought' (para. 179). This tribunal also referred to a number of past ISDS awards that had mentioned proportionality, although none of the referred tribunals have actually elaborated on or applied proportionality in casu. Most of them referred to the Tecmed award (*supra* note 32), which first mentioned proportionality (in the context of indirect expropriation), basing it on the jurisprudence of the European Court of Human Rights. Subsequently, the tribunals engaged in a more general balancing exercise. The jurisprudence of the European Court of Human Rights has been cited as a source of authority for including proportionality in FET assessment in a number of disputes (more recently, for example, in *SolEs Badajoz* v. *Spain*, *supra* note 23, para 328) as well as in academic literature (e.g. B. Kingsbury and S. Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality', in: S. Schill (ed.), *supra* note 46, pp. 75-104, referred to in *Electrabel* v. *Hungary*, *supra* note 58, para. 179).

[135] *Hydro Energy* v. *Spain*, *supra* note 133, para. 543. See also *RREEF* v. *Spain*, *supra* note 38, para. 465. Note that some tribunals have resorted to proportionality when assessing reasonableness of the host state's conduct (e.g. *Philip Morris* v. *Uruguay*, *supra* note 23, para. 409; *SolEs Badajoz v. Spain*, *supra* note 23, para 328), others through reasonableness the conduct's arbitrariness (*Electrabel* v. *Hungary*, *supra* note 58, para. 179). Yet other tribunals used proportionality as a self-standing obligation under the FET standard (*RREEF* v. *Spain*, *supra* note 38, para. 260) or as part of both the FET standard and reasonableness (*Hydro Energy* v. *Spain*, *supra* note 133, para. 573; *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum (31 August 2020), para. 414).

[136] The commonly accepted test of proportionality has three tiers, requiring cumulatively that the measure under consideration is (i) *suitable* to achieve a legitimate public policy objective; (ii) *necessary* and (iii) *not excessive*. This entails inquiry into the measure's causal relationship to the policy objective (under (i)), the existence of a less restrictive alternative (under (ii)) as well as the balancing of the effects of the measure on the affected right or interest (of the investor) *vis-à-vis* the policy objective sought (under (iii)). The last step is referred to as proportionality *stricto sensu*. See A. Stone Sweet and G. Della Cananea, 'Proportionality, General Principles of Law, and Investor-State Arbitration: Response to José Alvarez', 46 *Journal of International Law and Politics* (2014), 911-954, at 917-918. Note that the first step of the test is sometimes split into a part concerning the legitimacy of the public policy and a part where the measure's suitability to achieve the policy is assessed. – C. Henckels, 'Proportionality and the Standard of Review in Fair and Equitable Treatment Claims: Balancing Stability and Consistency with the Public Interest', Society of International Economic Law (SIEL), 3rd Biennial Global Conference, 26 June 2012, available at SSRN at <https://ssrn.com/abstract=2091474>, pp. 7-8; and A. Stone Sweet and J. Mathews, 'Proportionality Balancing and Global Constitutionalism', 47 *Columbia Journal of Transnational Law* (2008), 68-149, at 76.

[137] *Electrabel* v. *Hungary*, *supra* note 58, paras. 180-186, *Hydro Energy* v. *Spain*, *supra* note 133, para. 574; *Cavalum* v. *Spain*, *supra* note 135, para. 415. For example, recently in *Eskosol* v. *Italy* the tribunal accepted 'in principle' the applicability of proportionality test to a measure 'in the sense of [not] imposing burdens on foreign investment that went far beyond what was reasonably necessary to achieve good faith public interest goals' (para. 410) but did not go through each step of the proportionality test and did not assess the measure's impact on the investment. In its analysis, the tribunal focused on the fact that the measures clearly showed that 'consideration was given to, and reasonable provision was made for, the interests of [concerned] investors',

Despite noted inconsistent application of the proportionality test by ISDS tribunals,[138] and warnings against the unduly strict approaches taken by some (early) tribunals and curtailing of states' regulatory autonomy,[139] academics have also generally endorsed proportionality as part of the FET (and other) standard(s), considering it to be an appropriate tool for adjudicating disputes involving competing interests,[140] with opposition being relatively rare.[141] It has even been suggested that proportionality is more suitable for this purpose than reasonableness (meaning merely rationality) as, unlike the latter, the former provides for a set of criteria for judging the legality of state conduct preventing subjective value judgments, and allows for the protection against measures with excessive impact on investments.[142]

Arguments in favor of using proportionality in the application of the FET and other standards of investment protection, are certainly persuasive. Given the encompassing nature of this standard and the existence of competing interests in every society, proportionality appears to be a suitable tool capable of achieving their reconciliation. Moreover, as noted by others, there are few alternatives to proportionality: requiring either declaration by the legislator of certain rights being absolute or prevailing over other rights or values, or the granting of such rights to a judiciary bound by formal precedent. Neither of these options seems desirable.[143]

Nonetheless, concerns about the use of proportionality in ISDS disputes are equally noteworthy. Without repeating all arguments raised in this regard, a few

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with a consequence that the measures were proportionate. See *Eskosol S.p.A. in liquidazione* v. *Italian Republic*, ICSID Case No. ARB/15/50, Award (4 September 2020), paras. 411-415.

[138] For example, P. Ranjan, *supra* note 10, pp. 864- 867.

[139] For example, C. Henckels, *supra* note 136.

[140] B. Kingsbury and S. Schill, *supra* note 134; A. Stone Sweet and G. Della Cananea, *supra* note 136; C. Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge: Cambridge University Press 2015); T. Cottier *et al.*, 'The Principle of Proportionality in International Law: Foundations and Variations', 18 *Journal of World Investment and Trade* (2017), 628-672, especially section 6.

[141] A few commentators disagree that proportionality has a sufficient legal basis in international investment law. For example, Vadi argues that international investment law misses sufficient 'constitutional density' at present, needed for successful 'migration' of proportionality to the field. She also disagrees that proportionality has acquired the status of general principle of law or is part of customary international law (as yet). – V. Vadi, *supra* note 133, Chapter 3. See also M. Sornarajah, *supra* note 7, pp. 288-291; and P. Ranjan, *supra* note 10, pp. 868-877.

[142] C. Henckels, *supra* note 136, p. 13. It should be noted that reasonableness itself has indeed been regarded as a tool capable of balancing states' obligations under the IIAs and their right to regulate. See V. Vadi, *supra* note 133, p. 134. Given the increasingly felt need of reconciliation of states' obligations towards foreign investors with their right, even obligation, to regulate in pursuance of other legitimate policy objectives, and lacking explicit legal provisions in IIAs that could be employed, tribunals have resorted to various legal concepts and standards, often from public law, to do so. Apart from proportionality and reasonableness, another legal concept used for such balancing exercise is a deferential standard of review. See, for example, C. Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration', 4 *Journal of International Dispute Settlement* (2013), 197-215. For the discussion on 'balancing tools', see also S. Schill and V. Djanic, 'Wherefore Art Thou? Towards a Public Interest-Based Justification of International Investment Law', 33 *ICSID Review* (2018), 29-55.

[143] A. Stone Sweet and J. Mathews, *supra* note 136, p. 88.

deserve mention: the absence of the institutional safeguards and constitutional features in international investment law but present in legal systems where proportionality was developed, and the lack of embeddedness of investment arbitrators in the community concerned with the dispute resulting in unfamiliarity with the broader context of the dispute necessary for proper weighting and balancing of various interests.[144]

Disregarding which view is supported, the fact is that proportionality has been increasingly utilized in ISDS arbitration.[145] Therefore, unless somehow excluded by the applicable IIA, it is likely that this trend will continue. Surprisingly, except for indirect expropriation, new generation IIAs normally do not refer to proportionality in any way, neither in the context of the FET standard nor in relation to other standards of investment protection, and this is also the case with the EU's IIAs.[146] And so the question is whether proportionality can continue to be read into some standards of investment protection (e.g. FET), or rather whether safeguards against extensive interpretation of investment standards preclude this. If proportionality remains arguable, future tribunals will retain the ability to award compensation to foreign investors for states' measures with excessive impact on investments, disregarding the policy objectives behind the measures. Moreover, without a clear direction on the test to be employed for assessing proportionality, the current state of uncertainty about the limits of states' regulatory power will continue to cause unpredictability in investor-state relationships.

As mentioned, under the EU's FET definition, non-discriminatory regulatory measures seem substantively reviewable only under manifest arbitrariness. Therefore, the next section assesses how much scope is left for consideration of proportionality in the concept of manifest arbitrariness under the EU's IIAs.

5. MANIFEST ARBITRARINESS IN THE EU'S IIAs

Several commentators have expressed a view that manifest arbitrariness in CETA, the EU's first IIA, is 'prone to being interpreted in a myriad of ways, leaving an opening for a judicially active arbitral tribunal'.[147] Indeed, as shown above,

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[144] P. Ranjan, *supra* note 10, p. 862.

[145] UNCTAD, 'Review of ISDS Decisions in 2019: Selected IIA Reform Issues', *IIA Issues Note* (January 2021), p. 17, available at <https://investmentpolicy.unctad.org/publications/1241/review-of-isds-decisions-in-2019-selected-iia-reform-issues>.

[146] The EU's IIAs' provisions on indirect expropriation clarify, in line with previaling ISDS jurisprudence, that a non-discriminatory exercise of states' right to regulate does not constitute indirect expropriation 'except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive'. See CETA, Annex 8-A Expropriation, para. 3. A similar clarification is contained for example in Annex 9-B Expropriation of CPTPP, para. 3(b). Notably, the latter only refers to 'rare circumstances' without any further guidance, and thus without implied reference to proportionality, unlike the equivalent provision in CETA.

[147] B. Choudhury, 'International Investment Law and Noneconomic Issues', 53 *Vanderbilt Journal of Transnational Law* (2020), pp. 2-77, at p. 49. See also, for example, C. Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP', *supra* note 21, p. 49; and Y. Levashova, *supra* note 81, last para.

the interpretation of arbitrariness by past tribunals has not been uniform. Certainly, there is a common bottom line in that, to be arbitrary, state conduct must disregard 'the' rule of law. Nonetheless, exactly what constitutes such disregard can range from the most serious abuses of law and bad faith to a modification of an applicable regulatory framework with a disproportionate impact on the investment.

Therefore, by not specifying properly what constitutes (manifest) arbitrariness, the EU may not be able to live up to its promise that CETA, and by extension its other IIAs, preserve states' regulatory autonomy through, inter alia, 'clearly defined' standards of investment protection. In relation to the FET standard, concerns have indeed been raised not only about the recognition of legitimate expectations as relevant but also about a missing definition, especially of manifest arbitrariness.[148] Perhaps that is why the EU's latest agreement with Mexico finally includes further clarifications of the grounds covered by the FET obligation. This is a welcome development as only sufficiently precise rules are likely to ensure their predictable and uniform interpretation in line with treaty parties' intentions.

Looking at the clarifications in the EU-Mexico Agreement in more detail, a clarification has been included in the operative FET provision stipulating that manifest arbitrariness covers targeted discrimination on manifestly wrongful grounds.[149] More interestingly, footnote 16(ii) further instructs tribunals assessing claims of manifest arbitrariness to 'take into account' 'inter alia' the following considerations:

> whether the measure or series of measures were patently not founded on reason or fact, or were patently founded on illegitimate grounds such as prejudice or bias. The mere illegality, or a merely inconsistent or questionable application of a policy or procedure, does not in itself constitute manifest arbitrariness […], while a total and unjustified repudiation of a law or regulation, or a measure without reason, or a conduct that is specifically targeted to the investor or its covered investment with the purpose of causing damage are likely to constitute manifest arbitrariness…

Compared to clarifications of other listed FET obligations, this clarification is relatively long, suggesting that it received significant attention from the treaty parties, although obvious situations are included (lack of reasons, illegitimate grounds like prejudice and bias, unjustified repudiation of law, targeted injurious conduct) or excluded (mere illegality and mere inconsistent application of a policy or procedure) from the scope of manifest arbitrariness. Also unsurprisingly, to constitute 'manifest' arbitrariness, each situation must pass a high threshold ('patent', 'total', 'specific').

Nonetheless, there are a few noteworthy elements in this clarification, such as the exclusion of mere 'questionability' from the scope of manifest arbitrari-

[148] C. Henckels, *supra* note 4, p. 49.

[149] This is somehow surprising because discrimination is usually viewed as part of the FET standard *in addition* to arbitrariness. This is the approach taken in other EU's IIAs where non-discrimination is indeed listed as an independent FET obligation, with the EU-Singapore IPA being an exception by not explicitly including prohibition of discrimination in the FET standard at all.

ness; an express and double inclusion of a lack of reason (as 'not founded on reason or fact' and as 'without reason'); and the illustrative nature of the list of situations recognized as falling under manifest arbitrariness. As discussed hereunder, all these elements suggest that, even under this clarification, there is sufficient scope for ISDS tribunals to continue interpreting manifest arbitrariness as involving consideration of state measures' reasonableness and proportionality.

Taking a closer look at the first notable element in the clarification, as mentioned, a merely 'questionable' application of a policy or procedure does not qualify as manifest arbitrariness. Arguably, this 'questionability' should not be understood as referring to an 'unusual' state conduct where the policy or procedure would likely be hiding an improper motive, an undisputed element of arbitrariness also included in the present clarification. It is not such 'questionability' that is meant by the exclusion but rather some other form of questionability. One way to see it is as inferring a mistake in law or fact(s) in the application of a policy or a procedure. However, this is already explicitly excluded from the coverage of manifest arbitrariness under 'mere' incorrectness and inconsistency. Another possible reading of 'questionability' entails an application of a policy or procedure which relies on a controversial theoretical basis or involves a controversial policy choice unsupported by some stakeholders. In the past, some ISDS tribunals acknowledged that such 'questionability' should not be equated with arbitrariness but with the exercise of states' regulatory discretion.[150] However, while some tribunals placed a borderline between this 'questionability' (acceptable) and arbitrariness (unacceptable) at maladministration,[151] others implied the requirement of reasonableness in the assessment of states' exercise of regulatory autonomy.[152] It is therefore not certain that 'questionability' in the present clarification of manifest arbitrariness actually excludes controversial policies and procedures from its scope, especially if read together with the remaining part of the clarification stating that, *inter alia*, 'a measure without reason' is likely to constitute manifest arbitrariness.

Remarkably, a lack of reason justifying state conduct is mentioned twice in the clarification of manifest arbitrariness contained in the EU-Mexico Agreement – as 'not founded on reason or fact' and as 'without reason'. The relevant question here is whether the two concepts are different and, more importantly, whether either or both of them encompass the requirement of reasonableness and/or proportionality. If so, the prohibition of arbitrariness in the EU's IIAs may not depart from the previous interpretation as dramatically as may be believed. While it is true that to find an FET breach, arbitrariness must be 'manifest', as

[150] This understanding of 'questionability' and arbitrariness was adopted, for example, in *Cargill* v. *Mexico*, *supra* note 43, para. 291. Referring to another award too, the Cargill tribunal stated that for a state conduct to be arbitrary, it must 'move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an unexpected and shocking repudiation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive' – ibid, para. 293.

[151] Ibid.

[152] See *supra* section 4 as well as *supra* note 142.

argued before, this is an evaluative concept[153] and is therefore incapable of ensuring a high level of security and predictability of outcome. Besides, tribunals have generally already been applying a high threshold for finding arbitrariness under international law.[154] Moreover, according to the EU-Mexico clarification, a measure without reason 'is likely to constitute *manifest* arbitrariness' [emphasis added], suggesting that whenever a reason behind state conduct is missing, further inquiry into manifestness may not be needed.

When it comes to the meaning of, and the difference between, 'not found on reason or fact' and 'without reason', the former could be understood as relating to conduct found on 'something else' than reason or fact, necessarily presuming existence of other grounds or motives behind state conduct, whereas 'without reason' appears to indicate existence of no motive. There are several difficulties with making this distinction, though. Firstly, it is difficult to distinguish between 'reason' and 'motive' given that the dictionary meaning of 'reason' includes 'motive, goal, purpose'.[155] Secondly, it is hard to image no motive behind state conduct as, arguably, there typically is a reason, otherwise no action would be taken. This is not to say that the reason is always legitimate. However, conduct based on illegitimate grounds is caught by the clarification of arbitrariness separately. Hence, 'without reason' should have a different meaning.[156] And so should 'something else' than reason or fact under 'not founded on reason or fact'. Arguably, this 'something else' cannot be viewed as including error or inconsistency, at least not under the EU-Mexico clarification which stipulates that mere incorrectness or inconsistency are not to be regarded as arbitrariness.

Hence, this paper argues that there is very limited scope for a conduct other than irrational conduct to be characterized as 'not found on reason or fact' and/or 'without reason'. This is due to the ordinary meaning of the word 'reason', which includes motive, goal, purpose, but also logic and rationality.[157] It is also due to the context in which the interpretation of the relevant treaty language must take place,[158] namely investment protection aimed at establishing clear, transparent and predictable rules governing investments.[159] Therefore, conduct

[153] See *supra* section 3 and *supra* note 104.

[154] See *supra* section 4.

[155] *Oxford English Dictionary*, entry 'reason', available at <https://www.oed.com/view/Entry/159068?rskey=vpWceB&result=1#eid>.

[156] Given the wording used, it is not likely that 'without reason' would be understood as meaning the same as without 'a stated' reason as the latter entails the act of a reason's statement, some explanation of the basis for the measure to the affected person. It is a procedural matter, an issue of due process, rather than a substantive matter which seems implied in the wording 'measure without reason'. As part of due process, it would be covered by the EU's FET standard in its own right under Art. 8.10.2(b), Art. 2.4.2(b) EU-Singapore IPA, Art. Art. 2.5.2(b) EU-Vietnam IPA, and Art. 15.2(b) EU-Mexico Agreement (investment chapter).

[157] *Oxford English Dictionary*, entry 'reason', *supra* note 155.

[158] According to the main customary international rule on treaty interpretation enshrined in Art. 31 of the *Vienna Convention on the Law of Treaties*, treaties are to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. See *Vienna Convention on the Law of Treaties*, signed on 23 May 1969, UNTS Vol. 1155, p. 331.

[159] This objective, referred to earlier as well in section 3 and supra note 80, can be found in CETA Preamble, third paragraph. As mentioned, no preamble is available for the EU-Mexico

not based on (or without) reason should be interpreted as meaning irrational conduct. This would be in line with ISDS jurisprudence that has interpreted arbitrariness alongside/interchangeably with reasonableness and, through it, also proportionality because conduct that goes beyond what is necessary to achieve a legitimate policy goal or that disregards excessive impact on an affected investor is regarded as lacking rational justification too.

Even if such an interpretation of 'no reason' were to be rejected as being too broad, the fact that the clarification of manifest arbitrariness offers a merely illustrative list of expressly included situations leaves the door open for reading the requirements of reasonableness and proportionality into it. Certainly, it could be argued that the opening is not very large as 'unlisted' instances should be of a kind comparable to the 'listed' ones. Nonetheless, as seen in past ISDS jurisprudence, this does not prevent including reasonableness and/or proportionality. First of all, they are not unambiguously excluded and, more importantly, as mentioned previously, they seem to be the only feasible way in which investors' expectations can be taken into account in the application of the FET standard. This is because other FET obligations and other grounds explicitly included in the clarification of manifest arbitrariness are unsuitable. A conduct that denies justice, breaches due process, is abusive or discriminatory (other FET obligations), or that is based on illegitimate reasons, unrelated to relevant facts, totally repudiates law, or purposefully causes damage (other listed instances of manifest arbitrariness) would lead to a breach of the FET standard in and of itself. If investors' expectations are ever to play a role in the consideration of FET claims, it would have to be through the consideration of reasonableness and/or proportionality of state conduct, keeping in mind that interpretation of the FET standard in a manner never allowing for consideration of investors' expectations would be contrary to the principle of effective treaty interpretation and would therefore need to be rejected.[160]

This argument is further strengthened by the EU's choice not to exclude the FET standard from its IIAs and to include it as an autonomous standard, instead of merely listing included obligations or linking FET to customary international law. The EU cannot but be aware that, in consequence, the FET standard is likely to be interpreted as offering a higher level of protection to foreign investors than the minimum standard of treatment under customary international law. Since all other situations listed in the EU's FET definition and in the clarification of manifest arbitrariness are, in fact, part of this minimum standard too, the autonomous nature of the EU's FET standard may invite interpretation distinguishing the standard from the customary international law minimum standard. Reading reasonableness and proportionality into it are likely candidates to

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Agreement yet but it is conceivable that the object and purpose of this agreement it will not be substantially different in relation to the investment chapter than that in CETA.

[160] This principle entails that rules of law, and including international treaties, should be interpreted in a manner 'so as to make their application a means of fulfillment rather than an exercise in futility'. See 'World Court and United Nations Charter: The Principle of Effectiveness in Interpretation', 11 *Duke Law Journal* (1962), 85-96, at 85, available at <https://scholarship.law.duke.edu/dlj/vol11/iss1/3>.

achieve this objective,[161] in particular if considered together with investors' expectations whose scope also leaves some room for interpretation.[162]

Perhaps the clarification of manifest arbitrariness in the EU-Mexico Agreement will still be adjusted; after all the text of the agreement in principle is not yet final and will thus be subject to careful legal scrubbing before its signature. At that stage, the two concepts 'not found on reason or fact' and 'without reason' may well also be merged into one. However, if any reference to 'reason' is maintained, this paper argues that it could be interpreted as encompassing the requirement of reasonableness and proportionality. The same would apply if the list clarifying instances caught by manifest arbitrariness is left illustrative.

Hence, even the clarification of manifest arbitrariness in the EU's latest IIA is not bringing enough precision to the standard's meaning. Even though future tribunals are likely to adopt a deferential approach to the balancing of states' regulatory autonomy with investment protection,[163] measures excessively injurious to foreign investments could still be held 'unfair and unequitable'. In addition, unpredictability of which state conduct would have such an effect and therefore mandate compensation will continue to exist. In circumstances where unprecedented state action is needed to achieve sustainable development goals and to fight climate change, placing burden and costs on everyone, a decision on possible compensation for negatively affected foreign investments should result from a democratic decision-making process involving all affected stakeholders rather than from disputes adjudicated by international tribunals with discretion stemming from rules that provide insufficient guidance on how to deal with competing societal interests.

6. CONCLUDING REMARKS

In several respects, the EU has become a forerunner in reforming the traditional international legal framework for the protection of foreign investments, constructed by its Member States decades ago.[164] Not only has the EU launched the idea of a multilateral investment court to replace the much-criticized ISDS arbitration,[165] it has also paid great attention to the drafting of substantive standards of investment protection. The EU continues to believe in the need to offer

[161] According to Heiskanen, the standard of reasonableness provides for a substantially higher level of protection than the customary international law minimum standard of treatment. V. Heiskanen, *supra* note 112, p. 109.

[162] This is due to the fact that EU's FET clauses do not specify how specific representations may be and do not expressly exclude regulatory measures. See *supra* section 3.

[163] This approach has been advocated by both tribunals and academics. See C. Henckels, *supra* note 142.

[164] See, for example, A. Dimopoulos, 'EU Investment Agreements: A New Model for the Future', in: J. Chaisse *et al.* (eds.), *Handbook of International Investment Law and Policy*, (Heidelberg: Springer 2019).

[165] See the EU's submission to the UNCITRAL Working Group III – UNCITRAL, 'Possible reform of investor-State dispute settlement (ISDS), Submission from the European Union and its Member States', A/CN.9/WG.III/WP.159/Add.1 (24 January 2019), available at <https://undocs.org/A/CN.9/WG.III/WP.159/Add.1>.

international protection to foreign investors in exchange for their much-needed investments. At the same time, it wishes to protect its regulatory autonomy by a more balanced approach, both procedurally and substantively.[166]

This paper addresses a specific substantive issue of investment protection relating to the FET standard. The standard has been criticized as unduly restraining states' regulatory autonomy, tying governments' hands and limiting their policy choices in relation to ways forward towards the achievement of various legitimate policy objectives. The EU has addressed the problem by defining the FET standard on the basis of an exhaustive list of obligations that does not include the obligation of legal stability or direct protection of investors' expectations. Simultaneously, the EU has allowed the latter to be considered as a relevant factor in the assessment of FET claims. This paper argues that this is only possible if done under 'manifest arbitrariness', the only FET obligation that remains suitable for substantive examination of non-discriminatory regulatory acts. However, to do so, manifest arbitrariness would need to be interpreted as encompassing the requirement of reasonableness of state conduct. The EU's latest clarification of manifest arbitrariness does not seem to prevent this – it includes 'measures patently not found on reason or fact' and 'measures without reason' and it leaves the door open for including other, unspecified, instances.

This paper subscribes to the understanding of (manifest) arbitrariness requiring that willfulness substitutes lawfulness, thus not interchangeably with or including reasonableness and proportionality of state conduct. However, ISDS jurisprudence exhibits strong partiality towards the requirement of reasonableness under the FET standard, at times making no distinction between unreasonableness and arbitrariness. Since unreasonableness is not excluded by the EU from the scope of manifest arbitrariness even under its latest clarification, it remains arguable. The same applies to the requirement of proportionality. If future tribunals side with those using proportionality in the assessment of arbitrariness or reasonableness of state actions, investors will retain the right to receive compensation when regulatory changes are significant and/or overly impact their investments. Neither the fact that the threshold for finding arbitrariness under the EU's IIA has been set high, nor the explicit and repeated references to the right to regulate, are likely to result in a different outcome.

The EU's reiteration of states' right to regulate is unhelpful if no guidance is provided on how it is to be balanced with foreign investment protection. If it is not to be understood as an excuse for any state conduct, the only alternative seems to be recourse to reasonableness and even proportionality, advocated by academics and used by tribunals already. The EU's express reference to investors' expectations in its FET clauses does not make things easier as, once again, no instruction is provided regarding how the expectations should be balanced with states' regulatory autonomy. Here too, the only alternative to using

[166] European Commission, 'Concept Paper, Investment in TTIP and beyond – the Path for Reform, Enhancing the Right to Regulate and Moving from Current Ad Hoc Arbitration Towards an Investment Court', available at <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF>.

investors' expectations in the reasonableness and proportionality assessment of state conduct appears to be their complete disregard, which would ignore the mandate given to tribunals in the EU's FET clauses.

Of course, states may be willing to accept – or consider appropriate – that in certain circumstances compensation of damage caused to foreign investments by regulatory changes may be due. There certainly are arguments both in favor[167] and against such a position.[168] Whichever the choice, however, it should be made unambiguously, by the explicit, clear and precise wording of IIA provisions themselves – rather than leaving the decision to tribunals.

It is true that the EU's IIAs contain many notable procedural features that are likely to tilt the balance of power between tribunals and states in favor of the latter and reduce the risk of unintended or inconsistent decisions.[169] Nonetheless, a credible legal system cannot rest solely on a fine procedural framework; it must also provide for solid and predictable substantive legal rules.[170] Therefore, given the prominence of regulatory challenges under the FET standard and notable support in both ISDS jurisprudence and academia for recourse to reasonableness and proportionality in balancing investors' rights with other societal interests, states should explicitly address them under the FET standard, either way, depending on their preference. Thus far, they have only done so in relation to indirect expropriation, but not the most (successfully) litigated standard of investment protection, the FET standard.

[167] Arguments in favor of such approach include the inherent long-term nature of investments as well as the fact that they are much needed to help achieving many SDGs. Without a guarantee of a high level of protection against injurious state conduct, investors may be more reluctant to accept political risks in particular in sensitive or highly regulated sectors. On investments and SDGs, see for example G. Schmidt-Traub, 'Investment Needs to Achieve the Sustainable Development Goals, Understanding the Billions and Trillions', Sustainable Development Solutions Network, Working Paper, Version 2 (12 November 2015), available at <https://resources.unsdsn.org/investment-needs-to-achieve-the-sustainable-development-goals-understanding-the-billions-and-trillions>.

[168] Apart from the regulatory chill argument, there also is an argument that 'for many governments the requirement that they always conduct their business in a 'reasonable' manner may be a tall order. Politics is not necessarily, and perhaps never, purely a matter of reason and, accordingly, of reasonableness.' V. Heiskanen, *supra* note 112, p. 109.

[169] This includes abandonment of the *ad hoc* nature of investment tribunals, introduction of an appeal instance, and the possibility of issuing interpretations of the agreement that will bind the tribunal. See, for example, Arts. 8.27-8.28 and 8.31(3) CETA.

[170] As the current crisis with the Appellate Body of the World Trade Organization clearly demonstrates, where negotiated rights and obligations of parties are left ambiguous or unprecise, and sensitive policy decisions are left to an adjudicator, however reputable and coherent, rather than decided on political level through negotiated rules, disbalance between the legislative and the adjudicating arms of the system develops and may eventually threaten the very existence of the whole system. On the WTO crisis, see, for example, S. Charnovitz, 'A WTO if you can keep it', 63 *Questions of International Law* (2019), 5-35.

THE EU'S PROMOTION OF SUSTAINABLE DEVELOPMENT BEYOND ITS BORDERS THROUGH TRANSBOUNDARY WATER COOPERATION

Tuula Honkonen*

ABSTRACT

Water is a critical resource for the survival of humans and ecosystems and for economic and social development. The European Union (EU) is an active player in transboundary freshwater cooperation, not only by supporting joint management regimes within the Member States but increasingly also by action beyond the Union borders. In this respect, the EU acts through two main tracks: 'extraterritorial' application of its freshwater legislation; and systematic promotion of water diplomacy in its external relations.

The Water Framework Directive is the main piece of EU legislation through which the Union engages with non-Member States with the aim of promoting coordination and sustainable transboundary water management beyond the EU borders. The EU seeks to promote sustainable development in transboundary water management also through specific water diplomacy and water security policies. They are becoming integral parts of the EU external policies. The adoption of the 'Conclusions on water diplomacy' by the Council in November 2018 attest thereto. The EU external policy action in the area of water diplomacy has direct links to the Union's climate diplomacy policy, human rights policy, development policy, and foreign and security policy.

The EU has a good selection of legislative and policy tools available to promote sustainable development beyond its borders through transboundary water cooperation and water diplomacy initiatives. Water often appears a source of conflict and instability in inter-state relations, but it can also form an effective basis for cooperation that produces benefits far beyond a shared basin or water management activities. In the future, the EU's water diplomacy policy could act as a bridge between its foreign and security policy and the implementation of the Sustainable Development Goals (SDGs) beyond the Union's borders.

* Senior Lecturer of International Law, Law School and the Center for Climate Change, Energy and Environmental Law (*CCEEL*), University of Eastern Finland; e-mail: tuula.honkonen@uef.fi.

1 INTRODUCTION

1.1 **Water and sustainable development**

Water lies at the centre of sustainable development. It is a critical resource for the survival of human beings and ecosystems and for economic and social development. Consequently, water management is a necessity for sustainable development. However, due to its crucial role in relation to life and prosperity on Earth, water can also easily become a source of competition and conflict. This arises when a party perceives that water is not being utilised in an equitable and balanced manner.

The management and utilisation of freshwater also often involve transboundary elements. Over 60 percent of freshwater resources globally cross national boundaries,[1] including 310 transboundary rivers[2] and nearly 600 transboundary aquifers.[3] Many of these resources are under pressure due to competing water uses, over-utilisation and climate change effects. Through transboundary water cooperation based on sustainable water management, joint governance of these resources is possible.

1.2 **Transboundary water management and law**

The legal framework for transboundary freshwater management is provided by two global conventions: the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes[4] and the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses.[5] The Water Convention was signed in 1992 in Helsinki, Finland and entered into force in 1996. The main focus of the Water Convention lies in preventing, mitigating and controlling transboundary water problems, protection of the water environment and in establishing joint bodies for the governance of joint freshwater basins. The UN Watercourses Convention was adopted in 1997 but did not enter into force until 2014. The Convention largely codified in a legally binding form practices, principles and rules relating to the governance of transboundary freshwaters that were then in existence.

The global water conventions form the legal framework on which interstate water cooperation and transboundary water management is to be established. Several key principles, such as equitable and reasonable utilisation, enshrined

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[1] M. Giordano *et al*., 'A review of the evolution and state of transboundary freshwater treaties', 14 *International Environmental Agreements: Politics, Law and Economics* 2014, at 245.

[2] M. McCracken and A. Wolf, 'Updating the Register of International River Basins of the World', 35 *International Journal of Water Resources Development* 2019), at 310.

[3] International Groundwater Resources Assessment Centre (IGRAC) and UNESCO Intergovernmental Hydrological Programme (IHP), 'Transboundary Aquifers of the World' (2015), available at <https://www.un-igrac.org/sites/default/files/resources/files/TBAmap_2015.pdf>.

[4] Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992, 31 *ILM* p. 1312.

[5] Convention on the Law of Non-Navigational Uses of International Watercourses 1997, 36 *ILM* p. 713.

in the conventions are today regarded as having developed into customary law rules.[6] They are accordingly also binding on states that are not parties to these conventions. The global water conventions provide the general framework for transboundary water cooperation, but the practical cooperation takes place through bi- and multilateral treaties among the riparian states and through regional and national legislation, policies and management measures.

The European Union (EU) is a party, together with the Member States that have ratified, to the 1992 Water Convention.[7] Europe hosts a large number of transboundary water basins, and international basins cover around 60 percent of EU territory.[8] Almost all transboundary water basins in the EU area are subject to a specific agreement with a joint governance scheme.[9] Several of these transboundary water agreements involve both EU and non-EU parties.

The EU has solid freshwater legislation in place, in respect of which the Water Framework Directive (WFD)[10] forms the centrepiece. The WFD, adopted in 2000, established an overarching legal framework for the protection and restoration of the aquatic environment across Europe and to ensure long-term sustainable use of freshwater resources.[11] It established a new integrated approach to the protection, improvement and sustainable use of freshwater resources within the EU. The WFD contributes to the implementation of Community obligations under the 1992 Water Convention.[12]

1.3 **The EU as an actor in transboundary water cooperation**

In addition to having a comprehensive EU-wide freshwater policy and legislation in place, the EU is an active actor in transboundary water cooperation. This takes place either in relation to transboundary basins that involve both EU Member States and non-Member States, or in relation to basins and regions that have no geographical connection to the EU. In the latter case, the cooperation takes place in terms of joint initiatives based on support and water diplomacy cooperation. Capacity-building and sharing of EU best practices on one hand, and seek for business opportunities, on the other hand, have been

[6] See, e.g., O. McIntyre, 'Substantive rules of international water law', in A. Rieu-Clarke *et al*., (eds.), *Routledge Handbook of Water Law and Policy* (London: Routledge 2017) 234-246

[7] Council Decision 95/308/EC of 24 July 1995 on the conclusion, on behalf of the Community, of the Convention on the protection and use of transboundary watercourses and international lakes, OJ [1995] L 186/44, 5.8.1995.

[8] G. Baranyai, *European Water Law and Hydropolitics: An Inquiry into the Resilience of Transboundary Water Governance in the European Union* (Basel: Springer International 2019) p. 71.

[9] See also ibid. p. 87.

[10] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ [2000] L 327/1, 22.12.2000.

[11] WFD, Art. 1.

[12] WFD, recital 35.

the major components of many of such partnerships,[13] but explicit focus on water diplomacy is on the increase.[14]

Overall, the EU is in a good position to promote and practice transboundary water cooperation.[15] Its own legal and policy framework on water is in good shape and it has a stable operating environment for transboundary water management and cooperation, thanks to the absence of major water use conflicts and given the close relations among the Member States.[16] The EU has developed best practices in transboundary water management which could be spread to other regions.

This paper focuses on the EU as an active actor in promoting and realising transboundary water cooperation, based on sustainable development, an effective legal framework and the concept of water diplomacy. The paper examines the two main routes through which the EU seeks to engage in freshwater governance beyond its borders: the 'extraterritorial' application of its water legislation and the promotion of water diplomacy in its external policies. The paper argues that the EU has a diverse selection of legislative and policy tools available to promote sustainable development in a transboundary context. In the future, the EU's water diplomacy policy could effectively connect the Union's foreign and security policy and the implementation of the Sustainable Development Goals (SDGs)[17] beyond the EU borders.

The paper is structured as follows. After an introduction, section two examines the 'extraterritorial' application of the EU's freshwater legislation, focusing on the transboundary governance elements of key EU freshwater directives. In section three, the paper dives into the world of water diplomacy, and examines the EU's water diplomacy policy as well as the role of transboundary water cooperation and water diplomacy as elements of the EU's external policies. Sustainable development considerations form the general analytical lens for the analysis carried out in the paper. Finally, section four draws together the paper's main findings.

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[13] See, e.g., the priority areas of the India – EU Water Partnership (IEWP), available at <https://www.iewp.eu/priority-areas> and the EU Africa Water Partnership Programme (AEWPP), available at <https://europa.eu/capacity4dev/african-eu-water-partnership-programme>.

[14] See, e.g., the preparation document for the new massive EU Water4All initiative where 'innovative tools for international cooperation and diplomacy' has been identified as a key activity. Furthermore, the whole initiative is said to be 'important to strengthen water diplomacy and maintain the EU's leading role as a global actor'. See Draft proposal for a European Partnership under Horizon Europe, WATER4ALL – Water Security for the Planet, Version 5 June 2020, available at <https://ec.europa.eu/info/sites/default/files/research_and_innovation/funding/documents/ec_rtd_he-partnerships-water4all.pdf> 14, 21.

[15] The EU has even been referred to as 'the cradle and the global laboratory of institutionalised cross-border water management'. G. Baranyai, *supra* note 8, at 79.

[16] See also ibid.

[17] 'Transforming our world: the 2030 Agenda for Sustainable Development', UNGA Res. 70/1 of 25 September 2015.

2 'EXTRATERRITORIAL' APPLICATION OF THE EU'S FRESHWATER LEGISLATION

2.1 **Water Framework Directive**

The Water Framework Directive (WFD) is the main piece of EU legislation through which the EU engages with non-Member States with the aim of promoting joint sustainable water management. Overall, the WFD is based on a basin approach: it seeks to look at the basins as whole, not limiting water governance to national and EU borders. This approach is manifested mainly through procedural and planning requirements and mechanisms to be applied by the Member States.[18] Accordingly, the WFD obliges the Member States to coordinate their efforts aimed at meeting the environmental objectives of the Directive for an entire river basin or river basin district.[19]

The WFD contains a rather soft obligation[20] to establish 'appropriate' coordination with the non-EU riparian countries with a view to achieving the environmental objectives of the WFD for the entire transboundary basin.[21] The coordination may be arranged through agreements, joint bodies etc. In concrete terms, the WFD obliges the Member States to establish specific river basin districts in a transboundary waters context and to draw up the relevant action and management plans in cooperation with the riparian non-Member States with the aim of achieving the objectives of the Directive throughout the river basin district.[22] Most river basins that are shared between EU Member States and non-Member States have indeed been designated as international river basin districts in accordance with the WFD, and remarkable coordination in the management of the transboundary waters is taking place among the states involved.

2.2 **Floods Directive**

The EU Floods Directive,[23] adopted in 2007, also has significant transboundary implications. It established a legal framework for the assessment and management of flood risks across the EU Member States. The Directive aims at reducing the adverse consequences of floods for human health, the environment, cultural heritage and economic activity. In a similar manner to the WFD, the Floods Directive adopted a river basin approach as the basis for regulation. Consequently, it also includes the regulation of joint water management between Member States and non-Member States. Member States are to coordinate their

[18] G. Baranyai, *supra* note 8, at 101. This kind of an approach has been criticised for its lack of hard and fast substantive rules. Ibid.

[19] WFD, recital 35 and Art. 3.

[20] G. Baranyai, *supra* note 8, at 101.

[21] WFD, Art. 3(5).

[22] WFD, Art. 3.

[23] Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks (Floods Directive), OJ [2007] L 288/27, 7.11.2007.

flood risk management practices in shared river basins, including with non-Member States, and, in the spirit of solidarity, not undertake measures that would increase the flood risk in neighbouring countries. In addition, competent authorities are required to engage in information exchange and/or coordination in transboundary river basin districts.[24]

In practice, flood risk management planning, information exchange and flood protection actions in transboundary basins within the EU are often regulated in the relevant transboundary water agreements (or in regulatory documents adopted thereunder) which implement also the Floods Directive. For instance, the Danube River Basin District has a comprehensive flood risk management plan[25] which includes all basin countries, Members and non-Members of the EU, alike. The basin-wide plan is based on national flood management plans which are brought together and coordinated with all basin states. Overall, joint management bodies usually have a key role to play in ensuring effective cooperation with non-EU-Member basin states.

2.3 **Groundwater Directive**

The Groundwater Directive,[26] adopted in 2006, is another item of EU freshwater legislation that has ramifications beyond the EU's borders. It focuses on preventing pollution of groundwater by setting quality standards and introducing measures to prevent or limit pollutants getting into groundwater. The Directive provides that threshold values for assessing groundwater chemical status may also be established 'at the level of a body or a group of bodies of groundwater'.[27] Furthermore, the Member States are to 'ensure that, for bodies of groundwater shared by two or more Member States and for bodies of groundwater within which groundwater flows across a Member State's boundary, the establishment of threshold values is subject to coordination between the Member States concerned, in accordance with [the WFD]'.[28] Furthermore, where a body or a group of bodies of groundwater extends beyond EU territory, 'the Member State(s) concerned shall endeavour to establish threshold values in coordination with the non-Member State(s) concerned, in accordance with [the WFD]'.[29]

The Genevese Aquifer agreement[30] provides an example of transboundary groundwater cooperation between an EU Member and a non-EU Member State.

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[24] Floods Directive, Arts 4(3) and 8(2).

[25] International Commission for the Protection of the Danube River, 'Flood Risk Management Plan of the Danube River Basin District' (2015).

[26] Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration (Groundwater Directive), OJ [2006] L 372/19, 27.12.2006.

[27] Art. 3(2).

[28] Art. 3(3).

[29] Art. 3(4).

[30] Convention on the Protection, Utilisation, Recharge and Monitoring of the Franco-Swiss Genevois Aquifer between

the Community of the 'Annemassienne' region, the Community of the 'Genevois' Rural Districts, and the Rural District of Viry, on one part, The Republic and Canton of Geneva, on the other (2007).

The Agreement does not, however, specifically address the coordination requirements posed by the Groundwater Directive. Taking the Danube again as an example, specific guidance[31] exists on obligations related to coordination on transboundary groundwater management, applying similarly to all riparian countries. However, it appears that coordination in groundwater issues is not (yet) very strong in practice.

2.4 **Concluding remarks**

The EU legislation on freshwater contains provisions applicable to transboundary basins shared with Member and non-Member States. The provisions oblige the transboundary basin states to establish joint river basin districts and coordinate their governance plans and activities in the area of the whole shared basin. As a result, remarkable coordination is taking place in the management of transboundary waters beyond the EU's borders.[32]

Naturally some of the coordination obligations contained in the freshwater directives are rather general or programmatic in nature or focus on procedural obligations, arguably without proper enforcement mechanisms.[33] Nevertheless, the fact that EU freshwater legislation is based on a basin approach and that it actively engages non-Member basin States in policy planning and governance of the shared water resources is remarkable. In addition, it can be said that the EU's freshwater directives reinforce the role of existing treaty arrangements and their governing bodies (commissions), which has positive implications for freshwater governance and water security within the EU and beyond.[34] Although the relevant EU directives mainly only encourage the establishment of 'appropriate' coordination, in practice the transboundary water basins involving Member and non-Member States are now effectively jointly managed. This can be expected to lead to better governance of freshwater resources and reduction of water-related conflicts among states. Furthermore, sustainable management of transboundary freshwater resources necessitates the cooperative participation of all riparian states within a basin.

The Sava River basin offers an illustrative example of the implementation of the WFD in a transboundary basin involving EU Member and non-Member States. The Sava River is a tributary of the Danube, and its basin area covers six countries: Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro

[31] International Commission for the Protection of the Danube River, 'Groundwater Guidance' (2017), available at <https://www.icpdr.org/main/issues/groundwater>.

[32] A recent 'fitness check' of the EU freshwater legislation concluded that the objectives of the EU freshwater Directives have been the building block for bilateral river basin cooperation between EU Member States and non-EU Member States. In addition, the Directives provide the basis for the building of appropriate water policies in candidate countries. Commission, 'Fitness check of the [EU freshwater directives]', SEC(2019) 438 final, p. 111.

[33] G. Baranyai, *supra* note 8, 105-106.

[34] T. Honkonen, 'The Role of EU Water Directives in Promoting Transboundary Water Cooperation and Water Security through Water Agreements – with a Special Focus on Finland', in M. Lewis *et al*. (eds.): *International Environmental Law-making and Diplomacy Review 2014* (Joensuu: University of Eastern Finland 2015) 65-89 at 88.

and Albania, the first two of which are EU Member States. The basin is governed by the Framework Agreement on the Sava River Basin[35] and administered by the International Sava River Basin Commission. The international river basin is managed in accordance with the Sava River Basin Management Plan (SBMP) which has been developed based on the requirements of the WFD. In the preparation of the SBMP, all basin countries expressed their commitment to respect the WFD although not all of them were legally obliged to do so. This resulted in the EU providing assistance in the preparation of the first SBMP.[36] An additional aspect of this issue is that it is useful for EU candidate countries to align their freshwater legislation with the WFD at an early stage.[37]

3 PROMOTION OF WATER DIPLOMACY AND SUSTAINABLE TRANSBOUNDARY WATER MANAGEMENT IN THE EU'S EXTERNAL RELATIONS

3.1 **EU and water diplomacy**

This paper argues that the EU exercises transboundary water cooperation beyond its borders to advance sustainable development through two main routes: first through the extraterritorial reach of the EU's freshwater legislation and policy, and, secondly, through specific water diplomacy and water security policies. In relation to the latter, it is useful to first define what is meant by water diplomacy and how it differs from regular water cooperation. According to Keskinen *et al*., water diplomacy is political in nature, focusing on the political aspects of transboundary water management and cooperation.[38] However, water diplomacy may also aim at establishing processes and practices for water cooperation when these do not exist.[39] Overall, water diplomacy simultaneously uses diplomatic tools, water-related know-how and cooperation mechanisms across multiple diplomacy tracks.[40] In addition, water diplomacy may result in benefits

[35] Framework Agreement on the Sava River Basin (2002). All basin countries except Albania are parties to the Agreement.

[36] International Sava River Basin Commission, Sava River Basin Management Plan: Development of the plan, available at <http://www.savacommission.org/srbmp/en/about-plan/show-2-development-of-the-plan>. On the development of the SBMP and the role of the WFD therein, see A. Zinke *et al*., 'Development of Sava River Basin Management Plan. pilot project. Bosnia and Herzegovina, Croatia, Serbia and Montenegro, Slovenia.' UNDP & GEF Danube regional project (2007), available at <https://www.icpdr.org/main/sites/default/files/1.1-9_SavaRBM_FR_23-04-07_inclAnx-f.pdf>.

[37] Recognised also in Fitness check of the [EU freshwater directives], *supra* note 32, at 111.

[38] M. Keskinen *et al*., 'Water Diplomacy: Bringing Diplomacy into Water Cooperation and Water into Diplomacy', in G. Pangare (ed.), *Hydro Diplomacy. Sharing Water across Borders* (New Delhi: Academic Foundation 2014) 35-40, at 36.

[39] Ibid.

[40] M. Keskinen et al., 'Water Diplomacy Paths – an approach to recognise water diplomacy actions in shared waters', 602 *Journal of Hydrology* 2021, 126737.

that go beyond water cooperation, for example in terms of improved regional security and improved trade relations among countries that share a water body.[41]

Today, promotion of sustainable development is an integral part of water diplomacy, given the increasing pressures on water resources through the impacts of climate change, intensifying economic activities, population growth etc. Overall, human-induced unsustainable development can be identified as a key reason for the increasing need for transboundary water cooperation.

Water diplomacy also effectively links water and water management with different elements and scales of foreign and development policies, complementing ongoing efforts in respect of both water cooperation and regional cooperation.[42] The soothing of water-related tensions between states and the prevention of water-related conflicts are key aspects of water diplomacy.

The water diplomacy aspect is being integrated into the EU's external policies, which focus on preserving peace, promoting international cooperation and ensuring sustainable development. Naturally, political and economic interests also lie behind the EU's efforts to establish and maintain transboundary water cooperation.

The first Council Conclusions on EU water diplomacy were adopted in 2013.[43] The Conclusions recognised the concrete objective of EU water diplomacy to be to 'proactively engage in trans-boundary water security challenges with the aim of promoting collaborative and sustainable water management arrangements and to encourage and support regional and international cooperation in the context of agreed policies and programmes'. The stated objective reflects an active preventive transboundary water policy on the part of the EU that is in line with sustainable water management and largely based on existing policies and programmes.

As a follow-up to the 2013 initiative, the Council adopted 'Conclusions on water diplomacy' in November 2018.[44] These were based on the recognition that water plays a crucial role in terms both of human survival and the resilience of societies and the environment. Therefore, the EU is determined to initiate high-level political engagement to prevent and alleviate the conflict potential represented by shared waters, which can have grave human and economic costs that amount to direct implications for the EU. The Conclusions recognise that sustainable management of global freshwater resources is an international issue.

The Council Conclusions is not a legally binding document. Instead, these Conclusions are used to express the EU's political commitment in selected matters.[45] When comparing the 2013 and 2018 Council Conclusions on water diplomacy, some interesting developments can be discerned. The 2018 Conclu-

[41] Ibid. See also, e.g., M. Klimes *et al*., 'Water diplomacy: The intersect of science, policy and practice', 575 *Journal of Hydrology* 2019, 1362-1370.

[42] E. Salminen *et al*., 'Water Diplomacy – proactive peace mediation, Brief in English' (2019), available at <https://wdrg.aalto.fi/wp-content/uploads/2019/06/Water-Diplomacy-Brief.pdf> 1.

[43] Council Conclusions on EU water diplomacy, 22 July 2013.

[44] Council Conclusions on water diplomacy, 19 November 2018, doc. 13991/18, Annex.

[45] General Secretariat of the Council, Council conclusions and resolutions (2020), available at <https://www.consilium.europa.eu/en/council-eu/conclusions-resolutions/# >.

sions are more pragmatic in nature and do not focus solely on water management as such, as the document also mentions prevention of risks to peace and security, migration flows and an investment gap as being both relevant issues and, to an extent, as representing the EU's motives in this context.

3.2 **Sustainable management of water in the EU's external policies**

Over the years, water considerations have become an integral element of the EU's external policies, as demonstrated below. This is directly in line with one of the WFD's stated aims as to the need for "[f]urther integration of protection and sustainable management of water in to other Community policy areas."[46] Water is a vital resource to all of humanity, freshwater resources are under increasing stress for reasons attributable to human activity and there are numerous conflicts over water in transboundary settings in many parts of the world. Consequently, the EU will do well to integrate sustainable water management considerations into many of its policy areas and, in respect of transboundary waters, into its external policies.[47]

The EU's external policy action in the area of sustainable water management and water diplomacy has direct links to the EU's *climate and energy diplomacy policy*.[48] Climate impacts are indeed a major factor behind water scarcity and the resulting conflicts. At the same time, it can be said that the issue belongs to the wider scope of climate protection and sustainable development in EU's policymaking. Interestingly, the Council gave its Conclusions on climate diplomacy[49] shortly after the Conclusions on water diplomacy were published. In the former, several references are made to water-related risks and problems, and it is specifically stated that the Council 'supports comprehensive and concerted international efforts to address the water-related impacts of climate change in line with its conclusions of November 2018 on Water Diplomacy.' It is important for the practical effectiveness of these policies that the close links between action on climate change and water management in the EU external policies are explicitly recognised.

There were plans to renew the Council Conclusions on Climate Diplomacy,[50] but instead the Council adopted Conclusions on Climate and Energy Diplo-

[46] WFD, Recital 16.

[47] This can also be referred from Art. 21 of TEU (Treaty on the European Union) which defines the goals of the Union in its external relations, preserving and improving the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development, being one of them.

[48] The Council has recognised that '[t]here is a need to address the water-related consequences of climate change, including through building synergies between water diplomacy and climate diplomacy, as set out in the Council conclusions on Climate Diplomacy of 26 February 2018'. Council Conclusions on Water Diplomacy, 19 November 2018, doc. 13991/18, Annex, para. 4.

[49] Council Conclusions on Climate Diplomacy, 18 February 2019, doc. 6153/19.

[50] See the draft Council Conclusions on Climate Diplomacy, 20 January 2020, doc. 5033/20, Annex.

macy[51] in January 2021. The document recognises that climate change and environmental degradation are a threat to water security[52] and that there is a need for a comprehensive approach on water related challenges, including synergies between climate, energy and water diplomacy.[53] It appears natural that the EU coupled energy to its climate diplomacy policy since the two issues are very closely intertwined. This development can be considered positive also from the perspective of promoting water diplomacy given that in many cases and locations water-related conflicts revolve around energy questions (the River Nile case between Egypt and Ethiopia currently being the most prominent example).

The EU's *human rights policy* indicates that the EU is committed to supporting democracy and human rights in its external relations. The right to water and sanitation is nowadays considered as a universal human right[54] and so also the EU is to respect and promote it within and outside its borders. Safe drinking water and sanitation is one of the priorities for the human rights policymaking in the EU and the Member States.[55] The Conclusions on water diplomacy reiterate the EU's commitment to the human rights to safe drinking water and sanitation as aspects of the right to an adequate standard of living.[56] Protection of these rights is also fundamental in the EU's policymaking towards third countries.

The SDGs adopted by the UN in 2015 are relevant to human rights. The EU remains strongly committed to SDG6 ('Ensure availability and sustainable management of water and sanitation for all') and has expressed commitment to increase its implementation efforts, inter alia, through its development cooperation policies.[57] There are several other water-related SDGs (e.g., SDG2 on zero hunger, SDG13 on climate action and SDG15 on life on land) and their implementation is to be reflected in all EU policymaking.

The EU's *development policy* seeks to promote sustainable development and stability in developing countries. The European consensus on development,[58] the EU vision and action framework for development cooperation adopted in

[51] Council Conclusions on Climate and Energy Diplomacy – Delivering on the external dimension of the European Green Deal, 25 January 2021, doc. 5263/21, Annex.

[52] Para. 4.

[53] Para. 17.

[54] Most importantly, see UN GA, 'The human right to water and sanitation', 28 July 2010, A/RES/64/292.

[55] Commission and High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication 'EU Action Plan on Human Rights and Democracy 2020-2024', JOIN(2020) 5 final. See also Council Conclusions on EU Guidelines on Safe Drinking Water and Sanitation, 17 June 2019, doc. 10146/19.

[56] Council Conclusions on Water Diplomacy, *supra* note 49, para. 17. See the EU Human Rights Guidelines on Safe Drinking Water and Sanitation (*supra* note 56) for official guidance for the EU on how to use the available EU foreign policy tools to promote and protect the human rights to safe drinking water and sanitation.

[57] Conclusions on Water Diplomacy, *supra* note 48, para. 17.

[58] Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission, 'The New European Consensus on Development – Our World, Our Dignity, Our Future' (The New European Consensus on Development) [2017] OJ C210/1, 27.6.2017.

2017, highlights the challenge presented by water scarcity and the related problems and expresses the EU's commitment to supporting sustainable and integrated water management.[59] In concrete terms, under its development policy the EU can offer financial and technical cooperation relating to water governance and management, partnerships on collaborative and sustainable water management and support for accession to and implementation of global water conventions.[60]

The EU's *foreign and security policy* promotes international cooperation and an integrated approach to conflicts. The policy objectives and key documents do not directly mention water but emphasise issues such as human rights and the promotion of international cooperation. In contrast, water scarcity and water security are repeatedly mentioned in the Global Strategy for the European Union's Foreign And Security Policy.[61] Thus, considered in tandem with the Conclusions on water diplomacy, it is apparent that water figures strongly in the EU's foreign and security policy.

3.3 **Glimpses on practical implementation**

In the following, examples of EU-level initiatives related to its external water policy and promotion of water diplomacy will be briefly presented. The examples highlight the practical implementation of water diplomacy and the role of water in the Union's foreign policy.

The EU Water Initiative (EUWI) was adopted in 2002.[62] This strategic partnership focused on cooperation with a variety of stakeholders involving national governments, intergovernmental and non-governmental organisations, donors, representatives of the water industry, and other relevant stakeholders. Partnerships were formed also through several regional initiatives. In recent years, however, EUWI has largely lost its significance as the EU's water partnerships have been increasingly integrated into wider forms of regional cooperation.[63]

The EU's cooperation programmes with Central Asian countries are a fine example of the integration of water into the EU's external policies. The EU's Water Initiative + for the Eastern Partnership[64] assists Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine in bringing their legislation closer to or

[59] Ibid., para. 26.

[60] Conclusions on Water Diplomacy, *supra* note 48, paras 13 and 23.

[61] European External Action Service, 'Shared Vision, Common Action – A Stronger Europe: A Global Strategy for the European Union's Foreign and Security Policy', 2 June 2016.

[62] Commission, 'Water for Life – EU Water Initiative: International Cooperation from Knowledge to Action' 7 June 2003. For an assessment of the EUWI, see O. Fritsch *et al*., 'The EU Water Initiative at 15: origins, processes and assessment', 42 *Water International* 2017, 425-442.

[63] Ibid., at 426. A study on EUWI has showed that the initiative has not been successful in promoting sustainable development in a comprehensive manner. In addition, EUWI was reported as ineffective in promoting the WFD outside Europe. O. Fritsch *et al*., 'Three Faces of the European Union Water Initiative: Promoting the Water Framework Directive or Sustainable Development?', 13 *Water Alternatives* 2020, 709-730.

[64] The Eastern Partnership, launched in 2009, is a policy initiative that aims to deepen and strengthen relations between the EU, its Member States and their eastern neighboring countries.

into line with EU policy in the field of water management, and its principal focus is on the management of transboundary river basins.[65] Within the Initiative, EU support is given to the target countries for the purpose of, for example, drafting and reviewing policies and strategies and to developing and implementing River Basin Management Plans. The work conducted under the WI+ aims to improve water management, in particular within transboundary rivers, in the Central Asian region but also to support individual countries in reforming their national policies and strategies so that they come into line with the WFD.

From the EU perspective, the Eastern Partnership increases the degree of stability and resilience of the EU's eastern neighbours.[66] The Partnership has also facilitated constructive dialogue on water and energy issues between the EU and Central Asian countries, which has resulted in initial agreements and to the establishment of the EU-Central Asia Platform for Environment and Water Cooperation.[67] It is notable that the more recent form of regional water cooperation in Central Asia, the EUWI+ for the Eastern Partnership, has focused on promoting the WFD as a model for water management policies in the target area whereas the original Initiative was more focused on interaction with regional stakeholders.[68]

The European Union – Central Asia Water, Environment and Climate Change Cooperation (WECOOP) is another example of a clearly targeted EU-funded initiative that seeks to strengthen the transnational policy dialogue in the area of water policies, among other things. This initiative, established in 2009, targets both sustainable development dialogue among the Central Asian countries, and cooperation between them and the EU on environment and climate change. The WECOOP forms a framework for cooperation, which includes capacity-building in the Central Asian countries and the promotion of green investment on the EU side.[69] All the principal elements of sustainable development are present in some form in the initiative.

3.4 **The EU vision on water diplomacy**

From the EU perspective, the initiatives on transboundary water cooperation with non-Member States entail many co-benefits. While the initiatives and partnerships present an opportunity to harmonise neighbouring countries' water policies with EU freshwater legislation or to promote the best practices of the WFD in different regions, they also offer opportunities for development cooperation and investment in the area of water infrastructure, for instance. Furthermore, through the concept of water diplomacy, the initiatives are a concrete way

[65] EUWI+ for Eastern Partnership, Project description (2018), available at <https://www.euwipluseast.eu/en/about/description>.

[66] EUWI+ for Eastern Partnership: 'About Eastern Partnership', available at <https://www.euwipluseast.eu/en/about/about-eastern-partnership>.

[67] C. Ruiz Marquez, 'EU Water Diplomacy', 1 *Water Management and Diplomacy* (2020) 1-9 at 4.

[68] See O. Fritsch *et al*., *supra* note 62, at 428.

[69] See <https://wecoop.eu/>.

to advance the Union's foreign policy goals and to increase regional stability both near the EU borders and in regions farther away.

The Council conclusions on water diplomacy do not directly take a stance on the EU's role as a global actor in this field. Nevertheless, the conclusions underline the global nature of water resources and the need for cooperation at all levels. Furthermore, they call for high level political engagement in efforts to prevent and alleviate the conflict potential of shared waters and to promote peace and stability.[70] Water diplomacy is also connected with the EU's foreign and security policy in the Council conclusions. The EU action in this field does not only contribute to equitable and sustainable management of water resources and prevent and possibly resolve water-related conflicts, but the goals are partly broader so that cooperation on water will help the EU to promote regional integration and address political instability.[71]

The EU has consciously taken water as one of the main tools through which it seeks to not only cooperate with its neighboring regions but also to use it in a broader context where water diplomacy can promote stability and prevent and resolve conflicts. Thus, it acts also as a foreign and security policy tool while also promoting sustainable development at all levels. The EU may not be envisioned as the chief mediator in the most pressing transboundary water conflicts of our time, but it can achieve at least as much through the promotion of effective water legislation and policies in third countries and through the combination of transboundary water cooperation and water diplomacy initiatives. This kind of an approach targets all levels of sustainable water governance and beyond, from local to national and regional.

4 CONCLUSION

The EU has a strong array of legislative and policy tools available to promote sustainable development beyond its borders through transboundary water cooperation and water diplomacy initiatives. Water can be seen as a source of conflict and instability in interstate relations, but it can also form an effective basis for cooperation that yields benefits far beyond a jointly managed basin or the prevention of a dispute over competing water uses.

The WFD has been said to have opened a new chapter in the EU's external ambitions in the field of water[72] Under the WFD, the involvement of non-Member States in basin cooperation is crucial in attaining the WFD objective of achieving good surface water status within the EU. More generally, many of the key elements of the EU's freshwater legislation, such as the planning and management system in respect of joint basins, have become best practices in the field and thus their export to other regions is indeed beneficial from the sustainable development perspective.

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[70] Conclusions on Water Diplomacy, *supra* note 48, para. 3.

[71] Ibid. para. 5.

[72] O. Fritsch and D. Benson, 'Mutual Learning and Policy Transfer in Integrated Water Resources Management: A Research Agenda', 12 *Water* 2019, 72.

Water has been recognised by the EU as an integral element of its development and climate policies. The EU's specific water diplomacy policy directly aims at promoting sustainable development beyond the EU's borders by advancing the implementation of the 2030 Agenda for Sustainable Development and the Paris Climate Agreement.[73] The EU's water diplomacy approach further recognises the potential of water to affect peace and security and the EU's commitment to the human right to safe drinking water and sanitation.

Water has a less visible role in the EU's foreign and security policy, which is generally more focused on a traditional approach to interstate relations, peace and security. The view may be taken, however, that in the future the EU's water diplomacy policy may act as a bridge between its foreign and security policy and the implementation of the SDGs beyond the EU's borders. On the one hand, transboundary water cooperation is a very technical area, based on agreed rules, guidelines and strategies among riparian states. On the other hand, it may involve or have ramifications for a much broader array of issues among the parties – including environmental concerns (such as protection of species and habitats), crucial strong economic interests (such as energy production) and social aspects (such as traditional livelihoods).

Transboundary water cooperation is a very useful tool by which to advance sustainable development, not only within the aquatic sphere but also beyond the immediate borders of joint basins. In addition to ensuring, or at least contributing to, sustainably allocated and managed shared freshwater resources in a particular basin, transboundary water cooperation may advance broader goals, also beyond the targeted geographical area. The EU's transboundary water cooperation work is a win-win activity: the target countries and regions benefit from the transfer of best practices and support for sustainable water management, while the EU benefits from, inter alia, improved freshwater quality (in respect of basins shared with Member and non-Member States), potential investment opportunities (e.g. in water infrastructure), progress in implementing the SDGs, and increased political and environmental stability in the target area.

The EU is clearly seeking to adopt a more active and visible role in transboundary water cooperation, also through promotion of water diplomacy. In the past, extraterritorial application and 'marketing' and spreading of the best practices of the WFD were in the main role in these efforts and policy initiatives, together with direct capacity-building in the area of water management in the target countries or regions. However, the Council conclusions on water diplomacy, adopted in 2019, is testimony of a desired change, or perhaps rather a broadening, of the Union's transboundary water policymaking. Extraterritorial application of the WFD continues as one of the cornerstones of the EU's transboundary water cooperation policy and practice. Complementarily, the water diplomacy focus appears to emphasise the political aspects of transboundary water cooperation. Nevertheless, the Council conclusions do not envision a grand peace-maker role for the EU or otherwise indicate that the Union would seek to become a globally significant political player in resolving water-related

[73] Paris Agreement to the United Nations Framework Convention on Climate Change 2015, 55 *ILM* p. 740.

conflicts, for instance. Instead, the Union envisages itself as working mainly behind the scenes, trying to prevent water disputes from emerging or escalating by promoting sustainable water management policies and infrastructure in the partner countries and regions.

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

CLEER

E-mail: info@cleer.eu
Website: http://www.cleer.eu